



**Mutua alias Pilipili & 2 others v Republic (Miscellaneous Criminal
Revision E001 of 2025) [2025] KEHC 9129 (KLR) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9129 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS CRIMINAL REVISION E001 OF 2025**

RC RUTTO, J

JUNE 19, 2025

BETWEEN

VAATI MUTUA ALIAS PILIPILI 1ST APPLICANT

ERICK WAMBUA PETER 2ND APPLICANT

PETER MUSYOKA KILONZO 3RD APPLICANT

AND

REPUBLIC RESPONDENT

*(Being an application for sentence review arising
from Machakos Criminal Case No. E420 of 2022)*

RULING

1. The Applicants 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. They further seek that the court grants them a non-custodial sentence or community based sentence for the remaining time of sentence. They rely on the [Probation of Offenders Act](#) and section 3 and 8(2) of the [Community Service Order Act](#).
2. The application is supported by the affidavit sworn by the three applicants in which they deponed that; they are each currently serving seven years imprisonment term for the offence of robbery with violence contrary to section 295 as read with section 296(2) of the [Penal Code](#); the trial court made an error in law and in fact in failing to consider the period spent in custody as per section 333(2) of the [Criminal Procedure Code](#) before the conviction and sentence on 24th day of 2024.
3. The Applicants stated that they were arrested on 7th August 2022, charged, tried, convicted and sentenced on 24th December 2024. That they remained in custody for twenty nine (29) months (two years and five months) which period they urged this Court to consider as part of the sentence. They



- also urged the Court to grant them a non- custodial or community based sentence for the remaining time of sentence as enshrined in Section 5(1) of the [Probation of Offenders Act](#) or Section 3 and 8(2) of the [CSO Act](#).
4. In support of the application, the Applicants also filed written submissions dated 4th March 2025. They set out three issues for determination: whether the court has jurisdiction to entertain the application; whether they are entitled to section 333(2) of the [Criminal Procedure Code](#); and whether the Applicants are entitled to non custodial sentence for the remaining time of sentence as enshrined in the [Probation of Offenders Act](#) or section 3 and 8(2) of the [CSO Act](#).
 5. It was their submission that this Court has supervisory jurisdiction to entertain the present application. That the trial court did not consider the period spent in remand custody as per section 333(2) of the [Criminal Procedure Code](#) as such they are entitled to criminal revision pursuant to Article 50(2)(q) of the [Constitution](#). They referred to the case of Nyeri Criminal Revision No E001 of 2021 [Boniface Mugo Maingi v Republic](#) (2021) eKLR; Criminal Miscellaneous Application No 2 of 2019 [Jamaal Omar Hussein v Republic](#) (2019) eKLR; [Abamad Abolfath Mohammed & Another v Republic](#) (2018) eKLR, among others.
 6. The Applicants submitted that the Court should consider a non-custodial sentence for the remaining time. They also urged the court to make better use of community service order under the [Criminal Procedure Code](#). Reference was made to the case of Siaya High Court Criminal Appeal No 113 of 2016 [David Ochieng Owuor v State](#) (2018) eKLR.
 7. It was further submitted that the Court should consider the age, health character and rehabilitation, that they had undergone since being arrested. That they were remorseful and regretted what happened on the fateful day which changed the trajectory of their lives, their families, the complainant and community. In addition, the Court was asked to consider the Applicants’ ages: 25, 27 and 25 respectively. That they were relatively naïve and could not appreciate the repercussions of their actions.
 8. 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.”
 9. 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 [Abamad Abolfath Mohammed & Another v. 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.”

10. Also, the Court of Appeal in Bethwel Wilson Kibor v. 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 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...”

11. 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.”

12. 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, out rightly and emphatically state its commencement date in such a way that it reflects the period spent in custody in the sentence imposed.

13. I have considered the record before Court and note that the Applicants herein were arrested on 07th August 2022. They were arraigned in court on 15th August 2022, wherein plea was taken. They pleaded not guilty to the charges and were accorded bond terms. From the record, on 26th October 2022 the 3rd Applicant Peter Musyoka Kilonzo was released on bond upon paying a cash bail of kshs 20,000/= with two sureties. There is nothing to show that 1st and 2nd Applicants were released on bond.

14. Therefore, from the record the 1st and 2nd Applicants remained in custody from the date of arrest being 07th August 2022 to 24th December 2024 when the sentence was pronounced. I have perused the trial court record and I note that when sentencing the Applicants, the learned Magistrate did not specifically state that she had taken into account the period spent in custody. The trial court stated as follows:

“I have considered the offence, penalty and mitigation. I have also considered the probation report. I hereby sentence each Accused is to serve 7 years imprisonment”.

15. The trial court failed to take into account the period spent in custody contrary to section 333(2) of the Criminal Procedure Code. Consequently, I do find that the applicants are entitled to have the period spent in remand considered and factored in, the computation of their sentence.



- 16. Regarding the prayer for a review of the sentence to a non-custodial sentence, this Court acknowledges that sentencing falls within the discretion of the trial court. This discretion should not be interfered with unless it is demonstrated that it was exercised arbitrarily, or whimsically or without proper consideration. The High Court in *Wanjema v. Republic* (1971) EA 493 established the principles guiding appellate courts when reviewing sentences. An appellate court may only interfere with a sentence if it finds that the trial court failed to consider a relevant factor, took into account an irrelevant factor, or imposed a sentence that is unduly harsh and excessive. However, it is equally important to recognize that, where discretion has been exercised judicially and reasonably, an appellate court should be cautious in altering the sentence.
- 17. In this application, the Applicants seek a review of their sentence based on the fact that they are first-time offenders, have shown remorse, have undergone rehabilitative programs, and have been in custody since their arrest. I note that most of these assertions are matters of mitigation, which mitigation was considered by the trial court before meting out its sentence. Further, I note that the Applicants were sentenced on 24th December, 2024. It is barely, six months since that incarceration. This Court therefore takes with caution the particular assertion that the Applicants have been rehabilitated.
- 18. Be that as it may, this Court acknowledges the seriousness of the offence of robbery with violence, which, under the *Penal Code*, carries the death sentence.
- 19. In this case, rather than imposing the maximum prescribed penalty, the trial court considered mitigating factors—including those raised in the current application—and sentenced the Applicants to seven years’ imprisonment. This sentence is below the statutory maximum. Consequently, this court finds no basis to alter the sentence as it was already issued with consideration of the relevant mitigating circumstances.
- 20. The upshot of the above is that the application is partially allowed to the extent that the period spent in remand considered and factored in, the computation of sentence period as follows; the 1st and 2nd Applicants from the date of arrest being 07th August 2022 to 24th December 2024 when the sentence was pronounced, for the 3rd Applicant from the date of arrest 07th August 2022, to 26th October 2022 when he was released on bond.
- 21. Orders accordingly.

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

RHODA RUTTO

JUDGE

In the presence of;

..... Applicant

..... Respondent

Sam, Court Assistant

