



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**PETITION NO. 55 OF 2019**

**ERIC MUKUNDI NDWIGA.....PETITIONER**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**A. Introduction**

1. This ruling pertains to the petition dated 25<sup>th</sup> November 2019 in which the petitioner seeks that the court considers the period spent in remand during his trial as part of his sentence in view of the provisions of Section 333(2) of the Civil Procedure Code. He relies on the case of **Abdul Aziz Oduor & Another v Republic, Criminal Appeal No. 18 & 102 of 2018** where the relevant principle was applied.

2. The petitioner was charged with the offence of house breaking contrary to Section 304 (1) and stealing contrary to Section 279 (b) of the Penal Code. On the 30/8/2017 he was convicted of the offences and sentenced to serve five (5) years imprisonment for the offence of house breaking and seven (7) years for stealing from a dwelling house.

3. The petitioner subsequently appealed to the High Court vide Criminal Appeal No. 32 of 2017 which was dismissed. In his submissions made to court, the petitioner submitted that the failure by the sentencing court to consider the time spent in custody amounted to additional punishment meted out on him and as such his sentence ought to be computed from the date he was charged to conform with the judgement in the case of **Peter Maweu & Another v Republic**.

4. Ms. Mati for the respondent did not oppose the application and further stated that the accused was denied bond during his trial.

**B. Analysis & Determination**

5. I have considered the petition herein as well as the submissions by both the petitioner and the respondent.

6. Section 333(2) of the *Criminal Procedure Code* provides that:

**“(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.**

**Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”**

7. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced must be taken into account in meting out the sentence. While the court may in its discretion decide that the sentence shall run from the date of sentencing or conviction, it is my view that in departing from the above provisions, the court is obliged to give reasons for doing so.

8. I associate myself with the decision in **Ahamad Abolfathi Mohammed [supra]** where the Court of Appeal held that:

**“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced.”**

9. The same Court in **Bethwel Wilson Kibor vs. Republic [2009] eKLR** expressed itself as follows:

**“By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody.”**

10. According to **The Judiciary Sentencing Policy Guidelines**: -

**“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”**

11. The charge sheet show that the petitioner was arrested on 26/01/2016 and arraigned in court for plea on the same day. The date of the offence was 26/3/2014. PW4 the investigating officer explained in his evidence that the accused was first arrested on the date of the offence and charged jointly with another. He absconded court in that case and his co-accuse was tried alone to conclusion of the trial.

12. It was on 26/01/2016 that he was spotted and arrested and charged in Embu Criminal Case No. 93 of 2016, convicted and sentenced to serve imprisonment sentence. He unsuccessfully appealed in Embu HCRA No. 32 of 2017. The petitioner did give particulars or any information of the first case which he absconded relating to the period he stayed in custody fro this reason, the court will restrict itself to Embu CM Criminal Case No. 93 of 2016.

13. On the date of plea on 26/01/2016, the court was informed that the applicant had absconded in the earlier case and in another one of robbery with violence at Runyenjes Senior Principal Magistrate’s Court where he was facing charges of robbery with violence. It is on record that he had escaped twice while in custody. As a result of this, the court denied him bail and directed he be tried while in custody. The proceedings show he was in custody throughout the trial.

14. I have perused the proceedings and note that the applicant’s imprisonment sentence was not ordered to run from the date of arrest in accordance with the provisions of Section 333(2) of the Criminal Procedure Code.

15. For the foregoing reasons, I find this application merited. It is hereby allowed to the effect that sentences of five (5) and seven (7) years imprisonment in both limbs of the offences ordered to run concurrently will run from 26/01/2016 being the date of arrest.

16. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 7<sup>TH</sup> DAY OF APRPIL, 2020.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for Respondent**

**Petitioner through video link**