



**Modhiambo v Republic (Petition E004 of 2023)
[2023] KEHC 21442 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21442 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
PETITION E004 OF 2023
RPV WENDOH, J
JULY 19, 2023**

BETWEEN

JARED OTIENO MODHIAMBO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Jared Otieno Odhiambo, the appellant was convicted on his own plea, for the offence of trafficking in narcotics contrary to section 4 (a) of the [Narcotics Drugs and Psychotropic Substances Control Act 1994](#). He is alleged to have been found carrying 112 tariffs whose value was Kshs 16,800/=
2. Upon conviction on his own plea of guilty he was sentenced to serve four years imprisonment.
3. He has brought this application under section 333 (2) of the [Criminal Procedure Code](#) and under article 165 (3) (b) of the [Constitution](#). Article 333 (2) of the [Criminal Procedure Code](#) and considering the period he spent in the remand custody.

The prosecution did not oppose the application.

Section 333 (2) [Criminal Procedure Code](#) provides as follows: -

“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 sub section (1) has prior, to such sentence shall take account of the period spent in custody.”



4. This provision was the subject of discussion in the case of *Abamad Abolfathi Mobamed and another v Republic* [2018] eKLR where the Court of Appeal held:-

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. 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. Again, in *Bethwel Wilson Kibor v* [2009] eKLR

“By proviso to section 333(2) of the Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at September 22, 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”

5. The same provision has been considered in the Judiciary Sentencing Policy Guidelines. This court has the duty to supervise the subordinate courts by dint of section 165 of the *Constitution*. In this case the applicant was arraigned in court on December 27, 2021 and pleaded guilty on November 5, 2021. By then he had been in custody for six (6) months. There is no evidence from the record that the court took into account the said six (6) months when sentencing the applicant. For that reason, I find that the application has merit and I allow it.
6. I hereby set aside the sentence of four (4) years and substitute it with a sentence of three (3) years six months (3 ½) years and the sentence will take effect from November 5, 2021.

It is ordered.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 19TH DAY OF JULY, 2023.

R. WENDOH

JUDGE

In presence of; -



Mr. Kaino Prosecution Counsel

Appellant Absent

Ms. Emma/ Phelix –Court Assistant

