



**Lusiji v Republic (Miscellaneous Criminal Application
E019 of 2023) [2024] KEHC 4553 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4553 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION E019 OF 2023**

JN KAMAU, J

APRIL 30, 2024

BETWEEN

ELIJAH INGOSI LUSIJI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. The Applicant herein was charged with the offence of burglary contrary to Section 304(2) of the *Penal Code*. He was also charged with an alternative charge of handling stolen property contrary to Section 322(1) as read with Section 322(2) of the *Penal Code*. He was acquitted on the main charge. He was convicted on the alternative charge and sentenced to three (3) years imprisonment.
2. On 28th April 2023, he filed a Notice of Motion application dated 19th April 2023. However, a reading of the same showed that the information therein related to a murder convict and not him. Since he was unrepresented, this court considered the same as an inadvertent error and proceeded to look at his affidavit which was of even date and filed on the same date.
3. He sought to have the period that he stayed in custody while the trial was ongoing, a period of one (1) year, two (2) months, be taken into account as part of his sentence pursuant to Section 333(2) of the *Criminal Procedure Code*. In this regard, he cited the case of *Abamad Albofathi Mohammed & Another vs Republic* [2018] eKLR where the court held that sentence ought to run from the date of arrest.
4. It was his assertion that the omission by the Trial Court to consider this period contravened his right to fair trial under Article 25 (c) (sic) of *the Constitution*. He thus urged this court to grant him the orders he had sought.



5. 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. The Ruling herein was therefore based on the affidavit evidence on record.

Legal Analysis

6. As seen hereinabove, the Applicant's application was based on 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)”.

7. 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.”

8. 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 vs Republic (Supra).

9. The Applicant was arrested on 12th January 2022. He was sentenced on 15th March 2023. Although he was granted bail, he did not appear to have come out on bond/bail while his trial was going on. He thus stayed in custody for one (1) year one and two (2) months before he was sentenced. This was from 12th January 2022 to 14th March 2023

10. 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

11. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application that was dated 19th April 2023 and filed on 28th April 2023 was merited and the same be and is hereby allowed.
12. It is hereby directed that the time the Applicant spent in custody between 12th January 2022 and 14th March 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).



13. Taking into account the period he spent in custody during trial, the Applicant has already completed his sentence. It is hereby directed that the Applicant be and is hereby released from custody forthwith unless he be held for any other lawful cause.

14. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF APRIL 2024

J. KAMAU

JUDGE

