



**Musasia v Republic (Miscellaneous Criminal Application
E057 of 2023) [2024] KEHC 9612 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9612 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E057 OF 2023**

JN KAMAU, J

JULY 25, 2024

BETWEEN

JAIRUS KISAMBO MUSASIA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. The Applicant herein was charged with the offence of arson contrary to Section 332 (a) of the [Penal Code](#). On 29th May 2023, the Learned Trial Magistrate, Hon S. Manyura, convicted and sentenced him to five (5) years imprisonment.
2. On 16th October 2023, he filed an undated Notice of Motion application seeking to have the period that he stayed in custody while the trial was ongoing to wit from 7th December 2021 to 29th May 2023, a period of one (1) year, five (5) months and twenty two (22) days, taken into account as part of the sentence that he had already served pursuant to Section 333(2) of the [Criminal Procedure Code](#). He relied on the decision in the case of [Abammed Abolfathi Mohammed and Another vs Republic](#) [2018] eKLR where the court held that sentence ought to run from the date of arrest.
3. It was his assertion that the omission by the Trial Court to consider this period contravened his right to fair trial under Article 25(2) of the [Constitution](#). He thus urged this court to grant him the orders he had sought.
4. He did not file Written Submissions to support his application herein. The Respondent was not opposed to the said application and did not therefore file any Written Submissions.



Legal Analysis

5. As seen hereinabove, the Applicant's application was based on Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya). The said Section provides that:

“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” (Emphasis Court).
6. This duty is also contained in the Judiciary [Sentencing Policy Guidelines](#) 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.”
7. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the [Criminal Procedure Code](#) was restated by the Court of Appeal in the case of [Abamad Abolfathi Mohammed & Another vs Republic](#) (*Supra*).
8. This court noted that although the Applicant had indicated that he was arrested on 7th December 2021, the Charge Sheet herein showed that he was arrested on 9th December 2021. He was sentenced on 29th May 2023. Although he was granted bond/bail, he did not appear to have come out on bond/bail while his trial was going on. He thus spent one (1) year, five (5) months and eighteen (18) days in custody before he was sentenced.
9. A reading of the Trial Court proceedings showed that the Trial Court did not take into consideration the time he spent in remand before sentencing. This court was therefore persuaded that this was a suitable case for it to exercise its discretion and grant the orders sought.

Disposition

10. For the foregoing reasons, the upshot of this court's decision was that the Applicant's undated Notice of Motion application that was filed on 16th October 2023 was merited and the same be and is hereby allowed.
11. It is hereby directed that the time the Applicant spent in custody between 9th December 2021 and 28th May 2023 when he was arrested and sentenced respectively be taken into account while computing his sentence as provided in Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya).
12. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 25TH DAY OF JULY 2024

J. KAMAU



JUDGE

