



**Aswani v Republic (Miscellaneous Criminal Application
E065 of 2022) [2023] KEHC 17882 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17882 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CRIMINAL APPLICATION E065 OF 2022**

PJO OTIENO, J

MAY 11, 2023

BETWEEN

FANUEL ASWANI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By a Notice of Motion filed in Court on October 31, 2022 the Applicant having been convicted of the offence of murder in Kakamega High Court Criminal Case No 55 of 2006, does not challenge the conviction nor sentence but urges that the mandatory provisions of Section 333(2) of the *Criminal Procedure Code* be given effect.
2. The Prosecution does not oppose the application by any affidavit nor grounds of opposition but urged the Court to peruse the file and make a determination on whether or not section 333(2) Criminal Procedure Code was complied with by the Court.
3. It is now settled and trite law that every court meting out a sentence is obligated to take into account the period the accused has served in custody pending conclusion of his trial. Taking into account for purposes of that provision means outright deduction of that period from the term imposed by the sentencing Court.
4. This is a benefit of the law that vests in every convict and thus a right and benefit that must not be taken away from the Accused.
5. In underscoring the duty upon the Court and what means to take into account the Court of Appeal did rendered itself in *Abamed Abolfadhi Mohammed vs. Republic* [2018] eKLR as follows:-

“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(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 appellants' sentence of imprisonment to run from the date of their arrest on June 19, 2012."

6. In the Judgment now sought to be reviewed, there is nothing to show that the accused was ever released on bond nor that the court took into account the period between December 20, 2006 when he was arraigned in court and the date he was convicted on March 3, 2012.
7. That is a clear denial of a vested benefit from the law and such denial must be corrected by this Court declaring that the imprisonment term shall be computed from December 20, 2006.
8. Application is thus allowed as prayed.

Dated, delivered and signed at Kakamega this 11th day of May 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Applicant in person

Ms. Chala for the Respondent

Court Assistant: Polycap

