



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

PETITION NO. 39 OF 2019

STEPHEN NJAGI IRERI.....PETITIONER

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

A. Introduction

1. This ruling pertains to the undated petition filed on 7/11/2019 in which the petitioner seeks that the period spent in custody by the petitioner before being sentenced ought to have been taken into account as part of the imposed sentence of twenty (20) years term of imprisonment.
2. The petitioner 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.
3. The petitioner was jointly charged with another not before court with the offence of murder contrary to Section 203 as read with 204 of the Penal Code and was sentenced to death on 29/03/2012.
4. The petitioner appealed to the Court of Appeal which upheld the conviction and sentence. Following the decision of the Supreme Court in the case of **Francis Karioko Muratetu & Another Vs Republic [2017] eKLR**, the petitioner petitioned for resentencing and benefited from the death sentence being set aside and was sentenced to serve twenty (20) years imprisonment in the ruling of this court delivered on 7/06/2019.
5. In his written submissions, the petitioner submitted that he was sentenced to death on the 29/03/2012 and that the failure by the trial court to take into consideration the period spent in lawful custody amounted to an unfair trial in sentencing contrary to the provisions of Section 333(2) of the Criminal Procedure Code.
6. Ms. Mati for the respondent did not oppose the application and submitted that the petitioner's sentence should run from the date of arrest in accordance with the provisions of Section 333(2) of the Criminal Procedure Code.

B. Analysis & Determination

7. I have considered the petition herein as well as the submissions by both the petitioner and the respondent.
8. Section 333(2) of the Criminal Procedure Code provides that: -

(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) 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.

9. 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 conviction, it is my view that in departing from the above provisions, the court is obliged to give reasons for doing so.

10. 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 been in custody before they were sentenced.

11. 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.

12. 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 he 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.

13. It is clear from the proceedings that the accused was arrested on 3/10/2009 and appeared in court on 9/10/2009. He was convicted on 20/03/2012 and subsequently sentenced on 29/03/2012. It is not in doubt that the petitioner was in custody during his trial and prior to his sentencing. The applicant is now serving twenty (20) years imprisonment and it is appropriate that the time he spent in custody be considered.

14. I find this application merited and I allow it as prayed. The twenty (20) years imprisonment sentence do run from the date of arrest being 3/10/2009.

15. It is hereby so ordered.

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

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Petitioner through video link