



**Indiva alias Saba v Republic (Miscellaneous Criminal Application
E014 of 2022) [2023] KEHC 24310 (KLR) (30 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24310 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E014 OF 2022**

JN KAMAU, J

OCTOBER 30, 2023

**IT IS HEREBY ORDERED THAT THE TIME THE APPLICANT SPENT IN
CUSTODY BETWEEN 3RD DECEMBER 2020 AND 21ST AUGUST 2022 AS
THE TRIAL WAS ONGOING BE AND IS TAKEN INTO CONSIDERATION
WHEN COMPUTING HIS SENTENCE AS PROVIDED IN SECTION 333(2)
OF THE CRIMINAL PROCEDURE CODE CAP 75 (LAWS OF KENYA).**

BETWEEN

MACKMILAN INDIVA ALIAS SABA APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Introduction

1. The Applicant herein was tried and convicted of the offence of attempted rape contrary to Section 4 of the *Sexual Offences Act* No 3 of 2006. He was sentenced to five (5) years imprisonment. He had asserted that the same was to run from the date of conviction to wit, 22nd August 2022.
2. On 19th September 2022, he filed this application on review of sentence pursuant to Section 333(2) of the *Criminal Procedure Code*. In his said application that was supported by his Affidavit, he averred that the Trial Court did not consider the period of one (1) year eight (8) months and twenty (20) days that he spent in custody during trial. He pointed out that this was from 1st December 2020 to 22nd August 2022.
3. He cited the case of *Ahamad Albofathi Mohammed & Another vs Republic* [2018] eKLR where the court held that sentence ought to run from the date of arrest. He thus urged this court to grant him the orders he had sought.



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 seen hereinabove, the Applicant's application was based on 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 Court).

6. This duty is also contained in the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) where it is provided that: -

“The provision 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 Abamad Abolfathi Mohammed & Another vs Republic (*Supra*).
8. Although the Applicant indicated that he was arrested on 1st December 2020, a perusal of the Charge Sheet showed that he was arrested on 3rd December 2020. This court therefore adopted the date of 3rd December 2020 as the date of his arrest. He was convicted on 28th July 2022 and sentenced on 22nd August 2022. He was granted bail. However, he did not appear to have come out on bond/bail while his trial was going on. He thus spent one (1) year eight (8) months and seventeen (17) days in custody before he was convicted.
9. A further reading of the Trial Court's Sentence showed that it did not take into consideration the time he spent in remand before conviction and sentencing. This court was therefore convinced that this was a suitable case for it to exercise its discretion and grant the orders sought.

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 September 2022 was merited and the same be and is hereby allowed.
11. It is hereby ordered that the time the Applicant spent in custody between 3rd December 2020 and 21st August 2022 as the trial was ongoing be and is taken into consideration when computing his sentence as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
12. It is so ordered.



DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF OCTOBER, 2023.

J. KAMAU

JUDGE

