



**Mugesani v Republic (Miscellaneous Criminal Application E006 of 2024)
[2024] KEHC 11481 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11481 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E006 OF 2024**

JN KAMAU, J

SEPTEMBER 30, 2024

BETWEEN

AGGREY MUGESANI APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Introduction

1. The Applicant herein was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code Cap 63 (Laws of Kenya). The Learned Trial Magistrate, G. Mmasi, PM, convicted and sentenced him to life imprisonment.
2. The High Court dismissed his appeal and affirmed the life imprisonment. He appealed to the Court of Appeal and his sentence was reduced to twenty (20) years imprisonment.
3. On 19th March 2024, he filed this application on review of sentence pursuant to Section 333(2) of the Criminal Procedure Code. In his application, he averred that the Trial Court did not consider the period that he spent in custody while his trial was on going.
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 can be seen hereinabove, the Applicant's application was pursuant to 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)”

6. This duty is also contained in the Judiciary Sentencing Policy Guidelines where it is 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 *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.
8. Notably, this court did not have the original file. It only had a skeleton file from the lower court. Efforts to retrieve the original file were futile and there was a possibility that the same was still in the Court of Appeal file in Criminal Appeal No 250 of 2019.
9. Having said so, this court noted that the Court of Appeal had already reviewed the Applicant's sentence. Bearing in mind that the Court of Appeal was superior, this court's hands were tied and could not review his sentence. If he was aggrieved, he could only seek redress from the Court of Appeal.

Disposition

10. For the foregoing reasons, the upshot of this court's decision was that the Applicant's application for review that was filed on 19th January 2024 was not merited and the same be and is hereby dismissed.
11. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF SEPTEMBER 2024.

J. KAMAU
JUDGE

