



**Wahome v Republic (Miscellaneous Application E054 of 2022)  
[2025] KEHC 1989 (KLR) (Crim) (5 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1989 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
MISCELLANEOUS APPLICATION E054 OF 2022  
LN MUTENDE, J  
FEBRUARY 5, 2025**

**BETWEEN**

**PATRICK MAINA WAHOME ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Patrick Maina Wahome, the Applicant, was charged with six (6) counts of Robbery with violence contrary to Section 296(2) of the Penal; and, one count of Rape contrary to Section 3(1) of the *Sexual Offences Act*. After full trial he was convicted on two counts of Robbery with violence and sentenced to suffer death; On the count of rape he was sentenced to serve twenty (20) years imprisonment, a sentence that was held in abeyance.
2. Through an undated Notice of Motion, filed herein on 26<sup>th</sup> August, 2022, he seeks review of the sentence and in particular consideration of the period he spent in remand custody pursuant to section 333(2) of the *Criminal Procedure Code*.
3. The application is premised on the ground that failure to include time spent in custody of one (1) year and nine (9) months was a violation of his rights.
4. At the hearing the applicant urged the court to consider time spent in custody.
5. The Respondent through Mr. Obutu, submitted that the applicant had the opportunity of raising the question of time spent in custody which he failed to do. He urged the court to decline the prayer sought.
6. Section 333(2) of the *Criminal Procedure Code* provides that:



- (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.
7. That provision of the law applies in mandatory terms and it is the accused person's entitlement. The court is required to state that it considered the period spent in remand and it must further deduct that period from the sentence meted out. This was stated in the case of *Ahamad Abolfathi Mohammed & Another vs. Republic* [2018] eKLR where the Court of Appeal delivered itself thus:
- “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...”
8. In the case of *Bukenya v Uganda (Criminal Appeal No. 17 of 2010)* [2012] UGSC 3 (29 January 2013) the Court of Appeal stated that:
- “Taking the remand period into account is clearly a mandatory requirement. As observed above, this Court has on many occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this Court in which we have emphasized the need to apply Clause (8). It does not mean that taking the remand period into account should be done mathematically such as subtracting that period from the sentence the Court would give. But it must be considered and that consideration must be noted in the judgment”
9. Be as it may, this is a case where the Applicant on being aggrieved by the decision of the trial court appealed to the High Court. Wendoh J. who was seized of the matter found no reason to interfere with the findings of the trial court and dismissed the appeal.
10. Dissatisfied, the Applicant appealed to the Court of Appeal. The Court of Appeal found the appeal lacking merit hence dismissed it. The court of appeal is superior to the High Court; Its decision cannot be disturbed by this court. The judgment of the High Court which was final was delivered by Wendoh J. This court cannot purport to reconsider the case as it is *functus officio*.



11. The upshot of the above is that the application fails and is dismissed.

12. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5<sup>TH</sup> DAY OF FEBRUARY, 2025.**

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**L.N. MUTENDE**

**JUDGE**

