



**Vaite v Republic (Application E033 of 2024) [2025] KEHC 3382 (KLR) (19 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3382 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
APPLICATION E033 OF 2024  
RC RUTTO, J  
MARCH 19, 2025**

**BETWEEN**

**ANTONY MBITHI VAITE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant filed the present application seeking revision of sentence pursuant to the provisions of section 333(2) of the [Criminal Procedure Code](#) by taking into account the time spent in custody. He states that he was arrested on 11/01/2024 and sentenced on 19/2/2024.
2. The Applicant herein was charged with the offence of breaking into a building and committing a felony contrary to section 306 of the [Penal Code](#). He was convicted and sentenced to a fine of kshs. 150,000/- in default 2 years in prison.
3. The respondent did not oppose the application.
4. Section 333(2) of the [Criminal Procedure Code](#) provides as hereunder: -
  - “(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.”
5. By virtue of the provisions of section 333(2) of the CPC, courts are obliged to take into account the period a person sentenced, spent in custody prior to the sentence. The Court of Appeal in Ahamad



Abolfathi Mohammed & Another Vs. Republic Criminal Appeal No 135 of 2016(unreported) held that: -

“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.”

6. Also, the Court of Appeal in Bethwel Wilson Kibor vs. Republic (2009) eKLR held that: -

“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 22<sup>nd</sup> 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...”

7. According to The Judiciary Sentencing Policy Guidelines: -

“The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

8. It therefore follows that the requirement in section 333(2) of the *Criminal Procedure Code* to consider time spent in custody during trial, is mandatory. As held in the above quoted decisions the failure to comply with the requirement subjects the accused to a more severe sentence than the one prescribed; and inadvertently condones deprivation of liberty contrary to law. It is thus paramount that a sentence must, when meted out, outrightly and emphatically state its commencement date in such a way that it reflects the period spent in custody in the sentence imposed.

9. I have considered the record before Court and note that the applicant had been in custody from the date of arrest being 11/01/2024 to 19/2/24 when the sentence was pronounced. I have perused the trial court record and I note that when sentencing the applicant, the learned Magistrate did not specifically state that she had taken into account the period spent in custody. The trial court stated “Accused is fined Kshs 150,000 in default 2 years imprisonment”. Failure to take into account the period spent in custody is contrary to section 333(2) of the *Criminal Procedure Code*.



10. Consequently, I do find that the applicant is entitled to have the period spent in remand considered and factored in, the computation of his sentence period.
11. Orders accordingly

**DATED AND SIGNED AT MACHAKOS THIS 19TH DAY OF MARCH, 2025.**

**RHODA RUTTO**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 19<sup>TH</sup> DAY OF MARCH, 2025.**

In the presence of;

.....Applicant

.....Respondent

.....Court Assistant

