



**Ochea v Republic (Miscellaneous Criminal Application E008 of 2021)
[2023] KEHC 2223 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2223 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E008 OF 2021**

**JN KAMAU, J
MARCH 16, 2023**

BETWEEN

GEORGE OCHEA APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Introduction

1. The applicant herein was tried and convicted of the offence of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code* cap 63 (Laws of Kenya). He was sentenced to five (5) years imprisonment.
2. On December 8, 2021, he filed this application on review of sentence pursuant to section 333(2) of the *Criminal Procedure Code*. In his said application that was supported by his Affidavit, he averred that the Trial Court did not consider the period of one (1) year six (6) months he spent in custody during trial. He cited the case of *Ahamad Albofathi Mohammed & another v Republic* [2018] eKLR where the court held that sentence ought to run from the date of arrest. He told this court that he was arrested on June 9, 2018 and convicted on December 19, 2019 and thus urged this court to grant him the orders he had sought.
3. In his Written Submissions that were dated and filed on September 15, 2022, he pleaded with court to consider that he was arrested at the age of thirty nine (39) years and that he had been in custody for a period of three (3) years. He stated that before his incarceration, he was the sole breadwinner in his family which was now overwhelmed with the burden of eking a living and being single handedly parented by his wife.
4. He stated that he was a first offender and that he had learnt his lesson. He asked this court to exercise leniency and give him a second chance in life. He asserted that during his incarceration, he



had maintained high discipline and that he had engaged in transformative programmes and acquired religious skills and was issued with a Diploma from AFCM International Training Centre Africa. He added that he was undergoing additional trainings in farming techniques while awaiting the verdict of the present application.

5. The respondent was not opposed to his application.

Legal Analysis

6. 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).

7. This duty is also contained in the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) 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.”

8. 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 v Republic* (*supra*).
9. A perusal of the trial court's records showed that the applicant was arrested on June 11, 2018. He was convicted on December 19, 2019. He does not appear to have been come out on bond/bail. He thus spent about one (1) year and six (6) months in custody before he was convicted.
10. A further reading of the trial court's Judgment showed that it did not take into consideration the time he spent in remand before conviction and sentencing. This court was therefore convinced that this was a suitable case for it to exercise its discretion and grant the orders sought.
11. Taking into account the remission of a third of his sentence, he is expected to complete his sentence on April 19, 2023. Considering the period of one (1) years six (6) months that he spent in custody before his conviction into account, it is clear that he has since completed his sentence

Disposition

12. For the foregoing reasons, the upshot of this court's decision was that the Applicant's application for review filed on December 8, 2021 was merited and the same be and is hereby allowed.



13. It is hereby ordered that the time the applicant spent in custody during trial be and is taken into consideration when computing his sentence as provided in Section 333(2) of the *Criminal Procedure Code* cap 75 (Laws of Kenya).
14. As the applicant has since completed his sentence, it is hereby directed he be and is hereby set free and released from custody forthwith unless he be held for any other lawful cause.
15. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 16TH DAY OF MARCH 2023.

J. KAMAU

JUDGE

