



**Owino v Republic (Miscellaneous Criminal Application 12
(E015) of 2022) [2023] KEHC 19164 (KLR) (27 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19164 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS CRIMINAL APPLICATION 12 (E015) OF 2022**

PN GICHOHI, J

JUNE 27, 2023

BETWEEN

DENNIS OWINO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By a Notice of Motion dated May 11, 2023 , the Applicant seeks orders that the period of one (1) year , ten (10) months and Twenty-Nine (29) days from August 7, 2015 to July 7, 2017 spent in custody be considered as part of the sentence served in Original CM’s Court Criminal Case No 2412 of 2017 at Kisii. He also prays for any other order as this court would deem it just to grant.
2. In support, he filed an affidavit sworn on February 12, 2022 by Dennis Owino and states that he was on July 7, 2017 convicted and sentenced on to serve Ten(10) years imprisonment for the offence of attempted defilement contrary to section 8(1), 8(2) of the *Sexual Offences Act* No 3 of 2006 which sentence he continues to serve.
3. He further states that he does not wish to appeal against or oppose that sentence but seeks that in line with the case of *Abmad Abolfathi & another v Republic [2018]eKLR*, where Sec 333(2) of *Criminal Procedure Code* was applied so that the sentence of imprisonment runs from the date of arrest, he urges the Court to allow his application arguing that the omission by the trial court failed to promote his right to fair trial under Article 25 of the *Constitution*.
4. Mr J Ochengo for the Respondent conceded the application subject to verification by Court on the issue of the time spent in custody not having been considered during by the trial during sentence.



Determination

5. I have considered that application and the response by the Respondent. A perusal of the charge sheet in the lower court record in CM's Court Criminal Case No 2412 confirms that the Applicant was arrested on September 7, 2015 placed in custody and arraigned in court on September 8, 2015 when he took plea on the charge of Attempted defilement contrary to Section 9(1)(2) of the [Sexual Offences Act](#) No 3 of 2006 and not attempted defilement contrary to section 8(1), 8(2) of the [Sexual Offences Act](#) No 3 of 2006 as he states in his affidavit in support of the Notice of Motion dated May 11, 2023.
6. He was also charged with an alternative charge of committing an indecent Act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No 3 of the 2006.
7. The Applicant denied the charges and the trial court ordered that he be released on a bond of Kshs 200,000/= with a surety of similar amount. However, the Applicant never went out on bond. He therefore remained in custody from the date of plea according to the Warrant of Commitment on Remand.
8. He was ultimately convicted and sentenced on July 7, 2017 to serve Ten (10) years imprisonment for the offence of Attempted defilement contrary to Section 9(1)(2) of the [Sexual Offences Act](#) No 3 of the 2006. Sec 333(2) of the Criminal Procure Code is coached in mandatory terms and to the effect that;

' 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.'

9. Section 38 of the [Penal Code](#) provides that;

' When sentence is passed under this Code on an escaped convict, that sentence –

- (a) if of death, or fine, shall, subject to the provisions of this Code, take effect immediately;
- (b) if of imprisonment, shall run consecutively or concurrently, as the court shall order, with the unexpired portion of the sentence which the convict was undergoing when he escaped.'

10. The Applicant has aptly cited the Court of Appeal decision in [Abamad Abolfathi Mohammed & another v Republic \[2018\] eKLR](#) where the said Court held while discussing Sec 333(2) of the Criminal Procedure Code as it dealt with an appeal from High Court decision in HCCRA Nos 106 and 107 of 2013;

' The appellants have been in custody from the date of their arrest on June 19, 2012. 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(s) 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 June 19, 2012.'

11. There is nothing to show that trial magistrate complied with this provision of the law when passing the sentence of ten years imprisonment. The period that the accused spent in custody was from the date of arrest on September 7, 2015 to July 7, 2017 when he was convicted and sentenced should have been put into account as part of the sentence of Ten (10) years imposed by the trial magistrate.
12. The application is therefore allowed. This Court now directs that the Applicant's sentence of imprisonment runs from September 7, 2015. It should be so computed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 27TH DAY OF JUNE, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Dennis Owino- Absent

Mr. Ochengo for Respondent

Kevin Isindu, Court Assistant

