



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**MISC. REVIEW APPLICATION NO. 118 OF 2019**

**OSMAN MOHAMED BALAGHA..... APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. By an application filed in court on the 24<sup>th</sup> of September, 2019 **Osman Mohamed Balagha** moved the court seeking to have the court apply Section 333(2) of the Criminal Procedure Act in a matter that he preferred a 1<sup>st</sup> appeal but failed to raise the issue of the lengthy time he spent in custody. He urged that neither the trial court nor the High Court considered the matter when delivering judgement.

2. In his written submissions filed in 19<sup>th</sup> July, 2021, the Applicant admits that he did not raise the issue in any of the courts earlier. He further informs the court that has reformed within the 5 years he has spent in jail, was a first offender and is remorseful.

3. In written submissions dated 25<sup>th</sup> February, 2021, the State opposed the application on grounds that though the offence carries a minimum of 20 years, the Applicant was only sentenced to 10 years. Further, though it is true that the court did not consider the time spent in custody, the Applicant did not raise the issue and raising the same at this stage, is an appeal in disguise and ought to be dismissed.

4. The Applicant was charged with the offence of being in possession of an article for the use instigating the commission of a terrorist act contrary Section 30 of the Prevention of Terrorism Act No. 30 of 2002.

The particulars of the offence were that on the 9<sup>th</sup> of April, 2015 at Monemo Trading Centre within Tana River County, he was found in possession of Samsung Tablet GT-P5100 of IMEI Number 3587070308150520 which had two videos; VID- 20141229 and VID- 20150218 which are articles for use in instigating the commission of a terrorism act.

5. The matter proceeded to trial, the applicant was convicted and sentenced to 10 years imprisonment. Being dissatisfied with the judgement, the Applicant appealed to this court in High Court Criminal No. 30 of 2017. On the 4<sup>th</sup> of May, 2018, the appeal was found to have no merit and dismissed.

6. Section 332(2) of the Criminal Procedure Code provides that;

***“(2) 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 Sub-Section (1) has, prior to such sentence; been held in custody, the sentence shall take into account the period spent in custody”.***

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. In the case of **AHAMAD ABOLFATHI MOHAMMED and SAYED MANSOUR MOUSAVI Versus REPUBLIC** Criminal Appeal No. 135 of 2016 the Court of Appeal had this to say on the courts obligation under Section 333(2) of the Criminal Procedure Code; -

**“The appellants have been in custody from the date of their arrest on 19th June 2012. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants’ sentence of imprisonment to run from the date of their arrest on 19th June 2012.”**

9. It was not for the accused to remind the trial Court while sentencing to consider the time he spent in custody, the law obligates the court to consider the time the convict was incarcerated before conviction.

From the record it appears that the trial court failed to consider the same.

10. In the high court the issue was not raised and therefore not considered, The issue is featuring before this court for the first time.

11. In the spirit of applying substantive justice, being just and fair, it is necessary in view of this court not to punish the Applicant for having not raised the issue with the court earlier but allow him the benefit provided for by the said Section of the Criminal Procedure Code, as stated earlier it behooved the court to have complied.

12. Consequently, the 10 years jail term will be reduced by the number of months the Applicant spent in custody and reduced accordingly. The sentence will therefore be 7<sup>1</sup>/<sub>2</sub> years from the date of conviction, having taken into account the time served in custody.

**DATED, DELIVERED AND SIGNED THIS 30TH DAY OF SEPTEMBER 2021.**

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**ALI- ARONI**

**JUDGE**