



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwendwa v Republic (Miscellaneous Criminal Application  
E041 of 2024) [2025] KEHC 1747 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1747 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
MISCELLANEOUS CRIMINAL APPLICATION E041 OF 2024**

**JN ONYIEGO, J  
FEBRUARY 20, 2025**

**BETWEEN**

**FRANCIS MUSILI MWENDWA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being a revision application against the sentence dated 02-11-2023 delivered  
by Hon. S. O. Otuke (RM) in Garissa Criminal Case No. E353 of 2023)*

**RULING**

1. The applicant was charged with the offence of theft of motor cycle contrary to section 278(A) of the [Penal Code](#). The particulars of the offence being that on 09.05.2023 at around 2140 hrs at Mororo area, Sala Location, Bangale Sub - County within Tana River County, he stole a motor cycle reg. no. KMFZ 722L make SKYGO black in colour with book value of Kes. 118,000/- the property of John Makau Kilonzi.
2. He pleaded guilty to the charges and the trial court convicted him on own plea of guilty. On mitigation, he urged that the said motorcycle got lost while under his custody and further, he was suffering from TB. The trial magistrate consequently sentenced him to 3 years' imprisonment with an additional compensation order to the complainant of Kes. 118,000 being the value of the suit motor cycle.
3. He has since approached this court via an undated chamber summons urging that he was arrested on 14.07.2023 and sentenced on 02.11.2023. That he spent 3 months and 22 days in custody before his matter was disposed. He urged the court to consider the said period under Section 333(2) of the [CPC](#). He further stated that noting that he has spent sometime in the prison, he had since reformed and thus sought for this court's leniency and reduction of his sentence to a non-custodial one.



4. The application was canvassed by way of oral submissions wherein the applicant urged the court to allow his application as prayed. On the other hand, Mr. Okemwa, counsel for the respondent urged that he was not opposed to the said prayers.
5. I have considered the application, the affidavit in support and the applicable law. I have also considered the trial court's record. The issue for consideration is whether the trial court considered the time the applicant spent in remand custody.
6. The proviso to section 333(2) of the *Criminal Procedure Code* obligates a trial court to consider the time already spent in remand custody. The duty to take into account the period an accused person had remained in custody in sentencing under the proviso to section 333(2) of the *Criminal Procedure Code* which is couched in mandatory terms was acknowledged by the Court of Appeal in *Abamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR and *Bethwel Wilson Kibor v Republic* [2009] eKLR and more recently in the High Court case of *Vincent Sila Jona & 87 others v Kenya Prison Service & 2 others* [2021] eKLR.
7. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced be considered in meting out the sentence.
8. I have perused the original record and I find that the applicant was arrested on 16.07.2023 and was later arraigned before court on 18.07.2023. Despite being granted a bond of Kes. 100,000/- with one surety of similar amount or cash bail of Kes. 50,000/- plus a contact person, he was unable to raise the same. He was thus convicted and sentenced on 02.11.2023.
9. From the above, it is manifestly clear that the applicant spent a period of 3 months 14 days in custody and as such, the said period ought to be subtracted from the 3 years' sentence meted out by the trial court. To that extent, the application is upheld.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20<sup>TH</sup> DAY OF FEBRUARY 2025**

**J. N. ONYIEGO**

**JUDGE**

