



**Adan v Republic (Miscellaneous Criminal Application
E022 of 2023) [2024] KEHC 4089 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4089 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
MISCELLANEOUS CRIMINAL APPLICATION E022 OF 2023**

JN ONYIEGO, J

APRIL 26, 2024

BETWEEN

FARAH ISSACK ADAN APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant herein was tried and convicted of three counts:
2. Count I: Being in possession of a specified firearm without a firearm’s licence contrary to section 4A (1) (a) of the *Fire Arms Act*. Particulars were that on 06.08.2021 at about 1230 hrs at Waradey area in Eldas Sub County within Wajir County, he was found in possession of AK 47 riffle serial number MJ 5562 without a firearm certificate.
3. Count II: Being in possession of ammunitions without holding a firearm certificate in force at the time contrary to section 4(2)(a) as read with section 4(3)(a) of the Fire Arms Act. Particulars were that on 06.08.2021 at about 1230 hrs at Waradey area in Eldas Sub County within Wajir County, he was found in possession of thirty-six live rounds of ammunition of 7.62mm special caliber without a firearm’s certificate.
4. Count III: Preparation to commit a felony contrary to section 308(1) of the Penal Code. Particulars were that on 06.08.2021 at Waradey area in Eldas Sub County within Wajir County, he was found in possession of a fully loaded AK47 rifle s/no. MJ 5562, one extra magazine loaded with six rounds of ammunitions inserted in an improvised porch ready to commit a felony in the said area which is in contravention of the said Act.
5. The matter proceeded to full trial and the applicant was convicted on counts I and II and subsequently sentenced to serve seven years imprisonment in each of the counts. The sentences were to run concurrently.



6. The applicant has filed this application seeking for orders that this Honourable Court be pleased to consider the time already spent in lawful custody and thus review his sentence accordingly. The application in a nutshell is hinged on section 333(2) of the [Criminal Procedure Code](#). The applicant submitted thus inviting the court to be guided by the holding in the case of [Ahamad Abolfadhi Mohamed & another v Republic](#) [2018] eKLR and [Rwabuganda Moses v Uganda](#) where both courts considered the time already spent in remand custody by the appellant. He urged that this Honourable Court further review the sentence downwards considering the fact that he has since reformed while in custody.
7. On the other hand, Mr. Kihara, the learned prosecution counsel in rebuttal submitted that, in as much as the sentence meted out by the trial court was appropriate, he was not opposed to the consideration of the time spent in lawful custody.
8. I have considered the application herein together with the 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.
9. 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, been held in custody, the sentence shall take account of the period spent in custody.”
10. It is clear from the above provision that the law requires courts to take into account the period the convict spent in custody before pronouncement of such sentence.
11. The application of Section 333(2) of the [Criminal Procedure Code](#) was the subject of the decision in [Ahamad 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.”

[Also See [Bethwel Wilson Kibor vs Republic](#) [2009] eKLR and the [Judiciary Sentencing Policy Guidelines](#)].

12. This court is empowered by Article 165(6) of [the Constitution](#) of Kenya to review a decision by a subordinate court. Article 165(6) provides: -

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

13. The applicant was arrested on 06.08.2021 and convicted on 13.07.2023. By virtue of Section 333(2) of the [Criminal Procedure Code](#), this duration ought to have been considered during sentencing. Notably, the applicant also urged this court to consider reviewing his sentence downward by dint of the fact that he has since undergone rehabilitation while in prison.
14. On the issue of reviewing the sentence downwards for the reasons that the applicant has since reformed while in prison, it is my view that nothing was annexed in the application herein to support the same. See section 107 of the [Evidence Act](#) which imposes the burden of proof on he who alleges.
15. The above notwithstanding, the applicant was sentenced on 13.07.2023 having spent a period of One year and Eleven months in lawful custody during the pendency of his trial.
16. I find that this application under Section 333(2) has merit and it is hereby allowed. Accordingly, the period spent in remand custody shall be calculated deducted when computing sentence.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 26TH DAY OF APRIL 2024.

J.N.ONYIEGO

JUDGE

