



**Mohamed v Republic (Miscellaneous Criminal Application  
E009 of 2023) [2024] KEHC 4378 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4378 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
MISCELLANEOUS CRIMINAL APPLICATION E009 OF 2023**

**JN ONYIEGO, J**

**APRIL 12, 2024**

**BETWEEN**

**ABDIFATAH ABDI MOHAMED ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal vide High Court Criminal Appeal No.47 of 2018 and  
via a judgment delivered on 27.06.2019, Kariuki J. dismissed)*

**RULING**

1. The applicant herein was tried and convicted of three counts particularized as hereunder.
2. Count I: Being in possession of ammunitions without holding a firearm certificate in force at the time contrary to section 4 (2) (a) as read with section 4(3) (a) of the *Fire Arms Act*. The particulars being that on 11.11.2017 at Lafey area in Tabaj Sub County within Wajir County and with others not before court, were found in possession of ammunitions namely 17 rounds of 7.62 by 39mm in contravention of the said Act.
3. Count II: Membership of a terrorist group contrary to section 24 of the *Prevention of Terrorism Act* 2012. The particulars of the offence were that on 06.10.2017 at around 1930 hrs at Lafaley area in Tarbaj within Wajir County, was found while lying on Wajir – Mandera road being a member of a terrorist group namely Al – Shabaab which is an outlawed terrorist organization by the Kenya Gazette Notice 12585 of 2010 which is contravention of the said Act.
4. Count III: Facilitating of a terrorist act contrary to section 9(A) of the *Prevention of Terrorism Act* 2012. The particulars were that on or 06.10.2017 in Lafaley area of Tarbaj Sub County within Wajir County and with others not before court, knowingly transported grenades and ammunitions to the said area an act which was in preparation to commission of a terrorist act in contravention of the said Act.



5. Having denied the charges, the matter proceeded to full trial. Subsequently, the applicant was convicted in respect of Count I but acquitted of Counts II and III.
6. Aggrieved by both the conviction and sentence, he appealed to this court vide High Court Criminal Appeal No.47 of 2018 and via a judgment delivered on 27.06.2019, Kariuki J. dismissed the appeal in its entirety.
7. Undeterred, he lodged the current application filed in court on 18.04.2023 seeking for orders that this Honourable Court be pleased to consider the time already spent in lawful custody.
8. The application was canvassed orally whereby the applicant urged this court to review its sentence by considering the time already spent in lawful custody. Mr. Kihara, the learned advocate for the prosecution in rebuttal submitted that he was not opposed to the application.
9. I have considered the application herein together with the submissions by both parties. The only issue for determination is whether the applicant is entitled to review of his sentence under Section 333(2) of the *Criminal Procedure Code*.
10. Section 333(2) of the *Criminal Procedure Code* provides: -

“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, been held in custody, the sentence shall take account of the period spent in custody.”

11. It is clear from the above provision that the law requires courts to take into account the period the convict spent in custody preceding his sentence.
12. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in *Abamad Abolfathi Mohammed & Another vs 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 19<sup>th</sup> June 2012.”

13. According to *The Judiciary Sentencing Policy Guidelines* 2016 :

“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.”

14. This court is empowered by Article 165(6) of the *Constitution* of Kenya to review a decision by a subordinate court. Article 165(6) provides: -

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.

15. The applicant was arrested on 10.10.2017 and convicted on 27.07.2018 without having been released on bond or bail. By virtue of Section 333(2) of the *Criminal Procedure Code*, this duration ought to have been considered during sentencing. Notably, the applicant has not contested the sentence.

16. The applicant was sentenced on 27.07.2018 having spent a period of Two Hundred and Eighty-Nine Days in prison custody during the pendency of his trial.

17. It is my finding that this application is merited and the same must succeed pursuant to Section 333(2). The aforesaid period spent in remand custody should be deducted when computing his sentence.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12<sup>TH</sup> DAY OF APRIL 2024**

**J.N.ONYIEGO**

**JUDGE**

