



Musyoka v Republic (Miscellaneous Criminal Application E012 of 2024) [2024] KEHC 13249 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13249 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
MISCELLANEOUS CRIMINAL APPLICATION E012 OF 2024**

**JN ONYIEGO, J
OCTOBER 30, 2024**

BETWEEN

ISAYAH MBOYI MUSYOKA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant herein was charged with the offence of trafficking narcotic drugs contrary to section 4(a) of the *Narcotic and Psychotropic Substance Control Act* No. 4 of 1994. The particulars of the offence being that on 22.09.2016 at Shabaa road in Madogo area within Tana River County, he was found trafficking narcotic drugs to wit 12.8 kilograms of cannabis sativa of a street value of Kes. 60,000/-.
2. The matter proceeded to full trial. Subsequently, he was convicted and sentenced to 10 years' imprisonment.
3. Being dissatisfied with the conviction and sentence of the trial court, he appealed before this court via a petition of appeal filed in court on 22.11.2019. This court considered the grounds of appeal and the submissions by the appellant and the respondent. Via a judgment delivered on 11.02.2021, this court sustained the conviction and sentence by the trial court thus dismissing the appeal.
4. He has now filed this application referenced to as humble mitigation seeking for orders that this Honourable Court be pleased to consider the time already spent in remand custody and thus review his sentence in the same manner. He urged that he has spent five years in prison and has since transformed hence should be considered for acquittal. That this Honourable Court further review the sentence downwards considering the fact that he has since reformed while in custody.
5. The application was canvassed orally. The applicant urged that sentence is now computed from the time of arrest and further, time spent in custody during the determination of the case. He urged that it



is not only mete but also just that this court considers the time that he spent in lawful custody pending hearing and determination of his case.

6. Mr. Kihara, the learned prosecutor did not oppose the application.
7. I have considered the application herein together with the oral submissions by both parties. The only issue for determination is whether the applicant is entitled to review of sentence under Section 333(2) of the [Criminal Procedure Code](#).
8. 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, been held in custody, the sentence shall take account of the period spent in custody.”

9. It is clear from the above provision that the law requires courts to take into account the period the convict spent in custody prior to sentence.
10. The provisions of section 333(2) of the [Criminal Procedure Code](#) was the subject of the decision in [Abamad Abolfathi Mohammed & Another vs 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...

[Also See [Bethwel Wilson Kibor vs Republic](#) [2009] eKLR and the Judiciary Sentencing Policy Guidelines].

11. This court is empowered by Article 165(6) of the [Constitution](#) of Kenya to review a decision by a subordinate court. Article 165(6) 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.
12. The applicant was arrested on 22.09.2016 and thereafter released on bail on 01.03.2017 and convicted on 12.11.2019. By virtue of Section 333(2) of the [Criminal Procedure Code](#), this duration ought to have been considered during sentencing.
13. Having been sentenced to serve a period of 10 years, I find that a period of 5 months and 8 days be deducted when computing his sentence. To that extent the application succeeds.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF OCTOBER 2024



J. N. ONYIEGO
JUDGE

