



REPUBLIC OF KENYA

IN THE HIGH COURT AT MILIMANI

CRIMINAL DIVISION

MISC. CRIMINAL APP. NO. 251 OF 2019

DOUGLAS OJIAMBO OBINGO.....APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. The Applicant was charged with the offence of hardware breaking and committing a felony contrary to **Section 306 (a) of the Penal Code**. In the particulars of the offence, several goods were stolen from the hardware all totaling Kshs. 5,673,565 /=. At the time of the offence, the Applicant was a watchman of the premises. He did not appeal but instead filed the instant revision application.
2. His prayer to the court is basically that the period he was in remand custody of 10 months prior to posting a cash bail be considered to constitute part of the sentence.
3. The only submission that the Applicant has made before the court is that he is suffering in jail. He also claims to have a young family which too is suffering due to his incarceration. He has shown no remorse at all.
4. I have seen the remarks that the trial court made prior to passing the sentence, which are:

*“I consider the age of the case and the economic strain to both parties herein. The offence carries a penalty of up to 7 years imprisonment. Having taken into consideration of the issues before court, the accused is imprisoned to serve two (2) years imprisonment.”*

5. Under the proviso to **Section 333(2) of the Criminal Procedure Code** in pronouncing a custodial sentence, the court shall take into account the period an accused took in remand custody.
6. It suffices from the above excerpt that the learned trial magistrate failed to adhere to this provision. He ought to have had regard to the fact that the Applicant had been in remand for 10 months before he posted bail. The failure to do so was prejudicial to the Applicant.
7. In the upshot, I find that the application is merited. I order that in tabulating the sentence, the 10 months that the Applicant was in custody shall be considered to constitute part of the sentence.

**Dated and Delivered at Nairobi This 1<sup>st</sup> day of October, 2019.**

**G.W.NGENYE-MACHARIA**

**JUDGE.**

**In the presence of:**

1. Applicant in person
2. Momanyi for the Respondent.