



**Ondieki v Republic (Miscellaneous Criminal Application
E044 of 2024) [2025] KEHC 1481 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1481 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
MISCELLANEOUS CRIMINAL APPLICATION E044 OF 2024
WA OKWANY, J
FEBRUARY 20, 2025**

BETWEEN

SILAS ONDIEKI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This ruling is in respect to the Application for a review of the sentence passed by the trial court. The gist of the application is that the period that the Applicant spent in remand custody while awaiting his trial was not considered during his sentencing.
2. The Application is supported by the Applicant's affidavit wherein he avers that he was sentenced to serve 10 years' imprisonment for the offence of robbery with violence contrary to Section 296 of the *Criminal Procedure Code*. He explained that he was arrested on 19th February 2021 and sentenced on 15th September 2022 during which period he remained in remand custody. It was his case that the omission, by the trial court, to consider the period spent in custody amounted to a violation of his constitutional right to fair trial under Article 50 (2) (p) and Section 333(2) of the *Criminal Procedure Code*.
3. At the hearing of the Application, Ms. Mochama, Counsel for the Respondent, conceded that the Applicant spent about 19 months in custody as he awaited his trial.
4. The main issue for determination is whether the Application is merited.



5. Article 165(6) of the Constitution grants the High Court supervisory powers over subordinate courts. The Article stipulates as follows: -

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

6. This Court is therefore empowered to consider the sentence meted by the trial court and to satisfy itself that it the trial court correctly applied legal principles in sentencing.

7. Section 333(2) of the Criminal Procedure Code provides as follows: -

Subject to the provisions of Section 38 of the Penal Code, 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 shall take account of the period spent in custody.

8. Courts are therefore expected to take into account the period that a person convicted of an offence spent in custody. The Judiciary Sentencing Policy Guidelines also provide as follows:-

“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.”

9. This principle was aptly explained in the case of Abamad Abolfathi Mohammed & Another v. Republic [2018] eKLR where the Court of Appeal held that: -

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. 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(2) 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.”

10. In a nutshell, the period that the Applicant spent in custody ought to have been considered during sentencing. I find that this application is merited and I therefore allow it. This means that the sentence of 10 years imprisonment shall run from the date of arrest being 19th February 2021.

11. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 20TH DAY OF FEBRUARY 2025.

W. A. OKWANY

JUDGE

