



**Mutwiri v Republic (Criminal Petition E012 of 2024)
[2024] KEHC 6300 (KLR) (20 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6300 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL PETITION E012 OF 2024**

LW GITARI, J

MAY 20, 2024

BETWEEN

PETER MUTWIRI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

The petitioner has filed this Petition vide a Notice of Motion which is undated. It was filed in court on 7/3/2024 and seeks orders that the time spent in custody while awaiting trial be considered as provided under Section 333(2) of the Criminal Procedure Code. (Cap 75 Laws of Kenya).

1. The motion is supported by the affidavit of the Petitioner wherein he deposes that he was arrested on 1/10/2022 and charged at Chuka in Criminal Case No.602/2022 for an offence of robbery with violence contrary to Section 296(2) of the Penal Code and at the conclusion of the trial he was ordered to serve three (3) years imprisonment. The applicant avers that he was in remand for one year while awaiting trial and the trial magistrate did not take this time into account. He has urged this court to consider the time he spent in custody to reduce the sentence which was imposed by the learned trial magistrate.
2. The respondent did not oppose the application.
3. I have considered the application. The issue for determination is whether the learned trial magistrate took into account the time the applicant spent in custody when passing the sentence. Section 333 of the Criminal Procedure Code (Cap 75 Laws of Kenya) provides as follows:
 - (1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in



charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

- (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.”

4. It is clear from the Section that Section 333(2) supra is couched in mandatory terms and enjoins the court to take into account the period spent in custody where an accused person was in remand during the trial and before the sentence. It therefore follows the trial court has to consider whether the accused was in custody during the trial and before the sentence. It therefore follows that the trial court has to consider whether, the accused was in custody during his trial, the period if any that was spent in custody and finally take that period into account to reduce the sentence imposed. It is not enough to state that the time spent in custody has been considered, it must be shown that the period has been taken into account to reduce the sentence. Therefore the sentence must be imposed first then reduced by the time spent in custody awaiting trial. The appellate court has to satisfy itself that the period was taken into account to reduce the sentence and where it has not, it has jurisdiction to take it into account. Failure to take into account is an issue of violation of the rights of an accused person to fair trial as he may end up serving a longer sentence than the one passed.

Article 50(2) (p) of the *Constitution* provides as follows:

- (2) Every accused person has the right to a fair trial, which includes the right—
- (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.”

The Court of Appeal in the case of *Abamad Abolfathi Mohammed & Another v Republic* (2018) eKLR stated 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 sentence.....

“Taking into account the period spent in custody must mean considering that period so that the sentence imposed is reduced proportionately by the period already spent in custody.”

5. In this case the accused was charged in court on 3/10/2022. He was sentenced on 8/11/2023 which was a period of one year. The record shows that although the learned trial magistrate took into account the period spent in custody, she did not reduce the sentence imposed by the time spent in custody. This being the case as is evident from the trial court’s record, the applicant has made out a case for his sentence to be reduced by a period of one year and five days. In the premises I order that the sentence of three (3) years imposed on the applicant shall be reduced by one year and five days. In other words, the sentence shall run from 3/10/2022.

L.W. GITARI

JUDGE

20/5/2024



20/5/2024

Ruling read out in open court

Applicant- present

Mr. Ketoo-State Counsel -present

C/A Muriuki.

L.W. GITARI

JUDGE

20/5/2024

