



**Mbito v Republic (Miscellaneous Criminal Application
E065 of 2023) [2024] KEHC 4090 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4090 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS CRIMINAL APPLICATION E065 OF 2023**

M THANDE, J

APRIL 26, 2024

BETWEEN

ATHUMANI OMAR MBITO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By an application filed on 25.8.23, the Applicant seeks that the period spent in custody pending trial be considered as part of the 5 year sentence imposed upon him, in Mariakani Criminal Case No. E454 of 2021. The record shows that the Applicant was charged with the offence of stealing stock contrary to Section 278 of the Penal Code and was on 4.11.21 sentenced to 5 years imprisonment. He averred that the period of 2 months spent in custody was not taken into account in the sentence.
2. The Respondent did not file any response and urged the Court to make a decision after looking at the lower court file.
3. The Applicant stated that he was arrested on 28.8.21 and convicted on 4.11.21. The record however shows that the Applicant was arrested on 29.9.21.
4. Section 333(2) of the Criminal Procedure Code provides as follows:

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.
5. The proviso to Section 333(2) of the Criminal Procedure Code obligates the court to take into account the period an accused spent in custody pending trial.



6. In the case of *Abamad Abolfathi Mohammed & another v Republic* [2018] eKLR, the Court of Appeal addressed its mind to the proviso to Section 333(2) of the *Criminal Procedure Code* and stated:

“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*. That provision provides as follows:

“333(2) 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.”

The appellants have been in custody from the date of their arrest on 19th June 2012. 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(s) 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.

7. Flowing from the above authority, a trial court is required to take into account in a meaningful way, the period spent by an accused person in custody, pending trial. As such, the imposed sentence must be reduced proportionately by the period already spent in custody. The Court of Appeal went on to state that the proviso to Section 333(2) was introduced in 2007 to give the court power while sentencing a person convicted of an offence, to include the period already spent in custody.

8. I have looked at the record. There is no mention by the trial court that the period spent in custody by the Applicant pending trial was taken into account when sentencing him. This is a serious omission on the part of the trial court, as it amounts to non-compliance with an express statutory provision.

9. Accordingly, I find that the Application filed on 25.8.23 is merited and is allowed on terms that the sentence imposed upon the Applicant shall run from the date of his arrest, that is to say, 29.9.21.

DATED SIGNED AND DELIVERED IN MALINDI THIS 26TH DAY OF APRIL 2024

M. THANDE

JUDGE

