



**Mwithiga v Republic (Miscellaneous Criminal Application
E035 of 2024) [2025] KEHC 4453 (KLR) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4453 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS CRIMINAL APPLICATION E035 OF 2024**

DKN MAGARE, J

APRIL 8, 2025

BETWEEN

ROBERT WANJOHI MWITHIGA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This is a ruling over a Notice of Motion application filed on 31.5.2024 by the Applicant seeking a reconsideration of sentence to take into account time spent in custody.
2. The application is supported by the affidavit of the Applicant and it was deposed in material as follows:
 - a. The Applicant was charged with attempted defilement contrary to Section 9(1) as read with 9(2) of the [Sexual Offences Act](#) whereupon he was convicted on 28.10.2021 and sentenced to serve 10 years imprisonment.
 - b. The Applicant was arrested on 28.10.2020 and time spent in remand up to conviction date was not considered as required under Section 333(2) of the [Criminal Procedure Code](#).
3. The Respondent did not oppose the application only referring to the court file to confirm the allegations.

Analysis

4. The issue is whether the trial court failed to take into account the time the Applicant spent in custody in computing the sentence.



5. Sentencing is a matter of discretion of the trial court and may be interfered only in exceptional circumstances. In the case of *MMI v Republic* [2022] eKLR, the Court referred to the case of *Mokela vs. State* (135/11) [2011] ZASCA 166 where the Supreme Court of South Africa held that:

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”

6. This court will not alter a sentence unless the trial court has acted upon wrong principles or overlooked some material factors. The Court of Appeal in *Ogolla s/o Owuor vs. Republic* [1954] EACA 270, held that “The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

7. This court may also interfere if the sentence is excessive and therefore an error of principle has occurred. In the case of *Shadrack Kipkoech Kogo vs R, Eldoret Criminal Appeal No. 253 of 2003* the Court of Appeal held that:

“Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka-vs-R.* (1989 KLR 306))

8. The trial court is required to take into account the time spent in custody. This is also anchored in the Sentencing Guidelines. The Sentencing Guidelines (2023) provide thus:

2.3.18 Section 333(2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody. Failure to do so impacts the overall period of detention which may result in a punishment that is not proportionate to the seriousness of the offence committed. This also applies to those who are charged with offence that involve minimum sentences as well as where an accused person has spent time in custody because he or she could not meet the terms of bail or bond.

2.3.19 Upon determining the period of imprisonment to impose upon an offender, the court must then deduct the period spent in custody identifying the actual period to be served (see GATS at Part V). This period must be carefully calculated- and courts should make an enquiry particularly with unrepresented offenders- for example, there may be periods served where bail was interrupted and a short remand in custody was followed by a reissuance of bail e.g., where a surety is withdrawn, and a new surety is later found. This calculation must include time spent in police custody.

2.3.20 An offender convicted of a misdemeanour and who had been in custody throughout the trial for a period equal to or exceeding the maximum term of imprisonment provided for that offence, should be deemed to have served their sentence and be released immediately.

9. The Applicant was arrested on 18.11.2020 and remained in custody after he was convicted on 25.10.2021 and sentenced on 28.10.2021. The trial court erroneously failed to indicate that it had considered the period from the date of arrest on 18.11.2020 being 11 months and 19 days which was



not applicable to the Applicant's case. There is therefore no record that the period in custody was taken care of. In the circumstances Section 333(2) of the *Criminal Procedure Code* provides:

(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.

10. The trial court had the duty to show that it considered the time spent in custody and it was not enough to state without justification that the time had been considered without the record confirming such consideration. In *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR, the Court of Appeal held that the court is obliged to consider the period an accused person has spent in custody before they were sentenced. The Court held thus:

“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.”

11. Consequently, the period between 18.11.2020 and 28.10.2021 that the Applicant spent in custody is to be taken into account in computing the sentence.

Determination

12. In the upshot, I make the following orders: -

- a. The sentence meted out is retained save that the sentence shall run from the date of arrest, that is, November 18, 2020.
- b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 8TH DAY OF APRIL, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Kimani for the State

Applicant present

Court Assistant – Michael

M. D. KIZITO, J.

