



**Omondi v Republic (Miscellaneous Criminal Application E047 of 2021)
[2022] KEHC 13128 (KLR) (26 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13128 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CRIMINAL APPLICATION E047 OF 2021**

JN KAMAU, J

SEPTEMBER 26, 2022

BETWEEN

EZRA OMONDI APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Introduction

1. The applicant herein was tried and convicted for the offence of manslaughter contrary to section 202 as read with section 205 of the *Penal Code*. He was sentenced to twenty (20) years imprisonment.
2. Being dissatisfied with the said decision, he lodged an appeal at the High Court being HCCRA No 103 of 2013, which appeal was dismissed in its entirety. He opted not to appeal to the Court of Appeal.
3. On May 4, 2021, he filed this application for review of the sentence under section 333(2) of the *Criminal Procedure Code*. In his affidavit in support thereof, he urged this court to consider that he had spent seven (7) years in custody since conviction, that he was remorseful and that he had undergone a myriad of vocational training.
4. He reiterated the aforesaid averments in his written submissions that were filed on November 4, 2021 and urged the court to consider the period he had already spent in custody from the date of his arrest. He added that the denial of the enjoyment of the benefit of the said section would be in breach of his rights to equality before the law under article 27(1) 2 of the *Constitution* of Kenya, 2010.
5. He averred that during the period he had been incarcerated, he had made tremendous efforts and attained several certificates such as carpentry and joinery grade II and III respectively.
6. The respondent did not oppose his application. It conceded that the same could be considered as the applicant was arrested on February 21, 2012 and sentenced on September 4, 2013.



Legal Analysis

7. The application herein was premised 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).

8. The requirement under with section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in *Abamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.
9. Further, clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines (under) provide 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.”

10. The purport of the dismissal of the applicant’s appeal at the High Court by Maina J was that the trial court’s judgment was upheld. A reading of it showed that the learned trial magistrate did not indicate if it considered the provisions of section 332 (2) of the *Criminal Procedure Code* while imposing the sentence upon the applicant.
11. The learned trial magistrate rendered himself as follows:-

“I hereby sentence the accused to 20 years (sic) imprisonment”

12. In the premise, this court was therefore persuaded to exercise its discretion to grant the orders sought by the applicant.
13. The applicant was arrested on February 21, 2012. He was convicted and sentenced on September 4, 2013. He had therefore stayed in custody for about one (1) year and six (6) months before he was convicted, a period which ought to be taken into account at the time of computing his sentence.

Disposition

14. For the foregoing reasons, the upshot of this court’s decision was that the applicant’s application for review of sentence that was lodged on May 4, 2021 was merited and the same be and is hereby allowed.
15. It is hereby ordered and directed that the period the applicant spent in custody being the days between February 21, 2012 and September 4, 2013 when he was arrested and sentenced respectively be taken into account when computing his sentence in accordance with section 333(2) of the *Criminal Procedure Code* cap 75 (Laws of Kenya).
16. It is so ordered.



DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF SEPTEMBER 2022

J. KAMAU

JUDGE

