



REPUBLIC OF KENYA



KENYA LAW
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**Otieno & another v Republic (Miscellaneous Criminal Application
E081 of 2025) [2025] KEHC 11178 (KLR) (29 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11178 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
MISCELLANEOUS CRIMINAL APPLICATION E081 OF 2025**

DR KAVEDZA, J

JULY 29, 2025

BETWEEN

JOHN MUSYOKA OTIENO 1ST APPLICANT

TONNY MACHANI 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicants were charged and convicted for the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. They were each sentenced to death. Their appeal before this court was partially successful. The conviction for the offence of robbery with violence was set aside and substituted with conviction for the offence of handling stolen property and each sentenced to serve seven (7) years imprisonment.
2. The applicants filed the present application and an affidavit in support of the motion seeking sentence review. The arguments raised are that the trial court and the appellate failed to consider the time spent in remand custody during the computation of his sentence.
3. I have considered the application, the affidavit in support and the applicable law. I have also considered the trial court record. The issue for consideration is whether the trial court considered the time the applicant spent in remand custody.
4. The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already spent in custody. The duty to take in account the period an accused person had remained in custody in sentencing under the proviso to section 333(2) of the *Criminal Procedure Code* which is couched in mandatory terms was acknowledged by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs. Republic* [2018] eKLR and *Bethwel Wilson Kibor vs. Republic* [2009]



eKLR and more recently in the High Court case of Vincent Sila Jona & 87 others vs Kenya Prison Service & 2 others [2021] eKLR.

5. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced be considered in meting out the sentence where it is not hindered by other provisions of the law.
6. From the record, the 1st applicant was arrested on 1st January 2023 while the 2nd applicant was arrested on 2nd January 2023. They were never released on bail until their conviction and sentence. From the record, that the period was not factored in during his sentencing by the trial court and this court on appeal.
7. Guided by the law, the court is of the view that the application ought to be considered, as failure to do so would amount to denying the applicant a right due to the failure of the court to discharge an obligation bestowed upon it by law.
8. I thus allow the application and order that the sentence of seven years imprisonment shall run from 1st January 2023 against the 1st applicant and run from 2nd January 2023 against the 2nd applicant the dates of their respective arrests pursuant to section 333(2) of the *Criminal Procedure Code*.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 29TH DAY OF JULY 2025

D. KAVEDZA

JUDGE

