



REPUBLIC OF KENYA



**Mutua v Republic (Criminal Miscellaneous Application
E033 of 2023) [2024] KEHC 10392 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 10392 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL MISCELLANEOUS APPLICATION E033 OF 2023**

MW MUIGAI, J

JULY 29, 2024

BETWEEN

SHADRACK WAMBUA MUTUA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Background

1. The Applicant was charged before the Chief Magistrate’s Court at Machakos by the Principal Magistrate Hon. M.A Otindo in Criminal Case No E482 of 2021 with the offence of Breaking into a building and committing a felony contrary to Section 306(a) of the [Penal Code](#)
2. In the alternative, the applicant was charged with handling stolen goods contrary to Section 322(1) as read with section 322(2) of the [Penal Code](#).

Trial Court’s Judgment

3. The Trial Magistrate convicted the Applicant on his own plea of guilt. Upon considering the Applicant’s mitigation, the Trial Magistrate sentenced the Applicant to 3 years in jail.

Application

4. The Application filed on 20th June, 2023 and Supporting affidavit to the Application filed on the same day, essentially seeks a reduction of the 3 years sentence based on the Applicant’s grounds that the trial magistrate erred in law and in fact by not considering the period spent in remand before sentence.

Determination

5. I have considered the application and written submissions filed on behalf of the respective parties.



6. The Applicant is essentially seeking revision by computation of sentence of the 3 years jail sentence imposed on him by the Trial Court.
7. It is trite that sentencing is a discretion of the trial court as held in *Bernard Kimani Gacheru v Republic* [2002] eKLR.
8. Section 362 of the *Criminal Procedure Code*(CPC) on the scope of revision in criminal trial as follows:-

“The High Court may call for and examine the record of any Criminal proceedings before any Subordinate Court for the purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate Court.”
9. Section 364 of the *CPC* provides that:-

“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may –

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.”
10. As was stated by the High Court of Malaysia in *Public Prosecutor v Mubari bin Mohd Jani and another* [1996] 4 LRC 728 at 734, 735:

“.....The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...”
11. As regards the time spent in custody by the Applicant, The Applicant contends that Section 333(2) of the *CPC* in respect of the time spent in custody was not adhered to by the Trial court.
12. Section 333(2) of the *Criminal Procedure Code* provides that:

“(2) 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”
13. The Court of Appeal in *Abamad Abolfathi Mohammed & another v Republic* (*supra*) held that:-

“..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...”

14. According to the Applicant, prior to sentencing on 19th September 2022, the Applicant had been in custody for 8 months, 18 days). According to the record, this period was not taken into account by the Trial Court.
15. The charge sheet show that the date of arrest was on 31st October, 2021 and the Applicant was arraigned in court on 1st November , 2021. The Applicant remained in custody until he was sentenced on 18th September, 2022.

Disposition

- a. Pursuant to Section 333(2) of the [Criminal Procedure Code](#), the 3 year imprisonment sentence will be computed to take into account the 8 months and 18 days and to run from 31st October 2021 the date of the arrest.

It is so ordered.

RULING DELIVERED SIGNED & DATED IN OPEN COURT ON 29/7/2024 IN MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE)

M.W.MUIGAI

JUDGE

