



**Onkoba v Republic (Miscellaneous Criminal Application E004 of 2022)
[2022] KEHC 16550 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16550 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
MISCELLANEOUS CRIMINAL APPLICATION E004 OF 2022**

JN KAMAU, J

DECEMBER 20, 2022

BETWEEN

DENNIS OKARA ONKOBA APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

INTRODUCTION

1. The applicant herein was initially charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. He subsequently entered into a plea bargaining agreement whereupon the murder charge was reduced to manslaughter contrary to section 202 as read with section 205 of the *Penal Code*. He was convicted and sentenced to seven (7) years imprisonment.
2. He filed this application for review of the sentence on March 8, 2022. In his affidavit in support thereof, he contended that his application was premised on section 333(2) of the *Criminal Procedure Code*. In that regard, he relied on the case of *Abolfathi Mohamed and Said Mansour Mousavi vs Republic* [2018] eKLR where the court held that a sentence of imprisonment ought to run from the date of arrest. He thus urged the court to consider the time he had spent in custody prior to his conviction.
3. In his written submissions that were filed on June 6, 2022, he pointed out that he spent three (3) years and six (6) months in remand custody from the date of his arrest on March 13, 2015. He placed reliance on the Kenya Judiciary Sentencing Policy Guidelines and section 333(2) of the *Criminal Procedure Code* and urged the court to include the aforesaid period in the seven (7) years imprisonment sentence he was currently serving.
4. He submitted that he was arrested at the age of thirty three (33) years and was a young man with responsibility of taking care of his family. He said that he had attained the age of forty (40) years. He contended that the period of eight (8) years in prison was a long incarceration which had made his



family's future miserable. He pointed out that his wife left his young children who had no one to fend for them.

5. He pleaded with court to consider that he was a first offender and remorseful of the events that led to the crime and sought for its leniency. He added that he had maintained exemplary discipline before prison officers and fellow inmates and was classified among the best of all time prisoners.
6. He contended that while in custody, he had been training and acquiring skills for personal development such as Diploma in Association of Faith Churches and Ministries 1 & 2 and a Certificate in RODI Kenya. He believed that the skills he had acquired would enable him integrate well back to society. He thus urged this court to allow his application.
7. The respondent opposed the application. In its written submissions that were filed on September 21, 2022, it submitted that the time served by the applicant in custody prior to conviction had already been considered by the court that sentenced him. It asked this court to dismiss the present application for being frivolous and a waste of judicial time.

Legal Analysis

8. Section 333(2) of the *Criminal Procedure Code* cap 75 (Laws of Kenya) provides as follows:-

“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.”
9. The requirement under section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & another vs Republic* (*supra*).
10. 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.”
11. Having said so, a reading of the judgment of October 1, 2018 showed that Maina J had considered the period of time the applicant had spent in custody prior to his conviction. She rendered herself as follows:-

“I shall however take into consideration that the accused has been in custody for more than 3 years and reduce the sentence by that period (emphasis court). The accused is accordingly sentenced to serve seven (7) years imprisonment.”
12. Notably, this court's hands on reduction of the period the applicant had spent in custody from his sentence were tied by the learned judge's pronouncement. It was abundantly clear that she had taken into account the said period when meting out the sentence of ten (10) years on the applicant herein.



13. As the learned judge was of equal and competent jurisdiction as this court, this court could not purport to review and/or vary and/or sit on appeal on her decision. As she had since left the jurisdiction of this court and could not therefore review her orders, if at all there was an error, the only option that was left to the applicant herein was to appeal to the Court of Appeal if he was dissatisfied with her decision.

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 March 8, 2022 was not merited and the same be and is hereby dismissed.
15. It is so ordered.

DATED AND DELIVERED AT NYAMIRA THIS 20TH DAY OF DECEMBER 2022

J. KAMAU

JUDGE

