



**Agwana v Republic (Miscellaneous Criminal Application  
E028 of 2023) [2024] KEHC 4410 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4410 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
MISCELLANEOUS CRIMINAL APPLICATION E028 OF 2023**

**JN KAMAU, J**

**APRIL 30, 2024**

**BETWEEN**

**DOUGLAS ALWANDA AGWANA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant herein was charged with two (2) counts of the offence of grievous harm contrary to Section 234 of the Penal Code. He was convicted and sentenced to three (3) years imprisonment.
2. On 9<sup>th</sup> June 2023, he filed a Notice of Motion application dated 25<sup>th</sup> May 2023 seeking to have the period that he stayed in custody while the trial was ongoing, a period of one (1) year and four (4) months from 21<sup>st</sup> September 2021 to 24<sup>th</sup> February 2023 be, taken into account as part of his sentence pursuant to Section 333(2) of the Criminal Procedure Code.
3. It was his assertion that the Trial Court failed to consider the aforesaid period while sentencing him.
4. He cited the case of George Marwa Chacha vs Republic Petition No 42 of 2019(eKLR citation not given) where the court considered the period spent in remand while sentencing the petitioner.
5. His Written Submissions were dated 23<sup>rd</sup> May 2023 and filed on 9<sup>th</sup> June 2023. The Respondent was not opposed to the said application and did not therefore file any Written Submissions. The Ruling herein was therefore based on the Applicant’s Written Submissions only.

**Legal Analysis**

6. In his Written Submissions, the Applicant reiterated the averments that he made in his application. He further relied on Article 19(2), 3(a) and (b), 20(1) and 3(a), 21(1), 22(a), 25(a) and 50(2)(p) of the Constitution of Kenya, 2010 and contended that he had the right to benefit from the least severe



- of the prescribed punishment of an offence. He placed reliance on the case of *Abmad Bulfathi (sic) Mohamed & Another vs Republic* [2018] eKLR where it was held that while applying Section 333(2) of the *Criminal Procedure Code*, the sentence of imprisonment ought to run from the date of arrest.
7. Notably, Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) under which the present application was filed 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 *Ahamad Abolfathi Mohammed & Another vs Republic* (*Supra*).
10. The Applicant herein was arrested on 29<sup>th</sup> August 2021. He was sentenced on 24<sup>th</sup> February 2023. Although he was granted bail/bond, he did not appear to have come out on bond/bail while his trial was going on. He thus spent one (1) year, five (5) months and twenty five (25) 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 23<sup>rd</sup> May 2023 and filed on 9<sup>th</sup> June 2023 was merited and the same be and is hereby allowed.
13. It is hereby directed that the time the Applicant spent in custody between 29<sup>th</sup> August 2021 and 23<sup>rd</sup> February 2023 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 30<sup>TH</sup> DAY OF APRIL 2024**

**J. KAMAU**



**JUDGE**

