



**Mukenya v Republic (Criminal Miscellaneous Application
E043 of 2024) [2025] KEHC 10727 (KLR) (22 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10727 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL MISCELLANEOUS APPLICATION E043 OF 2024**

S MBUNGI, J

JULY 22, 2025

BETWEEN

WILLIAM TARIBO MUKENYA APPELLANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant herein had been charged with the offence of robbery with violence contrary to section 296 (2) of the *Penal Code*. The trial court convicted and sentenced him to suffer death .
2. The Applicant filed an appeal before the high court which appeal was dismissed. He filed a further second appeal in the court of appeal which substituted the death sentence and ordered he served 30 years imprisonment.
3. So he has brought this application seeking that this court do order that the time he spend in remand custody be taken into account when computing the 30 years imprisonments term pursuant to section 333 (2) of the criminal procedure code.
4. He submits that he a first time offender who has now reformed, rehabilitated and is remorseful.
5. He claims that his sentence was commuted from the day of the pronouncement of his sentence rather than from the date of his arrest

Analysis and Determination

6. The prayers of the applicant herein are that the time he spent in custody be taken into account under the provisions of Section 333(2) of the *Criminal Procedure Code*. The said section provides that: -

“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. This duty is further buttressed under clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines and in the cases of *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR and *Bethwel Wilson Kibor v Republic* [2009] eKLR)].

8. In *Bethwel Wilson Kibor v Republic* [2009] eKLR it was held: -

“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. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced ought to be taken into account by the trial court in meting out sentence unless it is hindered by other provisions of the law.
10. The material before the court does not indicate the date the accused was arrested, or if the trial court considered the time he was arrested before the conviction.
11. I called for the lower court file from 29th October, 2024 up to the time of writing this ruling it has not been availed.
12. This court is alive to the fact that the applicant is in prison and may have difficulties to access records but he says he filed appeal both in high court and court of appeal. He must be having copies of proceedings and judgment of the lower court, the high court and court of appeal. It is from this proceedings this court could have ascertained the date of his arrest or whether the court of appeal considered the period he was in custody before the sentencing in lower court.
13. In absence of such record, this court hands are tied and the burden was upon the applicant to avail such evidence .
14. The upshot of the above is that I find the applicant has not established that he did spend period in custody prior to sentencing by the trial court. Therefore the application is dismissed.
15. It is hereby so ordered.
16. Right if Appeal 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 22ND DAY OF JULY, 2025.

S.N MBUNGI

JUDGE



In the presence of :

Court Assistant – Elizabeth Angong'a.

