



**Wachira v Republic (Petition E028 of 2023)  
[2025] KEHC 140 (KLR) (17 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 140 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
PETITION E028 OF 2023  
M THANDE, J  
JANUARY 17, 2025**

**BETWEEN**

**NICHOLAS WACHIRA ..... PETITIONER**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner herein was charged in Mariakani Criminal Case No. 829 of 2019 with the offence of stealing goods on transit contrary to Section 279(c) of the Penal Code. He was on 8.4.21 convicted of the offence and sentenced to 10 years imprisonment.
2. The Petitioner filed this Petition on 22.12.23 seeking that the period spent in custody be taken into account pursuant to section 333(2) of the Criminal Procedure Code (CPC).
3. The Respondent chose not to file any response and left the decision to the Court.
4. The lower court record shows that the Applicant was arrested on 14.10.19. He remained in custody until he was convicted and sentenced on 8.4.21. The Petitioner's complaint is that the trial court failed to consider the period spent in custody as part of his sentence. as required by law.
5. 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.



6. The proviso to Section 333(2) of the Criminal Procedure Code requires that courts while sentencing, do take into account the period accused persons have spent in custody pending trial.
7. In the case of *Bethwel Wilson Kibor v Republic* [2009] eKLR, the Court of Appeal had this to say about the said proviso:

The incident took place way back in 1999. The appellant was promptly arrested and taken to court. There were long adjournments due to transfers and/or changes of trial Judges resulting in long incarcerations of the appellant. By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody.

The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence.

8. Flowing from the above authority, a trial court must specifically state that the period spent in custody by an accused person pending trial, has been taken into account when imposing sentence in a meaningful way, the period spent by an accused person in custody. As such, the imposed sentence must be reduced proportionately by the period already spent in custody.
9. From the record, there is no mention by the trial court that the period that the Applicant had spent in custody 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.
10. This Court is empowered by Article 165(6) of *the Constitution* of Kenya to review the decision by a subordinate court as follows:

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.

11. Accordingly, in exercise of the powers conferred upon this Court by *the Constitution*, I do review the sentence imposed upon the Applicant and order that the same shall run from 14.10.19 when he was arrested.

**DATED, SIGNED AND DELIVERED IN MALINDI THIS 17<sup>TH</sup> DAY OF JANUARY 2025**

**M. THANDE**

**JUDGE**

