



**Otondi v Republic (Miscellaneous Criminal Application 13
(E016) of 2022) [2023] KEHC 1876 (KLR) (6 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1876 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS CRIMINAL APPLICATION 13 (E016) OF 2022**

PN GICHOHI, J

MARCH 6, 2023

BETWEEN

IAN BARONGO OTONDI ALIAS MOI APPLICANT

AND

REPUBLIC RESPONDENT

(From original Criminal Case No. S.O 22 of 2017 at PM's Court at Ogembo)

RULING

1. The applicant has moved this court by way of a notice of motion dated February 2, 2022 and filed on May 13, 2022 under Art 25 (c) & 50 (2) (p) of the Constitution and section 333 (2) of the Criminal Procedure Code. He seeks orders that the eight (8) months 29 days spent in remand be considered as part of the sentence served in case No SO 22 of 2017 at PM's court at Ogembo. He also prays for any other order as this court would deem it just to grant.
2. In support, he filed an affidavit sworn on 2nd February by Ian Barongo Otondi Alias Moi the applicant states that he was convicted and sentenced on to serve ten(10) years imprisonment for the offence of rape contrary to section 3(1) (a) of the Sexual Offences Act No 3 of 2006 which was ordered to be calculated from the date of conviction on December 11, 2017.
3. Further, he states that he has never gone out on bond, he told the court that the period of 8 months and 29 days were not considered by the trial court during sentencing on December 11, 2017. While citing the case of Abmed Abolfathi Mohamed & another v Republic [2018]eKLR where Sec 333(2) of Criminal Procedure Code was applied, he urged the court to allow his application as failure to consider the period spent in custody awaiting trial did not promote the right to a fair trial under Art 25 (2) of the Constitution.
4. While conceding that the time spent in custody during trial should be considered during sentence, Mr Ayondo for the Republic told the court he did not oppose the application but urged the lower court



record as it would appear that the applicant was in custody but lower court did not consider the time spent in custody. He therefore conceded to the application.

Determination

5. A perusal of the of the charge sheet in the lower court record shows that the accused person was arrested on March 23, 2017 placed in custody and arraigned in court on March 29, 2017 when he took plea on the charge of rape contrary to section 3 (1) (a) (c) (3) of the *Sexual Offences Act* No 3 of the 2006.
6. Though he was ordered to be released on a bond of Kshs 100,000/= with a surety of similar amount, the accused never went out on bond. The warrant of commitment on remand shows that the accused person was remanded to GK Prison Kisii on March 29, 2017.
7. He remained in custody throughout the trial and ultimately convicted and sentenced on December 11, 2017 to serve ten (10) years imprisonment. Sec 332 (2) of the *Criminal Procedure Code* provides :-

“Subject to the provisions of section 38 of the *Penal Code* 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.”

8. There is nothing to show that the trial magistrate put into consideration the period that the accused person spent in custody when passing the above sentence. While discussing Sec 333 (2) of the *Criminal Procedure Code*, the Court of Appeal in *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR had this to say in an appeal from High Court decision in HCCRA Nos 106 and 107 of 2013:-

“The appellants have been in custody from the date of their arrest on June 19, 2012. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “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(s) 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 appellants’ sentence of imprisonment to run from the date of their arrest on June 19, 2012.”

9. The applicant herein has demonstrated that he remained in custody from the date of arrest on March 27, 2017 through to the date of conviction and sentence on December 11, 2017. That period he was in custody should have been put into account as part of the sentence of ten (10) years imposed by the trial magistrate.



10. The application is therefore allowed. This court now directs that the applicant's sentence of imprisonment run from March 27, 2017.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 6TH DAY OF MARCH, 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Ian Barongo Otondi Alias Moi - Applicant

Mr. Ayondo for Respondent

Kevin Isindu, Court Assistant

