



**Ndungu v Republic (Miscellaneous Criminal Application
E141 of 2024) [2024] KEHC 12177 (KLR) (14 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12177 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
MISCELLANEOUS CRIMINAL APPLICATION E141 OF 2024**

**DR KAVEDZA, J
OCTOBER 14, 2024**

BETWEEN

JOHN GITONGA NDUNGU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged and convicted for the offence of robbery with violence contrary to section 296(2) of the [Penal Code](#). He was sentenced to death. His sentence was substituted with a sentence of eighteen years by the Court of Appeal vide Criminal Appeal No. E021 of 2023.
2. He filed the present application 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 [Ahmad Abolfathi Mohammed & Another vs. Republic](#) [2018] eKLR and [Bethwel Wilson Kibor vs. Republic](#) [2009] eKLR and more recently in the High Court case of [Vincent Sila Jona & 87 others vs 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 12th April 2012 and was never released on bail/bond. He was convicted on 24th June 2013. He, therefore, spent one (1) year and two (2) months and ten (10) days in remand custody. From the record, that the period was not factored in during his sentencing.
7. In *Abmed Abolfathi 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 imposed shall be computed less by one (1) year and two (2) months and ten (10) days in remand custody during his trial.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 14TH DAY OF OCTOBER 2024

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D. KAVEDZA

JUDGE

