



**Omondi v Republic (Miscellaneous Criminal Application E152 of 2024) [2025] KEHC 3487 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 3487 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
MISCELLANEOUS CRIMINAL APPLICATION E152 OF 2024**

**M THANDE, J**

**FEBRUARY 28, 2025**

**BETWEEN**

**SYLVESTER ODHIAMBO OMONDI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant states that he is serving a 10 year sentence for the offence of drug trafficking. He seeks that he be placed on probation for the remainder of his sentence. The Applicant further seeks that the period spent in custody pending trial, be taken into account and that his sentence be reduced accordingly.
2. In support of his prayer for probation, the Applicant states that he possesses the qualities that the court is required to have regard for in considering probation orders, under Section 4 of the *Probation of Offenders Act* (POA). He states that he is young and full of energy. He has much potential to contribute to the economy and to help the community, if he could only be accorded a second chance.
3. The Respondent opted not to file any response.
4. Under the Section 4 of the POA, courts have the power to permit conditional release of offenders under probation. The provision further stipulates the circumstances under which a probation order may be granted and the conditions that may be imposed. Section 4 provides in part as follows:
  1. Where a person is charged with an offence which is triable by a subordinate court, and the court thinks that the charge is proved but is of the opinion that, having regard to age, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may—



- a. convict the offender and make a probation order; or
  - b. without proceeding to conviction, make a probation order, and in either case may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.
2. Where any person is convicted of an offence by the High Court and the court is of the opinion that, having regard to the age, character, antecedents, home surroundings health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may, in lieu of sentencing him to any punishment, make a probation order, and may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.
5. It is quite evident from the above provision, that where a charge is proved in a subordinate court or the High Court convicts a person and forms the opinion, after considering the factors listed, that it is expedient to release the offender on probation, the court may make a probation order in lieu of sentencing him to any punishment. A reading of the above provision makes it clear that the power to grant probation orders can only be exercised by the trial court. This power cannot be invoked post-conviction and sentence or pursuant to an application such as the one before this Court. Accordingly, the prayer is found to be without merit.
6. I now turn to the prayer for review of sentence by taking into account the period spent in custody pending trial.
7. The Applicant states that he was released on bond 3 months after his arrest but was later arrested for failing to attend court and remained in custody for 12 months before conviction and sentence.
8. Section 333(2) of the [Criminal Procedure Code](#) provides as follows:

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 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.
9. The proviso to Section 333(2) of the [Criminal Procedure Code](#) requires that court while sentencing, to take into account the period an accused person has spent in custody pending trial. In the case of *Bethwel Wilson Kibor v Republic* [2009] eKLR, the Court of Appeal had this to say about the said proviso:

The incident took place way back in 1999. The appellant was promptly arrested and taken to court. There were long adjournments due to transfers and/or changes of trial Judges resulting in long incarcerations of the appellant. By proviso to section 333(2) of [Criminal Procedure Code](#) where a person sentenced has been held in custody prior to such sentence, the sentence shall take 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 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence.

10. Flowing from the above authority, it is clear that a trial court must specifically state that the period spent in custody by an accused person pending trial, has been taken into account when imposing sentence.
11. The lower court record shows that the Applicant was arrested on 14.6.18 and released on bond on 24.9.18. He failed to attend court on 18.2.19 and a warrant of arrest was issued against him. The Appellant was arrested and brought to court on 30.9.19 and his bond was cancelled. He remained in custody until 25.11.2020 when he was sentenced. There is no mention by the trial court that the period that the Applicant had spent in custody pending trial, was taken into account when sentencing him. This is a serious omission on the part of the trial court, as it amounts to non-compliance with an express statutory provision.
12. In the end and in view of the foregoing, the Application is allowed on terms that the period from 14.6.18 to 24.9.18 and the period from 30.9.19 to 25.11.2020 shall be deducted from his sentence. The prayer for probation orders is declined.

**DATED, SIGNED AND DELIVERED IN MALINDI THIS 28<sup>TH</sup> DAY OF FEBRUARY 2025**

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**M. THANDE**  
**JUDGE**

