

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

HCCRMISC APPLICATION NO. E010 OF 2020

HUSSEIN HASSAN MOHAMED.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Hussein Hassan Mohamed** was on the 5th of November 2019 before the Principal Magistrate’s Court to answer for a case of assault causing actual bodily harm contrary to Section 251 of the Penal Code.

2. The prosecution case was that on 28th day of October 2019 at Wajir township the Applicant assaulted his own father Hassan Mohamud Sheikh who was then frail and sickly causing him bodily injury.

3. The Applicant pleaded not guilty and the matter proceeded to full trial. He was convicted of the offence and before sentencing the Court called for a pre-sentencing report. The report stated inter alia, that the Applicant abused alcohol and drugs and had served a sentence for a similar offence.

4. The court sentenced the Applicant to a period of 5 years. The trial took a period of 4 months where the Applicant was in custody.

5. **Section 333(2)** of the Criminal Procedure Code provides

“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 for 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.”

6. **The Judiciary Sentencing Guidelines** emphasize the principle further on the following terms;

“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 proportionate 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 trial.”

7. Sentencing is discretionary and as the court arrives at a sentence, however, it is a requirement that the time spent in custody be taken into account.

There is no indication in the Judgement that the trial court considered the 4 months the Applicant spent in custody.

8. As a consequence, the 5-year jail term is set aside and in its place the Applicant is jailed for 4 years 6 months. That is the best this court can do in the circumstances bearing in mind that the matter before this court is not an appeal and therefore some aspects of the application must fail.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 11TH DAY OF NOVEMBER, 2021

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ALI-ARONI

JUDGE