



**Odhiambo v Republic (Criminal Application E130 of 2024)  
[2024] KEHC 10000 (KLR) (12 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10000 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL APPLICATION E130 OF 2024  
RE ABURILI, J  
AUGUST 12, 2024**

**BETWEEN**

**VICTOR ODHIAMBO ODHIAMBO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence dated 10/7/2024 in Nyando  
SPM Criminal Case No. E605 of 2023 by Hon. Lilian Kiniale, SPM)*

**RULING**

1. The convict is Victor Odhiambo Odhiambo. He was sentenced to serve one year imprisonment for the offence of house breaking and stealing. He now applies that the period he spent in remand custody pending trial be considered as part of the sentence served. This is pursuant to section 333(2) of the [Criminal Procedure Code](#).
2. I have perused the original Nyando SPM Cr Case No E605 of 2023. When the accused took plea on 27/9/2023, he was granted bond of Kshs 50,000 plus one surety of similar amount but the proceedings show that he remained in custody until he was sentenced on 10/7/2024. There is no indication that the period spent in custody was to be considered.
3. The charge sheet shows that the convict was arrested on 26/9/2023. It is therefore true that between the date of arrest and date of sentence, he was in remand custody.
4. 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.”

5. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody.
6. 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 19<sup>th</sup> June 2012.”

7. The said Court in *Bethwel Wilson Kibor v Republic* [2009]eKLR expressed itself thus:

“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 22<sup>nd</sup> 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.”

8. The *Judiciary Sentencing Policy Guidelines* also ascribe to the above position 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. Article 165(6) of the *Constitution of Kenya* empowers this Court to review a decision by a subordinate court. The Article provides:-

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

10. The applicant was sentenced on 10/7/2024 having spent a period of six (10) months in prison custody during the pendency of his trial, from his arrest on 26/9/2024. He is therefore remaining with just one month to complete his one year prison sentence.

11. I find that this application under Section 333(2) merited and it is hereby allowed.

12. As the convict has only one month to complete sentence of one year already served in prison and he was a first offender, in the spirit of prison decongestion, I hereby order that the convict having substantially served the sentence imposed, the remainder of one month is hereby ordered to be suspended sentence and the convict is hereby discharged from prison. Unless otherwise lawfully held, Victor Odhiambo Odhiambo shall be released forthwith.

13. Signal to issue.

14. This file is closed.

15. I so Order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 12<sup>TH</sup> DAY OF AUGUST, 2024**

**R. E. ABURILI**

**JUDGE**

