



REPUBLIC OF KENYA



KENYA LAW
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**Onyango & another v Republic (Petition E001 of 2023)
[2023] KEHC 21441 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
PETITION E001 OF 2023
RPV WENDOH, J
JULY 19, 2023**

BETWEEN

DAVID OUMA ONYANGO 1ST APPLICANT

FIDEL OTIENO JUMA 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The two accused David Ouma Onyango and Fidel Otieno Juma were jointly charged with the offence of threatening to kill contrary to section 223 (1) of the [Penal Code](#) and Assault contrary to section 251 (1) of the [Penal Code](#).
2. Both were convicted on both counts and sentence to a fine of Kshs. 50,000/= on each count in default twelve (12) months imprisonment. The applicants have come to this court under section 333 (2) of [Criminal Procedure Code](#) and praying that the court do consider the time they spent in custody. They rely on the case of [Abamad Abolfathi Mohamed and Another vs. Republic](#) 2018 where the court held in sentencing that the court has to consider the time an accused has spent in remand.

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.”



3. The Court of Appeal in the *Abamad Abolfathi Mohamed and Another* (supra) said as follows:-

“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

4. The same court also considered the above provision in *Bethwel Wilson Kibor vs. (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 is contained in the Judiciary Sentencing Policy Guidelines. The sentencing court is required to take into account the period an accused has spent in remand custody.

6. In this case, the applicant was arraigned in court on 20/9/2021 having been arrested on 17/9/2021. They were sentenced on 26/5/2022 which is a period of eight months. There is no evidence from the record that the court considered this period when sentencing. For that reason, the application has merit and this court sets aside the default sentence of twelve (12) months imprisonment. I substitute it with nine (9) months imprisonment on each count.

It is so 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 Assistants

