



REPUBLIC OF KENYA



**Kariuki v Republic (Criminal Revision E022 of 2024)
[2024] KEHC 10880 (KLR) (16 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10880 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL REVISION E022 OF 2024
DR KAVEDZA, J
SEPTEMBER 16, 2024**

BETWEEN

HARRISON MUTURI KARIUKI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged and after a full trial convicted for the offence of stealing by servant contrary to section 281 of the *Penal Code*. He was sentenced to pay a fine of Kshs. 500,000 in default to serve four (4) years imprisonment. Being aggrieved, he filed an application seeking sentence review.
2. The application is supported by an affidavit sworn by the applicant where it was averred that the trial court failed to consider the time spent in remand custody. The applicant urged the court to invoke the provisions of section 333(2) of the *Criminal Procedure Code*. He also prayed for leniency and urged the court to reduce the sentence imposed.
3. I have considered the application, the affidavit in support and the applicable law. The issue for consideration is whether the trial court considered the time the applicant spent in remand custody.
4. The proviso to section 333(2) of the *Criminal Procedure Code* obligates the court to consider the time already spent in custody during sentencing. The court has a duty to take into account the period an accused person had remained in custody during sentencing under the proviso to section 333(2) of the Criminal Procedure Code which is couched in mandatory terms. This was acknowledged by the Court of Appeal in *Abamad Abolfathi Mohammed & Another v. Republic* [2018] eKLR and *Bethwel Wilson Kibor v. Republic* [2009] eKLR and more recently in the High Court case of *Vincent Sila Jona & 87 others v Kenya Prison Service & 2 others* [2021] eKLR.



5. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced be considered in meting out the sentence where it is not hindered by other provisions of the law.
6. In this case, however, the applicant was not sentenced to a serve a prison sentence to pay a fine and in default serve a sentence. The sentence therefore is not custodial, but payment of a fine, and the custodial sentence, is being served in default of the payment of a fine.
7. That notwithstanding, under Section 281 of the *Penal Code*, any person convicted for the offence of stealing by servant is liable to imprisonment for 7 years. In the present case though, the trial court opted to impose a fine. In that case, the learned trial magistrate ought to have imposed the default sentences pursuant to Section 28(2) of the *Penal Code*. Under the provision, where the fine imposed exceeds Kshs. 50,000/= the default sentence must not exceed 12 months imprisonment. It follows then that the sentences imposed was illegal which represents an irregularity on the sentences.
8. In the end, the sentence of a fine of Kshs. 500,000 in default to serve 4 years imprisonment is substituted with a fine of Kshs. 500,000 in default to serve 12 months imprisonment.

Orders accordingly.

RULING DELIVERED VIRTUALLY THIS 16TH DAY OF SEPTEMBER 2024

.....

D. KAVEDZA

JUDGE

