Case Number:	Miscellaneous Criminal Application 222 of 2021
Date Delivered:	04 Apr 2022
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Dorah O. Chepkwony
Citation:	Thomas Kiarie Nyambura v Republic [2022] eKLR
Advocates:	M/S Joy counsel for Respondent/State
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC CRIMINAL APPLICATION NO.222 OF 2021

THOMAS KIARIE NYAMBURA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant***, Thomas Kiarie Nyambura*** approached this court vide a **Chamber Summons** application dated **22nd March, 2019** seeking for orders that, the court do invoke provisions of **Section 333(2)** of the **Criminal Procedure Code** and consider the period he was in custody while on trial and factor the same into the sentence meted against him.

2. The application is supported by an affidavit deposed by the Applicant where he averred that he was convicted to serve 10 years imprisonment after being in remand for 4 years and 5 months and there having been delays in the course of the trial by the prosecution. According to Applicant, he abandoned his right to appeal to pursue revision of sentence that was passed against him and that the court has the jurisdiction to deal with the application.

3. The Respondent filed **Grounds of Opposition** to oppose the Applicant's application, wherein it is stated that on **8th January, 2019**, Hon. Githinji in passing sentence considered the period he had spent in custody and hence the application lacks merit. It has also been stated that the Applicant is deceitful and has approached court with unclean hands. At the hearing of the application, the Applicant prayed that his sentence be reduced with regard to the time spent in custody during trial.

4. While opposing the application, **Ms. Ntabo**, submitted that in the **Judgment** delivered on **8th January, 2019**, the trial Magistrate considered the time spent in custody by the Applicant when he passed the sentence and that the sentence is lenient as per the law. He thus urged the court to dismiss the application.

5. In considering the application, I have carefully read through the application, its Supporting Affidavit, submissions on record by the parties, the proceedings and Judgment of the trial court. I find that the issue which needs to be decided on is whether the prayer by the Applicant that the sentence that was meted against him be reviewed by considering the period he spent in custody is merited.

6. While the application is premised on the provision under **Section 333(2)** of the **Criminal Procedure Code**, it invokes the revisional jurisdiction of this court which is donated by **Section 362** of the **Criminal Procedure Code** which reads as follows:

"…The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."

7. The Applicant's grievance is that the period he remained in custody during trial was not taken into account as per **Section 333(2)** of the **Criminal Procedure Code** which provides thus:-

(2) "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. The Court of Appeal in the case of **Ahmad Abolfathi Mohammed & Another Criminal Appeal No.135 of 2016 [2018]eKLR** held thus:-

"***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."***

9. The **Judiciary Sentencing Policy Guidelines** at **Paragraph 7.10** states 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."

10. It is therefore clear from the foregoing provisions and case law that an obligation is imposed on the trial court to take into account the period an accused has spent in remand in the determination of an appropriate sentence. Failure to comply with the foregoing provision renders the subsequent sentence a contravention of the law.

11. In view of the present application, I have read through the record, and more particularly the Judgment. I find that in meting out the sentence against the Applicant, the trial court stated as follows;-

"Probation report and the time each accused has spent in custody and their mitigation is considered…"

12. From the above statement, it is clear that the trial Magistrate was alive to the proviso to **Section 333 (2)** of the **Criminal Procedure Code** and in sentencing the Applicant to serve ten (10) years imprisonment, he actually took it into account the period he had spent in custody. The Applicant was arraigned in court on **27th August, 2014** and was sentenced on **8th January, 2019**, which is almost a five (5) year period. It would be noted that the Applicant and his co-accused person were tried, convicted and sentenced for the offence of Robbery with Violence which carries a mandatory death sentence. Thus, in sentencing the Applicant to serve a sentence of ten (10) years while being alive to the prosivo of **Section 333(2)** of the **Criminal Procedure Code,** by taking into account the period the Applicant had spent in custody during his trial, the trial Magistrate acted within his discretion and power. In my considered view, there is no incorrectness, illegality, impropriety or irregularity demonstrated in the manner in which the sentence was passed and therefore this court cannot interfere with the same.

13. In conclusion, I find that the application dated **22nd March, 2019** has failed to meet the test as laid down under **Sections 333(2)** and **362**, both of the **Criminal Procedure Code**, and hence lacks merit and is dismissed accordingly.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF APRIL 2022.

D. O. CHEPKWONY

JUDGE

IN THE PRESENCE OF:

APPLICANT IN PERSON – PRESENT

M/S JOY COUNSEL FOR RESPONDENT/STATE

COURT ASSISTANT - GITONGA