



**Omollo v Republic (Miscellaneous Criminal Application E006 of 2022)
[2023] KEHC 25936 (KLR) (27 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25936 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E006 OF 2022**

JN KAMAU, J

NOVEMBER 27, 2023

BETWEEN

AGGREY NDENGU OMOLLO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. The Applicant herein was charged with the offence of attempted defilement contrary to Section 9(1) (2) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. He was acquitted on the main charge. He was convicted on the alternative charge and sentenced to ten (10) years imprisonment.
2. On 3rd March 2022, he filed a Notice of Motion application seeking to have the period that he stayed in custody while the trial was ongoing, a period of ten (10) months and thirteen (13) days from 6th September 2016 to 29th June 2017 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 pointed out that his sentence ought to have run from the date of his conviction which was 29th June 2017. 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 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.



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 vs Republic* (*Supra*).
9. The Applicant was arrested on 19th October 2016. He was convicted and sentenced on 29th June 2017. 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 eight (8) months and ten (10) days in custody before he was sentenced.
10. A 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 23rd February 2022 and filed on 3rd March 2022 was merited and the same be and is hereby allowed.
12. Taking into account the time the Applicant spent in custody between 19th October 2016 and 27th June 2017 as the trial was ongoing as provided in Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya), it was evident that he had since completed his sentence. It is hereby directed that the Applicant be and is hereby released from custody forthwith unless he be held for any other lawful cause.
13. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF NOVEMBER 2023



J. KAMAU
JUDGE

