



**Tatema v Republic (Miscellaneous Criminal Application E029 of 2023)
[2023] KEHC 25934 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25934 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E029 OF 2023
JN KAMAU, J
NOVEMBER 30, 2023**

BETWEEN

HILLARY TATEMA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant herein was charged 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 sentenced to five (5) years imprisonment.
2. On 9th June 2023, he filed a Notice of Motion application seeking to have the period that he stayed in custody while the trial was ongoing 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 the Trial Court did not consider the period of one (1) year and four (4) months that he spent in custody while sentencing him. He pointed out that this was from 5th February 2022 to 2nd February 2023. It was his assertion that the omission by the Trial Court to consider this period contravened his right to fair trial under Article 25 (c) and Article 50(2)(p) (sic).
4. He cited the case of Ahamad Albofathi Mohammed & Another v 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 *Ahamad Abolfathi Mohammed & Another v Republic* (*Supra*).
9. The Applicant was arrested on 5th February 2022. He was convicted on 16th January 2023 and sentenced on 2nd February 2023. Although he was granted bail, he did not appear to have come out on bond/bail while his trial was going on. He thus spent eleven (11) months and twenty seven (27) days in custody before he was sentenced and not one (1) year and four (4) months as he had contended.
10. 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

11. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application that was dated 25th May 2023 and filed on 9th June 2023 was merited and the same be and is hereby allowed.
12. It is hereby ordered that the time the Applicant spent in custody between 5th February 2022 and 1st February 2023 as the trial was ongoing be and is hereby taken into consideration when computing his sentence as provided in Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
13. It is so ordered.

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

J. KAMAU



JUDGE

