



REPUBLIC OF KENYA



**Mutua v Republic (Criminal Revision 156 of 2024)
[2024] KEHC 11556 (KLR) (1 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11556 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL REVISION 156 OF 2024
DR KAVEDZA, J
OCTOBER 1, 2024**

BETWEEN

JACKSON MUTINDA MUTUA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged and convicted for the offence of kidnapping contrary to section 257 as read with 256 of the *Penal Code*. He was sentenced to serve five (5) years imprisonment.
2. He filed an undated notice of motion received on 15th July 2024 seeking revision of sentence. He filed an affidavit in support of his motion. The arguments raised are that the trial court failed to consider the time she spent in remand custody during the computation of sentence under the provision of section 333(2) of the *Criminal Procedure Code*, Cap 75 of the Laws of Kenya.
3. I have considered the application, the affidavit in support and the applicable law. I have also considered the trial court record. 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. From the record, the applicant was arrested on 19th September 2021 and was never released on bail/ bond. He was convicted on 16th December 2022. He, therefore, spent one (1) year and three (3) months in remand custody. From the record, that the period was not factored in during his sentencing by the trial court.
 7. In *Abmed Abolfatbi Mohamed v Republic* (*supra*) the Court of Appeal held as follows;

“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 appellant’s sentence of imprisonment to run from the date of arrest on 19th June 2012.”
 8. Guided by the law, the court is of the view that the application ought to be considered, as failure to do so would amount to denying the applicant a right due to the failure of the court to discharge an obligation bestowed upon it by law.
 9. I thus allow the application and order that the sentence of five (5) years imprisonment shall be run from 19th September 2021 the date of the appellant’s arrest pursuant to section 333(2) of the *Criminal Procedure Code*, Cap 75 Laws of Kenya.
- Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 1ST DAY OF OCTOBER 2024

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D. KAVEDZA

JUDGE

