



**Masambu v Republic (Miscellaneous Criminal Application
E049 of 2024) [2024] KEHC 9600 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9600 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E049 OF 2024**

JN KAMAU, J

JULY 31, 2024

BETWEEN

PETER KIVUITU MASAMBU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. The Applicant herein was charged with the offence of burglary contrary to Section 304(2) of the *Penal Code*. He was also charged with an alternative charge of the offence of handling stolen property contrary to Section 322(1) as read with Section 322(2) of the *Penal Code*. He was convicted and sentenced to three (3) years imprisonment.
2. On 27th April 2024 he filed Notice of Motion application of even date seeking to have the period that he stayed in custody from 14th May 2022 to 17th March 2023 while the trial was ongoing, a period of ten (10) months and three (3) days, be taken into account as part of the sentence that he had already served pursuant to Section 333(2) of the *Criminal Procedure Code*. He cited the case of *Abammed Abolfathi Mobammed and Another v Republic* [2018] eKLR where the court held that sentence ought to run from the date of arrest.
3. It was his assertion that the omission by the Trial Court to consider this period contravened his right to fair trial under Article 25(2) of the *Constitution*. He thus urged this court to grant him the orders he had sought.
4. He did not file Written Submissions to support his prayer. The Respondent was not opposed to the said application and did not therefore file any Written Submissions.



Legal Analysis

5. As could be seen hereinabove, the Applicant's application was based on Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya). The said Section provides that:

“Subject to the provisions of section 38 of the [Penal Code](#) (Cap. 63) 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” ([Emphasis Court](#)).
6. This duty was also contained in the [Judiciary Sentencing Policy Guidelines](#) where it was provided that: -

“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.”
7. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the [Criminal Procedure Code](#) was restated by the Court of Appeal in the case of [Abamad Abolfathi Mohammed & Another v Republic](#) (*Supra*).
8. This court noted that the Applicant was arrested on 14th May 2022 and was sentenced on 17th March 2023. Although he was granted bond/bail, he did not appear to have come out on bond/bail while his trial was going on. He thus spent ten (10) months and three (3) days in custody before he was sentenced.
9. A reading of the Trial Court's Sentence showed that it did not take into consideration the time he spent in remand before sentencing. This court was therefore convinced that this was a suitable case for it to exercise its discretion and grant the orders sought.

Disposition

10. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated 27th April 2023 that was filed on even was merited and the same be and is hereby allowed.
11. It is hereby directed that the time the Applicant spent in custody between 14th May 2022 and 16th March 2023 when he was arrested and sentenced respectively be taken into account while computing his sentence as provided in Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya).
12. Taking into account the remission and the period that he spent in custody during trial, the Applicant has already completed his sentence. It is hereby directed that he be and is hereby released from custody forthwith unless he be held for any other lawful cause.
13. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 31ST DAY OF JULY 2024



J. KAMAU
JUDGE

