



**Ombalo v Republic (Miscellaneous Criminal Application  
E005 of 2022) [2024] KEHC 3848 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3848 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
MISCELLANEOUS CRIMINAL APPLICATION E005 OF 2022**

**JN KAMAU, J  
MARCH 20, 2024**

**BETWEEN**

**DICKSON INDIMULI OMBALO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Introduction**

1. The Applicant herein was charged with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*. He was convicted and sentenced to ten (10) years imprisonment.
2. On 8<sup>th</sup> February 2022, he filed a Notice of Motion application dated 31<sup>st</sup> January 2022 seeking to have the period that he stayed in custody while the trial was ongoing, be taken into account as part of the sentence that he had already served pursuant to Section 333(2) of the *Criminal Procedure Code*. He also prayed that the court reviews his sentence to a least severe one as per Article 50(2)(p) of the *Constitution* of Kenya 2010.
3. He asserted that he did not appeal to the Court of Appeal due to a lack of legal points. He, however, pointed out that he had undergone rehabilitative reforms and was remorseful to the parties concerned.
4. He did not file Written Submissions to support his prayer. The Respondent was not opposed to the said application and did not therefore file any Written Submissions.



## Legal Analysis

5. Notably, the Applicant was charged under Section 295 and 296(2) of the Penal Code. Section 296(2) of the [Penal Code](#) provides as follows:-

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

6. As the punishment for robbery with violence is death, this court was of the view that the Learned Trial Magistrate was lenient in meting out the sentence of ten (10) years imprisonment which qualifies as a least sentence. It did not therefore find it prudent to interfere with the same as it was safe.

7. Turning to Section 333(2) of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya), the said Section provides that:

“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 (emphasis court).”

8. This duty is also contained in Clauses 7.10 and 7.11 of the [Judiciary Sentencing Policy Guidelines](#) where it is provided that: -

“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.”

9. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the [Criminal Procedure Code](#) was restated by the Court of Appeal in the case of [Abamad Abolfathi Mohammed & another v Republic](#) [2018] eKLR.

10. The Applicant was arrested on 18<sup>th</sup> August 2018. He was released on bond on 23<sup>rd</sup> January 2019. He thus spent five (5) months and five (5) days in custody before he was sentenced.

11. A reading of the Trial Court’s Sentence showed that it did not take into consideration the time he spent in remand before conviction and sentencing. This court was therefore convinced that this was a suitable case for it to exercise its discretion and grant the orders sought.

## Disposition

12. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s Notice of Motion application that was dated 31<sup>st</sup> January 2022 and filed on 8<sup>th</sup> February 2022 was partially merited and



the same be and is hereby allowed but limited to the period he spent in remand while his trial was ongoing. His conviction and sentence were upheld as they were both safe.

13. It is hereby directed that the time the Applicant spent in custody between 18<sup>th</sup> August 2018 and 23<sup>rd</sup> January 2019 when he was arrested and released on bond respectively be taken into account while computing his sentence as provided in Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).
14. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 20<sup>TH</sup> DAY OF MARCH 2024**

**J. KAMAU**

**JUDGE**

