



**Adori v Republic (Miscellaneous Criminal Application E023 of 2024)
[2024] KEHC 11389 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11389 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E023 OF 2024
JN KAMAU, J
SEPTEMBER 26, 2024**

BETWEEN

WYCLIFF ADORI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. The Applicant herein was charged with the offence of preparation to commit a felony contrary to Section 308(1) of the *Penal Code*.
2. On 25th January 2024, he filed an undated Notice of Motion application seeking a review of his sentence. He prayed that the period between 6th September 2021 and 5th July 2023, a duration of one (1) year ten (10) months that he stayed in custody while the trial was ongoing, when he was arrested and convicted respectively, be taken into account as part of the sentence that he had already served pursuant to the decision in the case of *Ahmed Abolfatih Mohammed and Another vs Republic* [2018] eKLR and Section 333(2) of the *Criminal Procedure Code*.
3. He did not file any written submissions. The Respondent was not opposed to the said application and did not therefore file any written submissions.

Legal Analysis

4. Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) 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).

5. 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.”
6. 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 vs Republic*](#) (*Supra*).
7. The Charge Sheet herein showed that the Applicant herein was arrested on 6th September 2021. It was not clear from the proceedings when he was released on cash bail. However, he was out on cash bail as at 16th November 2021.
8. On 1st December 2021, he indicated that his release order indicated 1st December 2021 (sic). The Trial Court then lifted the warrant of arrest. It does appear to this court that this may have meant that he was to attend court on that date and not 29th November 2021.
9. He again failed to attend court on 15th December 2021. The Prosecution withdrew that case against him under Section 87A of the *Criminal Procedure Code* on 11th February 2022 and the Trial Court forfeited the cash bail.
10. The proceedings showed that he was present in court on 2nd March 2022. It was, however, not clear if he was remanded in custody on that date but he was in custody as at 4th April 2022. He was sentenced on 5th July 2023. He thus spent one (1) year, seven (7) months and eleven (11) days in custody before he was sentenced.
11. 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

12. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s undated Notice of Motion application that was filed on 25th January 2024 was merited and the same be and is hereby allowed.
13. It is hereby directed that the time the Applicant spent in custody between 6th September 2021 and 1st December 2021 and between 2nd March 2023 and 4th July 2023 be taken into account while computing his sentence as provided in Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
14. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 26TH DAY OF SEPTEMBER 2024



J. KAMAU
JUDGE

