Njenga v Republic (Criminal Revision E147 of 2024)
[2025] KEHC 5693 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5693 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL REVISION E147 OF 2024

FN MUCHEMI, J

APRIL 30, 2025

BETWEEN

JAMES KINUTHIA NJENGA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

Brief Facts

1. The application for determination is undated in which the applicant seeks to have his sentence reviewed pursuant to Section 333(2) of the *Criminal Procedure Code*.

2. The applicant was convicted by Thika Chief Magistrate in Criminal case (S.O.) Case No. 74 of 2017 with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. He was convicted and sentenced to serve 15 years imprisonment. The applicant argues that he is not opposed to the sentence meted upon him but wishes to have the period he spent in custody to be factored in his sentence as per Section 333(2) of the *Criminal Procedure Code*.

3. The applicant states that he has not filed any appeal to the High Court. The applicant avers that he was arrested on 29th September 2017 convicted on 28th April 2022 and that the time spent in custody was not taken into account during sentencing.

4. The respondent states that from the trial record, the trial court considered the time spent in custody and the mitigation.

The Law.

5. This court is empowered by Article 165(6) of the *Constitution* of Kenya 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.

6. Section 333(2) of the *Criminal Procedure Code* provides:-

> " 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody."

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

8. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in Ahamad Abolfathi Mohammed & Another vs Republic [2018]eKLR 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 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 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."

9. The same court in Bethwel Wilson Kibor vs Republic [2009]eKLR expressed itself as follows:-

> " By proviso to section 333(2) of the *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take into 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 10 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."

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 applicant was arrested on 29th September 2017 and convicted on 28th April 2022. He therefore stayed in custody for a period of four (4) years and 7 months. By virtue of Section 333(2) of the *Criminal Procedure Code*, this duration ought to have been considered during sentencing. Notably the applicant has not contested the sentence imposed on him. His only prayer is to have the duration he spent in custody be taken into account which is his legal right. I have perused the court record and noted that during sentencing, the trial court said it took into account the mitigation and the nature of the offence. The trial court then sentenced the applicant to 15 years imprisonment upon considering that the charge was pegged under the Sexual Offence Act which provides for a mandatory sentence. It is therefore evident that the trial court did not take into consideration the time the applicant spent in custody.

12. The applicant was arrested on 29th September 2017 and convicted on 28th April 2022 which is a period of 4 years 7 months. This court empowered under Article 165 of the *Constitution* and Section 362 of the *Criminal Procedure Code* to review the sentence herein. Accordingly, I find that this application has merit and I hereby allow it in the following terms: -

> " It is hereby ordered that the applicant shall serve fifteen (15) years imprisonment to commence from the date of arrest 29th September 2019."

13. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 30TH DAY OF APRIL 2025.

F. MUCHEMI

JUDGE