



**Otieno v Republic (Miscellaneous Criminal Application E082 of 2021)
[2022] KEHC 14072 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 14072 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CRIMINAL APPLICATION E082 OF 2021
RE ABURILI, J
SEPTEMBER 22, 2022**

BETWEEN

RICHARD ODHIAMBO OTIENO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant in the application dated September 21, 2022 under Certificate of Urgency is Richard Odhiambo Otieno. He seeks for an order that the court do take into account the Provisions of section 333(2) of the *Criminal Procedure Code* and order that the 40 months that he spent in remand custody pending trial be taken into account in the prison sentence imposed on him by the Senior Principal Magistrate's Court at Maseno in Criminal Case No 37 of 2017.
2. In the said case, whose lower court file has been placed before me, the convict now applicant was convicted and sentenced to serve Seven (7) years imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006.
3. He claims that from the sentence remarks and committal warrant into prison, the sentence was to run from the date of conviction yet he was in custody pending trial for a period of 40 months.
4. I have perused the trial court record Sexual Offences Case No 37 of 2017 at Maseno. The charge sheet dated December 28, 2017 shows that the convict was arrested on December 27, 2017 and apprehended in court on December 28, 2017.
5. When the plea was taken on December 28, 2012 by Hon R S Kipngeno, Senior Resident Magistrate, an order was made that the accused may be released on his own bond of Kshs 200,000/= with surety.
6. On January 4, 2018, a surety by the name of Onyango Odero Ochola ID No 4176XXXX was approved to stand surety for the accused. He deposited his Title Deed for Land Parcel No Kisumu/Kogony/



XXXX into court. The court record shows that on January 4, 2018, the accused person was released from prison when he signed Bond and Bail bond after the grandfather Onyango Odero Ochola deposited his title deed into court as security for the bond granted. It follows that the convict herein was in remand custody from December 27, 2017 to January 4, 2018 and was released on bond after 7 days in custody following his arrest.

7. The case proceeded to hearing and on April 23, 2019, the accused absconded court upon which the warrant of arrest was issued against him.
8. He was arrested and presented to court on May 14, 2019 whereupon he mitigated saying he had been unwell but the court rejected his explanation for lack of evidence that he had been unwell. It was then that the accused person's bond was cancelled and he was remanded in custody pending hearing and determination of his case.
9. The hearing was restarted afresh on August 16, 2019 after the Trial Magistrate was transferred from the court station. On October 14, 2019, the convict's bond was reinstated on the same terms upon his surety applying and he was released on October 17, 2019.
10. The Judiciary Sentencing Policy Guidelines acknowledge 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 offence was held in custody during the trial.
11. Section 333(2) of the Criminal Procedure Code provided that:

“(2) Subject to section 38 of the Penal Code every sentence shall be deemed to commence from and include the whole of the day, 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 into account the period spent in custody.”

12. I must therefore find out what section 38 of the Penal Code stipulates. Under the above section:

“When sentence is passed under this code on an escaped convict, that sentence –

If a death, or fine, shall subject to the provision of this code, take effect immediately;

If of imprisonment, shall non consecutively or concurrently as the court shall order, with the unexpired portion of the sentence which the convict was undergoing when he escaped.”
13. In this case, the accused only absconded bond during the trial. He did not escape from lawful custody.
14. Taking into account the above provisions of the law and having considered the history of this case, I make the following orders:
 - i. That the 7 years' imprisonment imposed on the convict herein Richard Odhiambo Otieno shall be calculated taking into account the following period that the accused/convict was held in remand custody;
 - a. The period between December 27, 2017 and January 4, 2018 only from date of his arrest to the date he was first released on bond pending trial;



- b. The period between May 14, 2019 to October 17, 2019 only, when the accused/convict's bond was cancelled and reinstated.
15. It follows that the applicant herein does not deserve the 40 months rebate that he has cited in his application as he never stayed in custody for that period.
16. This file is now closed as the application dated 30th September 2021 has been subsumed into the application dated September 21, 2022 which I have considered under Certificate of Urgency.
17. I so order.
18. File closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF SEPTEMBER 2022

R. E. ABURILI

JUDGE

