



**Liboiywa v Republic (Miscellaneous Criminal Application E001 of 2022)
[2023] KEHC 25939 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25939 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E001 OF 2022
JN KAMAU, J
NOVEMBER 30, 2023**

BETWEEN

GEDION JOHNSON LIBOIYWA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. The Applicant herein was jointly charged with others on two (2) Counts. Count I was in respect of the offence of robbery with violence contrary to Section 296(2) of the *Penal Code* Cap 63 (Laws of Kenya). Count II was in respect of the offence of rape contrary to Section 10 of the *Sexual Offences Act* No 3 of 2006. He was acquitted on Count I but was convicted on Count II and sentenced to twenty (20) years imprisonment.
2. On 4th January 2022, he filed a Notice of Motion application seeking to have the period he stayed in custody while the trial was ongoing be taken into account as part of the sentence that he had already served pursuant to Section 333(2) of the *Criminal Procedure Code*.
3. In his said application that was supported by his Affidavit, he averred that while sentencing him, the Trial Court did not consider the period of four (4) years, two (2) months and ten (10) days that he spent in custody from 9th September 2007 to 18th November 2011. He pointed out that his sentence ought to have run from 19th October 2011 which was the date of his conviction. It was his assertion that the omission by the Trial Court to consider this period contravened his right to fair trial under Article 25 (2) of *the Constitution*.
4. He cited the case of *Ahamad Albofatbi 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.



5. 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

6. 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).
7. This duty is also contained in the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) 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 (Supra).
9. Notably, the records from the lower court, High Court Kakamega and Court of Appeal Kisumu were not placed before this court. This court nonetheless took the liberty to look for Cr Case No 72 of 2014 Gideon Johnson Liboywa vs Republic [2016] eKLR in the Kenya Law Reports Website with a view to ascertaining what the decision of the Court of Appeal Kisumu was. The Applicant had furnished the court with a copy of a Hearing Notice bearing the details of Cr Case No 72 of 2014 Gideon Johnson Liboywa vs Republic.
10. This court noted that the Court of Appeal upheld the decision of Chitembwe J that was delivered in HCCRA No 230 of 2011 Gideon Johnson Liboywa vs Republic [2014] eKLR where he also upheld the decision of the lower court.
11. In his decision of 28th May 2014, Chitembwe J rendered himself as follows:-

“The minimum sentence for the offence of gang rape is 15 years imprisonment and it can be extended to life imprisonment.... There is no need to disturb the sentence.”
12. Bearing in mind that the Court of Appeal upheld the decision of Chitembwe J who was a judge of equal and competent jurisdiction as this court, this court could not therefore disturb the sentence. The only remedy that was open to the Applicant herein was to seek appropriate redress from the Court of Appeal as this court was bound by its decision.



Disposition

13. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application that was filed on 4th January 2022 was not merited and the same be and is hereby dismissed.

14. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF NOVEMBER 2023

J. KAMAU

JUDGE

