



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**PETITION NO. 49 OF 2019**

SAMUEL NJUE NJERU.....1<sup>ST</sup> PETITIONER

EPHANTUS MUGENDI KARIUKI.....2<sup>ND</sup> PETITIONER

ISAAC KARIUKI NJERU.....3<sup>RD</sup> PETITIONER

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**A. Introduction**

1. The petition dated 15<sup>th</sup> November 2019 seeks for orders that the court considers the period spent in remand during the trial as part of the sentences of the petitioners. Reliance on this proposition was placed on the case of **Abdul Aziz Oduor & Another v Republic, Criminal Appeal No. 18 & 102 of 2018** and under the provisions of Section 333(2) of the Criminal Procedure Code.
2. The petitioners were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and were subsequently convicted and sentenced to serve eight (8) years imprisonment.
3. The petitioners all submit that they stayed in custody for a period of six (6) months, a period which ought to have been taken into consideration prior to their sentencing. The petitioner thus submit that the failure of the trial court to comply with section 333 (2) of the Criminal Procedure Code amounted to an unfair trial in sentencing.
4. In rejoinder, Ms. Mati for the respondent submitted that the petitioners were all released on bond on the 22/10/2012 and that the sentence given by the court was within the law.

**B. Analysis & Determination**

5. I have considered the petition herein as well as the submissions by both parties as well as the relevant provisions of the law.
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. The petitioners are therefore, entitled to the benefits of the provisions of Section 333(2) should they demonstrate that they spent part of the trial period in custody.
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 record reveals that the petitioners were arrested on the 8/05/2012 and that the record further reveals they were released on bond on the 22/10/2012. About 5½ months prior to the start of the trial were spent in custody.

12. The effect of section 333 (2) of the Criminal Procedure Code is that any time spent by an accused prior to sentencing should be taken into consideration in computation of the sentence handed out to the accused. Section 333 (2) does not provide for exceptions where an accused is released on bond prior to trial or not.

13. I find that the petition is successful for the petitioners have demonstrated that five and a half (5½) months were spent in custody pending trial.

14. Accordingly, it is hereby ordered that the petitioners’ sentence of eight (8) years imprisonment do run from the date of arrest being 8<sup>th</sup> May 2012.

15. It is hereby so ordered.

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

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Mati for Respondent**

**Petitioner through video link**