



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

MISC. CRIMINAL APPLICATION NO. 28 OF 2019

JOHN IRERI NJIRU.....1ST APPLICANT

PAUL MURIITHI MARIGU.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

A. Introduction

1. This ruling pertains to the undated application filed by the applicant on the 21/11/2019 in which the applicants moved court to make a finding that their sentence should run from the date of arrest as opposed to the date of conviction as provided for within Section 333(2) of the Criminal Procedure Code.
2. The applicants herein were jointly charged in Embu Criminal Case 455 of 2014 with the offence of robbery contrary to section 296 (1) of the Penal Code, convicted and sentenced to six (6) years imprisonment. They subsequently appealed to the High Court vide Criminal Appeal 68 and 69 of 2015 that was dismissed and their sentence upheld.
3. In his oral submissions, the 1st applicant submitted that he stayed in remand for one year and two months as he was arrested on the 26/3/2014 and convicted and sentenced on the 18/8/2015, a period the 1st applicant states was not considered by the trial court during sentencing.
4. The 2nd applicant on his part submitted that he was arrested on the 23/3/2014 which the police erroneously noted as the 24th and was similarly convicted and sentenced on the 18/8/2015.
5. Ms. Mati for the respondent did not oppose the applications but urged the court to ensure that the dates of arrest were confirmed as there was a discrepancy in what both the applicants told the court.

B. Analysis & Determination

6. I have considered the application herein as well as the submissions by both the applicants and the respondent.
7. **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.”

8. 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 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.

9. 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. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody means considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants’ sentence of imprisonment to run from the date of their arrest on 19th June 2012.”

10. 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. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”

11. 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.”

12. From the record, the charge sheet brought against the applicants indicates that both applicants were arrested on the 26/03/2014. The applicants were convicted and sentenced to six (6) year imprisonment on the 18/08/2015 and the record shows that the trial magistrate did not take into consideration the time spent in remand during the trial. Consequently, it is appropriate that the said error be corrected in accordance with the law.

13. From the charge sheet, it is indicated that the two applicants were arrested on 26/03/2014 and arraigned in court on 27/03/2014 when plea was taken. This was confirmed by PW4 the investigating officer. There is no evidence to show that the 2nd applicant was arrested on 23/03/2014. The court will go by the date of 26/03/2014 as the date of arrest for it is borne by the record.

14. On further perusal of the record, I note that the two applicants were released on bond on 29/04/2014 for 1st applicant and on 4/04/2014 for the 2nd applicant. This means that the 1st applicant was in custody for one (1) month and three (3) days while the 2nd applicant was in custody for only ten (10) days. The record shows that the two applicants remained out on bond until 18/08/2015 when they were convicted and sentenced. This is a fact that the applicants did not reveal during the hearing of their application.

15. Nevertheless, I find that the provisions of Section 333(2) should benefit the applicants.

16. This application is allowed in the following terms: -

a) That the sentence of the 1st applicant John Ileri Njiru shall be reduced with thirty-four (34) days being the period spent in custody.

b) That the sentence of the 2nd applicant Paul Muriithi shall be reduced with ten (10) days which he spent in custody.

17. It is hereby ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF APRIL, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Applicant through video link