



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL MISC. APPLICATION NO. 23 OF 2019

ISAAC MBUVA MWANZIA.....1ST APPLICANT

GABRIEL MUTHIE MBORE.....2ND APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

R U L I N G

A. Introduction

1. This ruling pertains to the undated application filed on the 19th September 2019 in which the applicants seek orders that their sentence should run from the date of arrest as opposed to the date of conviction within the meaning of **Section 333(2) and 137(1) (20a) of the Criminal Procedure Code.**

2. It is the applicants case that they have been in custody from the date of their arrest on the 20th April 2009 whereas the judgement was delivered on the 26th January 2018 and thus submit that the trial court ought to have taken into consideration the time they had spent in custody when passing their sentence. Reliance is placed in the case of **Ahamed Abolfathi Mohammed & Another v Republic [2018] eKLR, Embu High Court Criminal Case No. 3 of 2014, Peter Maweu & Others** and **Nairobi High Court Criminal Cases 18 & 102 of 2018.**

3. The prosecution is not opposed to the hearing on resentencing but urge the court to consider the circumstances under which the offence was committed.

B. Analysis of Law

4. The issue for determination before this court is whether there was a failure by the trial court failed 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. That provision provides as follows:

“333(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.”

5. The applicants were convicted and sentenced to fifteen (15) years imprisonment for the offence of robbery with violence on the 25/04/2011. It is not in dispute that the applicants were in custody from the 20/04/2009, when they were arrested. This is borne by the record of the trial court.

6. It is now trite law that prior to sentencing, a trial court should take into consideration the time the accused has been in custody. This was the holding of the Court of Appeal in the case of **Ahamad Abolfathi Mohammed (supra)**. Section 333(2) is very clear on this issue.

7. It is my considered view that the court misdirected itself in that respect and ought to have ordered that the sentence of imprisonment do

run from the date of their arrest on 20th April 2009.

8. In the circumstances, I allow this application and order that the applicants sentence of imprisonment of fifteen (15) years do run from the date of arrest being 20th April 2009.

9. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 5TH DAY OF NOVEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Nandwa for State/Respondent

Both applicants present