



**Wambua v Republic (Miscellaneous Application E067 of 2022)
[2024] KEHC 1097 (KLR) (5 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1097 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E067 OF 2022**

**MW MUIGAI, J
FEBRUARY 5, 2024**

BETWEEN

PETER KILONZO WAMBUA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Background

1. The Applicant herein was charged with the offence of stealing contrary to Section 278 (A) of the [Penal Code Act](#)
2. Particulars of the offence that led to his arraignment in court were that:

Peter Kilonzo Wambua: on 6th day of September, 2019 at Utithini Village, Nyaanya Sub-location, Mwala Location in Mwala Sub-county within Machakos County, stole a motor cycle registration No. KMDK 212P make skygo blue in colour engine no. 162FMJE5112503 all valued at Kshs. 85,000 being the property of Boniface Mutuku Mbithi.

Trial Court Sentence

3. The Trial Court in its sentence dated 26th August 2020 found that the accused deserved a custodial sentence in the circumstances to better achieve the purpose of denunciation, retribution, deterrence and promote a sense of responsibility and sentenced to serve a term of imprisonment of six (6) years.

Notice of Motion

4. Dissatisfied by the Sentence of the trial court, the applicant filed the Notice of Motion under the Certificate of Urgency filed in court on 14th September, 2022, wherein the Applicant sought the following that:



- a. He be allowed to appeal out of time as a pauper.
- b. Seeking review of his sentence pursuant to section 333 (2) of the [Criminal Procedure Code](#).
- c. He wishes to be present during the hearing of this application.

Supporting Affidavit

5. His application was supported by supporting affidavit sworn by Peter Kilonzo Wambua, wherein he deposed that he is currently at Machakos Main Prison Serving a 6 years' imprisonment term for the offence of stealing contrary 278 of the [Penal Code](#).
6. Depositing that the trial Magistrate erred in law and fact by not considering the period he spent in remand custody as per Section 333 (2) of the [Criminal Procedure Code](#) before his conviction on 26th August,2020. Further that he has been in remand custody for 11 months, period which he prayed to this Honorable Court to be factored in his sentence.
7. The Matter was canvassed by written submissions.

Submissions

The Applicant's submissions

8. The on 17th October,2023 waived his right to file the written submissions and asked the court to look at the file and give its verdict.

Respondent's submissions

9. The respondent in its submissions dated 2nd February,2023 and filed in court on 28th March 2023, wherein state counsel submitted that Article 50 (2) of [the Constitution](#) states "Every accused person has the right to a fair trial, which includes the right if convicted, to appeal to or apply for the review by, a higher court as prescribed by law." Reliance was placed on the cases of [Benard Kimani Gacheru Vs Republic \[2002\]](#) eKLR and Ahmad Abolfathi Mohammed & Another Vs Republic and submitted that the trial court factored that indeed the Applicant was in custody for 334 days (10 months, 30 days) approximately 11 months hence his sentence was reduced to 6 years instead of 7 years as provided in law.

Determination/Analysis

10. I have considered the Application herein, the Supporting Affidavit as well as the submissions by the Respondent the Applicant having waived his right to file submissions.
11. Before I can delve into the matter it is worth appreciating the jurisdiction of this court in the exercise of its supervisory powers as provided in [the Constitution](#) and statutory provisions.
12. Article 165(6) and (7) of [the Constitution](#) of Kenya 2010 provides as follows: -
 - “(6) the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial functions but not over a superior court.
 - (7) for purposes of clause (6) the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred



to in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

13. Section 362 of the *Criminal Procedure Code* (Cap 75) on the other hand provides as follows: -

“362. The High Court may call and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court”.

14. The issue that arises for determination is whether the Application for revision is merited.

15. Section 333(2) of the *Criminal Procedure Code* provides that:

“(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.”

16. The import of the aforementioned provision is that when the Court is meting a sentence, the period spent in custody is included.

17. In the present case, I note from the charge sheet that Applicant was arrested on 25th September 2019, charged for stealing contrary Section 278 (A) of the *Penal code* and the Trial Court in its sentence dated 26th August,2020 was sentenced to serve six (6) years imprisonment. The Applicant in his supporting affidavit deposed that the Trial Magistrate erred in law and fact by not considering the period he spent in remand custody as per Section 333 (2) of the *Criminal Procedure Code* before his conviction on 26th August,2020. The State on the other hand submitted that Trial Court factored that period in custody; indeed the Applicant was in custody for 334 days (10 months and 30 days) approximately 11 months. Henceforth his sentence was reduced from seven years as provided in law.

18. The Court of Appeal decision in *Ahamad Abolfathi Mohammed [2018]* eKLR, where the Court of Appeal held that:

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. 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. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

19. The same Court in *Bethwel Wilson Kibor vs. Republic [2009]* eKLR expressed itself as follows:

"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."

20. Vide 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."

21. It is not in contention that the Applicant was arrested on 25th September, 2019 and sentenced on 26th August, 2020 / 10/2022. In my view the period between arrest and conviction is approximately eleven (11) months.

22. It is evident from the record that the Applicant was in custody pending trial for a period of eleven (11) months. This period was not taken into account during the sentencing. Even if the Applicant was sentenced to six (6) years imprisonment the Trial Court did not indicate when sentence was to run and/or taking into account the period he spent in custody.

23. I therefore find this application is merited and I hereby allow it by issuing the order sought that; -

- a. Sentence for a period of six (6) years is sufficient for the said offence and it shall be computed to include the period the Applicant was in custody during trial under Section 333(2) *CPC*. The Sentence to run from the 25th September, 2019 when the Accused person was arrested.

It is so ordered.

RULING DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 5TH FEBRUARY, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W. MUIGAI

JUDGE

