



REPUBLIC OF KENYA



KENYA LAW
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**Musyoki v Republic (Criminal Revision E003 of 2025)
[2025] KEHC 9128 (KLR) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9128 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL REVISION E003 OF 2025**

RC RUTTO, J

JUNE 19, 2025

BETWEEN

DAVID MWENDWA MUSYOKI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant has filed a Notice of Motion Application dated 07/01/2025 seeking the following orders;
 - a. The Honourable Court pronounce the period I spent in custody prior to my conviction be invoke in my sentence.
 - b. This Honourable Court do deem and consider that the applicant is remorseful and a first offender
 - c. The applicant be exempted from paying court fees as he is a pauper.
2. The Application is supported by the affidavit of the Applicant in which he deposed that he was arrested and charged with the offence of stealing contrary to section 268 (1) of the *Penal Code*. He indicated that he has been in remand custody from 25/4/2024 and the magistrate failed to consider the time spent in custody prior to conviction of 4 months and 9 days. He urged the court to consider this period under section 333 (2) of the *Criminal Procedure Code*.
3. The Application was not opposed.

Analysis & Determination

4. I have considered the Application and the lower court record and find that the issue for determination is whether the sentence should be reviewed and the time spent in custody taken into consideration.



5. It is not disputed that the Applicant was found guilty and sentenced to imprisonment of 2 years imprisonment on 3/10/2024 in Machakos Chief Magistrate’s Criminal Case No E059 of 2024. From the Trial Court record and in particular the charge sheet, it is indicated that the Applicant was arrested on 30/02/2024.
6. Section 333 (2) of the *Criminal Procedure Code* provides as follows;
 - (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. The Judiciary Sentencing Policy Guidelines state as follows in respect to Section 333 (2) of the CPC:-
 1. 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.
 2. 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. I am guided by the finding of the Court of Appeal finding in Eldoret in the case of Bethwel Wilson Kibor vs. Republic [2009] eKLR where it was 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 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. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”
9. From the Trial Court record, on 19/02/2024 the court was informed that the Applicant had escaped from the remand home and a warrant of arrest was issued. On 28/03/2024, the minor was arrested however he was not in court on 4/4/2024, 18/4/2024 and 2/5/2024.
10. On 30/5/2024 the court was informed by the prosecution that the Applicant had escaped from custody again and a warrant of arrest was issued. Subsequently, the subject was remanded in custody and on 11/07/2024, the court was informed that the Applicant had escaped from custody but was arrested.
11. The Trial Court while sentencing the Applicant directed as follows;

“...he is sentenced to serve 2 years in prison from the date of arrest.”
12. Clearly, the time spent in custody was considered. Therefore, this application is not merited and it is dismissed.
13. It is so ordered.



DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 19TH DAY JUNE OF 2025

RHODA RUTTO

JUDGE

In the presence of;

.....Applicant

.....Respondent

Sam, Court Assistant

