



**Swahili v Republic (Miscellaneous Criminal Application E062 of 2024)  
[2024] KEHC 16232 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16232 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
MISCELLANEOUS CRIMINAL APPLICATION E062 OF 2024**

**JN KAMAU, J**

**DECEMBER 19, 2024**

**BETWEEN**

**HESBON SWAHILI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Introduction**

1. The Applicant herein was charged with others not before this court with two (2) counts of the offence of breaking into a building and committing a felony contrary to Section 306(a) of the *Penal Code*. He was convicted and sentenced to five (5) years imprisonment.
2. On 15<sup>th</sup> May 2024, he filed Notice of Motion application of even date seeking a review of his sentence. He urged the court to consider the period of one (1) year that he spent in remand during trial, from 2<sup>nd</sup> February 2022 to 2<sup>nd</sup> February 2023, when he was arrested and sentenced respectively, as part of his sentence.
3. He contended that the omission by the Trial Court violated his right contrary to Article 19(1), (2), 50(1), 50(2)(p), 25(c), 165(3)(b) and Section 333(2) of the *Criminal Procedure Code*.
4. In that regard, he placed reliance on the case of *Bethwel Wilson Kibor vs Republic* Criminal Appeal No 78 of 2009 (eKLR citation not given) where the court, while applying Section 333(2) of the *Criminal Procedure Code*, held that the sentence of imprisonment ought to run from the date of arrest.
5. He did not file any Written Submissions. The Respondent was not opposed to the said application and did not also file any written submissions. The Ruling herein is therefore based on the Applicant's affidavit evidence.



## Legal Analysis

6. Section 333(2) of the [Criminal Procedure Code](#) 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)”.

7. 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.”

8. 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](#) [2018] eKLR.

9. The Charge Sheet herein showed that the Applicant herein was arrested on 5<sup>th</sup> February 2022. He was sentenced on 2<sup>nd</sup> February 2023. Although, he was granted bond, he did not appear to have been released on bond. He thus spent eleven (11) months and twenty seven (27) days in custody before he was sentenced.

10. A reading of the proceedings of the Trial Court showed that it did not take into account the time that he spent in remand before sentencing him. This court was therefore persuaded that this was a suitable case for it to exercise its discretion and grant the orders sought.

## Disposition

11. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s Notice of Motion application dated and filed on 15<sup>th</sup> May 2024 was merited with regard to his prayer pursuant to Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya) only.

12. For the avoidance of doubt, it is hereby ordered and directed that the period the Applicant spent in custody between 5<sup>th</sup> February 2022 and 1<sup>st</sup> February 2023 be taken into account when computing his sentence in accordance with Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya).

13. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 19<sup>TH</sup> DAY OF DECEMBER 2024**

**J. KAMAU**

**JUDGE**

