



**Ketter v Republic (Miscellaneous Criminal Application
E017 of 2023) [2024] KEHC 3529 (KLR) (22 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3529 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION E017 OF 2023**

JRA WANANDA, J

MARCH 22, 2024

BETWEEN

ISAACK KETTER PETITIONER

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was charged in Eldoret High Court Criminal Case No. 13 of 2016 with the offence of murder contrary to Section 203 as read with section 204 of the *Penal Code*. He was convicted of the offence vide the Judgment of H. Omondi J (as she then was) dated 30/04/2021 and was on 6/05/2021 sentenced to serve a prison term of 6 years.
2. Now before this Court for determination is the Application by way of the Notice of Motion dated 2/03/2023 and brought basically under Section 333(2) of the *Criminal Procedure Code*. The Applicant prays that the time that he spent in remand custody prior to conviction, be included in the computation of his sentence. The Application is supported by the Applicant's brief Affidavit.
3. The Applicant also on 8/03/2023, filed brief written submissions. He submitted that he took plea on 24/02/2016 and was remanded at the Eldoret G.K. Main Prison, that on 8/06/2017, he was given bond of Kshs 2 Million, that Judgment was delivered on 30/04/2021, he was then taken for quarantine at the same prison and sentence was then read out on 6/05/2021
4. When the matter came up in Court for hearing, Prosecution Counsel, Mr. Mugun stated that he had perused the record and had verified that indeed, there is no indication that the time spent by the Applicant in remand custody was factored in the sentence. He confirmed that the dates stated by the Applicant were correct and that the total period not factored was about 1 year and 4 months. He therefore basically conceded to the Application.



5. When I asked the Applicant to comment on Counsel’s computation of the said timelines as amounting to about 1 year and 4 months, he confirmed that the same was correct.

Determination

6. The issue that arises for determination is

“whether the Applicant’s sentence should be reviewed to the extent that the time that he spent in custody before conviction be factored under Section 333(2) of the *Criminal Procedure Code*”.

7. Section 333(2) of the *Criminal Procedure Code* provides as follows:

“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.”

8. A reading of the said provision reveals that at the time of sentencing, the Court is required to take into account the period a convict has already spent in custody. Further, the *Judiciary Sentencing Guidelines* provide as follows;

“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.”

9. Section 333(2) was the subject of the decision in *Ahamad Abolfathi Mohammed & Another v 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 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.”

10. The same Court in *Bethwel Wilson Kibor v 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. 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 September 22, 2009 he had been in custody for ten 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.”

11. In this instant case, I do not have the benefit of the trial Court file before me but the Applicant has attached a copy of the typed proceedings and also a copy of the Judgment of H. Omondi J (as she then was). Prosecution Counsel Mr. Mugun having confirmed the authenticity of the said material, I find the same to be sufficient to enable me make a determination of the Application herein.

12. The record confirms that, as stated by the Applicant, he was first arraigned in Court on 22/02/2016 when he was presented before the Deputy Registrar. He then took plea on 24/02/2016 before G.K. Kimondo J, and was remanded in custody where he stayed until 9/06/2017 when he was granted bond. Judgment was then delivered on 30/04/2021 and the sentence was then read out on 6/05/2021. Both Prosecution Counsel and the Applicant confirmed that the period spent in custody before conviction, but not taken into account, amounted to about 1 year and 4 months.

13. I have perused the sentence order made of H. Omondi J (as she then was) and confirmed that indeed, there is no indication that the said 1 year 4 months period that was spent by the Applicant in custody was factored in the sentence. It would therefore be a miscarriage of justice were this Court to ignore the said period since it is an express and mandatory requirement of the law to do so.

Final Orders

14. In the premises, I allow the Applicant's Notice of Motion dated 2/03/2023 and order as follows:

- i. In respect to the 6 years prison sentence imposed in the Judgment delivered in Eldoret High Court Criminal Case No. 13 of 2016, the same shall be computed from the date of conviction, but less the period spent in custody by the Applicant, prior to conviction.
- ii. For avoidance of doubt, such period to be deducted is from 22/02/2016 (date of arraignment) to 9/06/2017 (date of grant of bond).

DELIVERED, DATED AND SIGNED AT ELDORET THIS 22ND DAY OF MARCH 2024

WANANDA J. R. ANURO

JUDGE

