



REPUBLIC OF KENYA



KENYA LAW
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**Brencius v Republic (Criminal Revision 130 of 2024)
[2024] KEHC 9125 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9125 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL REVISION 130 OF 2024
DR KAVEDZA, J
JULY 30, 2024**

BETWEEN

KAROLIS BRENCIUS APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged and convicted for the offence of trafficking in Narcotic Drugs Contrary to Section 4(a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No. 4 of 1994. The applicant was sentenced to pay a fine of Kshs. 50,220,000 in default to serve 3 years imprisonment. In addition, he was sentenced to serve 7 years imprisonment.
2. He has now filed an application seeking revision of sentence. He filed an affidavit in support of his motion. The arguments raised are that the trial court failed to consider the time she spent in remand custody during the computation of sentence under the provision of section 333(2) of the *Criminal Procedure Code*, Cap 75 of the Laws of Kenya.
3. I have considered the application, the affidavit in support and the applicable law. I have also considered the trial court record. The issue for consideration is whether the trial court considered the time the applicant spent in remand custody.
4. The proviso to section 333(2) of the *Criminal Procedure Code* obligates the court to consider the time already spent in custody during sentencing. The court has a duty to take into account the period an accused person had remained in custody during sentencing under the proviso to section 333(2) of the *Criminal Procedure Code* which is couched in mandatory terms. This was acknowledged by the Court of Appeal in *Abamad Abolfathi Mohammed & Another vs. Republic* [2018] eKLR and *Bethwel Wilson Kibor vs. Republic* [2009] eKLR and more recently in the High Court case of *Vincent Sila Jona & 87 others vs Kenya Prison Service & 2 others* [2021] eKLR.



5. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced be considered in meting out the sentence where it is not hindered by other provisions of the law.
6. From the record, the applicant was arrested on 10th December 2020. He was arraigned in court for take plea and was never released on bail during the entirety of his trial. He was convicted on 25th January 2024. He, therefore, spent three (3) years and one (1) month in remand custody. From the record, it is clear that the period was not factored in during his sentencing by the trial court.
7. In *Abmed Abolfatbi Mohamed v Republic* [2018] eKLR the Court of Appeal held as follows;

“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 appellant’s sentence of imprisonment to run from the date of arrest on 19th June 2012.” (emphasis mine)
8. Although the trial court, indicated that the said period had been considered, the court was not specific on what amount of time was considered. Guided by the law, the court is of the view that the application ought to be considered, as failure to do so would amount to denying the applicant a right due to the failure of the court to discharge an obligation bestowed upon it by law.
9. In addition, I note that the applicant was sentenced to a default sentence of three (3) years. The payment of a fine of Kshs. 50,220,000 in default to serve 3 years imprisonment was illegal since it contravened the provisions of Section 28 (2) of the *Penal Code* which guides courts on imposition of default sentences. The provision prescribes a maximum sentence of 12 months imprisonment in default of payment of fines exceeding KShs.50,000. The default sentence imposed in was obviously in violation of Section 28 (2) of the *Penal Code* as it exceeded the term prescribed by the law.
10. I thus allow the application. In the premises, I make the following orders:
 - i. The sentence of seven (7) years imprisonment shall be computed less by three (3) years and one (1) month and shall run from the date of conviction.
 - ii. The additional fine of Kshs. 50,220,000 imposed shall be maintained in default the applicant shall serve 12 months imprisonment.
 - iii. The sentence shall run consecutively being a default sentence.Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JULY 2024

D. KAVEDZA
JUDGE

