



**Mohamed v Republic (Miscellaneous Criminal Application
E001 of 2024) [2024] KEHC 4313 (KLR) (26 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 4313 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
MISCELLANEOUS CRIMINAL APPLICATION E001 OF 2024**

**JN ONYIEGO, J
MARCH 26, 2024**

BETWEEN

ABDIWELI SALAH MOHAMED APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant herein was tried and convicted of two counts namely; Engaging in Organised Crime activity contrary to section 3 (c) as read with Section 4 (1) of Prevention of Organised Crime Act, 20109(count one). Particulars were that on the night of the 12th and 13th day of January 2018 at Garissa Sub County acting in concert with others, not before the court assaulted for purposes of obtaining money Kes. 157,000 from Abdikadir Said Warsame.
2. Count two, he was charged with acquiring proceeds of crime contrary to section 4 (a) as read with section 16 (1) of the proceeds of crime and Money laundering Act 2009. Particulars were that on 12th and 13th January, 2018 at Industrial Area remand prison Nairobi, within Nairobi County acquired Kes. 157,000/- and at the time of the acquisition knew or reasonably ought to have known that it formed part of the proceeds of robbery with violence committed by others not before the court.
3. The matter having proceeded to full trial and the applicant convicted on both counts and sentenced to serve five years and three years’ imprisonment respectively. The sentences were to run concurrently.
4. Aggrieved by the said conviction and sentence, he appealed to this court vide High Court criminal Appeal No.22B of 2020. via a judgment delivered on 10.06.2022, Aroni J. (as she was then) dismissed the appeal in its entirety.
5. Undeterred, he filed the instant application dated 24.01.2024 under certificate of urgency seeking for orders that this Honourable Court be pleased to consider the time already spent in lawful remand custody and thus review his sentence.



6. The application in a nutshell was hinged on articles 27, 50(2) (p) and section 333(2) of the Criminal Procedure Code. Further reliance was placed in the case of *Abamad Abolfadhi Mohamed & another v Republic* [2018] eKLR where the court considered the time already spent by the appellant in remand custody commencing from the date of arrest. He urged that it is not only mete but also just that this court considers the time he spent in lawful custody pending hearing and determination of his case.
7. Directions were taken that the application be canvassed by way of written submissions.
8. The applicant in his oral submissions reiterated his prayers. He urged this court to find his application merited and thereby consider time spent in lawful custody and review his sentence accordingly.
9. Mr. Kihara, the learned advocate for the prosecution in rebuttal submitted that the application herein was underserved as the same had been determined by a court of equal jurisdiction to this court. In counsel's view, this court is now functus officio and any move by this court addressing the same was akin to it sitting on its appeal. It was his view that the applicant ought to have appealed the same to the Court of Appeal. As a consequence, he urged this court to dismiss the application for the same was devoid of merit.
10. I have considered the application herein together with submissions by both parties. The only issue for determination is whether the applicant is entitled to review of sentence under Section 333(2) of the *Criminal Procedure Code*.
11. Section 333(2) of the *Criminal Procedure Code* provides: -

“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.”
12. It is clear from the above provision that the law requires courts to take into-account the period the convict spent in custody before the impugned conviction and sentence.
13. The application of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in *Abamad Abolfadhi Mohammed & Another vs Republic* [supra] where the Court of Appeal held that: -

“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 19th June 2012.”

14. Similar position was held in the case of *Bethwel Wilson Kibor vs Republic* [2009] eKLR].

15. According to The Judiciary Sentencing Policy Guidelines:

“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 proportional 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 the trial.”

16. However, this court having heard and dismissed the applicant's appeal, the same is functus official. This court can not review the issue of sentence having determined an appeal challenging both the conviction and sentence. The only recourse the applicant has is to approach the court of appeal. Accordingly, the application is dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF MARCH 2024

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J.N.ONYIEGO
JUDGE

