



REPUBLIC OF KENYA



**Nyaga v Republic (Criminal Revision E004 of 2024)
[2024] KEHC 8027 (KLR) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8027 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL REVISION E004 OF 2024**

FN MUCHEMI, J

JUNE 28, 2024

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR
FUNDAMENTAL FREEDOMS UNDER ARTICLES 2(5), 3, 10, 22, 23(1),
25(A), 27, 50(2)(Q), 165 & 259(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT
CRIMINALCASE NO. 3394 OF 2021 AT THIKA LAW COURTS**

AND

IN THE MATTER OF SECTION 333(2) OF THE CRIMINAL PROCEDURE CODE

BETWEEN

BENSON GAKUVA NYAGA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. The application for determination filed on 2nd January 2024 seeks for orders for rehearing and sentence. It also urges the court to invoke Section 333(2) of the *Criminal Procedure Code* and take into account the time the applicant spent in custody during the pendency of the trial.
2. The applicant states that he was arrested on 7th December 2021 and charged with the offence of obtaining by false pretence contrary to Section 313 of the *Penal Code* in Thika Chief Magistrate's Court Criminal Case No. 3394 of 2021. Upon conviction, the applicant states that he was sentenced to serve two (2) years imprisonment.



3. The applicant argues that he is filing the instant application in light of the decision in Constitutional Petition No.15 of 2020 *Vincent Sila Jona & 87 Others* at Machakos and states that the trial court did not consider the time he spent in custody.
4. The respondent conceded to the application upon perusal of the trial court's proceedings and finding that the applicant spent time in custody.
5. The parties were directed to file written submissions but only the applicant filed his.

Applicant's Submissions

6. The applicant states that he was arrested on 7th December 2021 and charged in Thika Chief Magistrate's Court Criminal Case No. 3394 of 2021 with the offence of obtaining by false pretences contrary to Section 313 of the Penal Code. The matter proceeded for hearing and the applicant states that judgment was rendered on 3rd May 2023 and the trial court sentenced him to two (2) years imprisonment. The applicant argues that the trial court did not factor in the period of one (1) year 5 months that he spent in custody. The applicant relies on Section 333(2) of the *Criminal Procedure Code*, the *Judiciary Sentencing Policy Guidelines* and the cases of *Bethwel Wilson Kibor v Republic* [2009] eKLR and *Abamad Abolfathi Mohammed & Another v Republic* (2018) eKLR and submits that the period spent in custody ought to have been considered. The applicant further submits that nowhere in the record does it indicate that the honourable trial magistrate said that the sentence meted was to run from the date of arrest as required by the law.
7. The applicant further relies on the case of *Vincent Sila Jona & 87 Others* Constitutional Petition No. 15 of 2020 and *Boniface Mugo Maingi* in Criminal Revision No. E001 of 2021 Nyeri and urges the court to compute his sentence from the date of arrest being 7th December 2021.
8. The main issue for determination is whether the applicant is entitled to review of sentence based on the provisions of section 333 (2) of the *Criminal Procedure Code*.

The Law

9. 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.”
10. It is clear from the provision of section 333 (2) that the law requires courts to take into account the period the convict spent in custody.
11. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in *Abamad Abolfathi Mohammed & Another v 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.”

12. The same court in *Bethwel Wilson Kibor v 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.”

13. 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.”

14. From the record, the applicant was arrested on 16th December 2021 and charged in Thika Chief Magistrate’s Court Criminal Case No. 3394 of 2021 with the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code. The applicant took plea on 16th December 2021 and pleaded not guilty. He was admitted to cash bail of Kshs. 400,000/- or bond of Kshs. 600,000/- with a surety of similar amount. The matter thereafter proceeded for hearing in which the applicant remained in custody. The trial court rendered its judgment on 20th April 2023 and found the applicant guilty of the offence. The trial magistrate sentenced the applicant on 3rd May 2023 to serve two (2) years imprisonment. On scrutiny on the proceedings, the trial magistrate did not take into consideration the time spent in custody for this was not put on record.

15. In conclusion, it is my considered view that the applicant herein is entitled to benefit from the provisions of Section 333 (2) of the *Criminal Procedure code*.



16. It is hereby ordered that the sentence of two (2) years imprisonment do commence from 16th December 2021.

17. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 28TH DAY OF JUNE 2024.

F. MUCHEMI

JUDGE

