

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**HIGH COURT MISCELLANEOUS APPLICATION CASE NO.**

**E008 OF 2023**

**PETER GATIMU NGURE.....**

**.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Applicant **PETER GATIMU NGURE** has filed this application dated **17<sup>th</sup> February 2023** seeking to have the period which he spent in remand during the pendency of the trial deducted from his sentence.
2. The Applicant had been arraigned before the Nyeri Magistrates Court in **Criminal Case No. 654 of 2020** facing two charges of **TRAFFICKING IN NARCOTIC DRUGS CONTRARY TO SECTION 4(a) OF THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1994**. The Applicant

faced a third charge of **Being in Possession of Materials used in preparation of Narcotic Drugs.**

3. The Applicant entered a plea of '**Not Guilty**' on all three counts and his trial proceeded in the Lower Court. On **15<sup>th</sup> November 2022, Hon. F. MUGUONGO, Senior Resident Magistrate** delivered a judgment in which she convicted the Applicant on **Count Nos 1 and 2** of Trafficking. The trial Court acquitted the applicant on **Count No. 3.**

4. Following his conviction the Applicant was allowed an opportunity to mitigate. The trial court then delivered a sentencing ruling on **21<sup>st</sup> November 2022** in which she sentenced the Applicant as follows:-

**Count No. 1:** Fined Kshs. 5,000,000/= in default to serve five (5) years imprisonment.

**Count No. 2:** Fined Kshs. 100,000/= in default to serve one (1) year imprisonment.

5. The Applicant does not seek to challenge his conviction or sentence. He only prays that orders be made that his term of

imprisonment run from the date he was remanded in custody after arrest.

6. The **ODPP** does not oppose this application. The learned state Counsel confirms that although the Applicant was initially released on bond, his bond was later cancelled by the trial court on **21<sup>st</sup> June 2021** when the surety withdrew. Therefore the Applicant remained in custody from **June 2021** upto the date of his conviction.

7. The court is empowered by **Article 165(6)** of the **Constitution of Kenya 2010** to review a decision by a subordinate court. **Article 165(6)** provides:-

**“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function but not over a superior court.”**

8. **Section 333(2)** of the **Penal Code Cap 63 Laws of Kenya** provides as follows:-

**“Subject to the provisions of Section 38 of the Penal Code, every sentence shall be deemed to commence from and 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. [Own emphasis]**

It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody.

9. The provisions of **section 333(2)** of the Criminal Procedure Code were considered in this case of **HAMAD ABOLFADHI MOHAMMED & Another vs REPUBLIC [2018] eKLR** where the **Court of Appeal** held as follows:-

**“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 didn't 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 sentences 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 the appellants had been in custody, he ordered that their sentences 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 must mean 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 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 332 (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 appellant's sentence of imprisonment to run from the date of their arrest on 19<sup>th</sup> June 2012.” [Own emphasis]**

10. The ***Judiciary Sentencing Policy Guidelines clauses 7:10 and***

**7:11** state that:-

**“The proviso to section 332(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. I have carefully perused the sentencing ruling as delivered by the trial

court. The trial court despite taking into account the **Judiciary Sentencing Policy 2015** did not however specifically take into account the period of time which the Applicant had spent in remand during the trial.

12. The Applicants bond was cancelled on **21<sup>st</sup> June 2021** and he was

sentenced on **21<sup>st</sup> November 2022**. His sentence ought to have been proportionally reduced by the period of time spent in remand. Accordingly I direct that the sentences imposed upon the Applicant will run from **21<sup>st</sup> June 2021**. It is so ordered.

**Dated in Nyeri this 13<sup>th</sup> day of February 2026.**

.....  
**MAUREEN A. ODERO**  
**JUDGE**

ORIGINAL