



**Mburu v Republic (Criminal Revision E565 of 2023)  
[2024] KEHC 12948 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12948 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CRIMINAL REVISION E565 OF 2023  
CW GITHUA, J  
OCTOBER 23, 2024**

**BETWEEN**

**PATRICK IRUNGU MBURU ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Patrick Irungu Mburu (the applicant), approached this court through a Notice of Motion dated 30<sup>th</sup> November 2023 seeking review of his sentence imposed by the lower court in Kigumo Senior Principal Magistrate's Court Criminal Case no. 2597 of 2014.
2. A brief background to the application is that the applicant was charged and tried for the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act* (SOA). He was however convicted of the offence of rape contrary to Section 3 of the SOA under Section 179 of the *Criminal Procedure Code* after the trial court found that it was a minor offence compared to the charge of defilement and it is the offence which the prosecution had managed to prove beyond reasonable doubt.
3. Upon conviction, the applicant was sentenced to serve ten (10) years imprisonment. It is this sentence that the applicant urges this court to review by either reducing it or substituting it with a non-custodial sentence. In addition, the applicant implored this court to consider the time he had spent in lawful custody prior to the date he was sentenced as this was not taken into account by the trial court.
4. In support of his application, the applicant invited this court to consider that that he was a young energetic man aged 45 years who was building a foundation for the future of his family for whom he was the sole breadwinner together with his aged mother. He also contended that he was now rehabilitated having served six years of his sentence. In his view, he deserved to serve the rest of his sentence under probation.



5. At the hearing, the applicant abandoned his prayer for reduction of his sentence or its substitution with a non-custodial sentence. In his brief oral submissions, he only prayed that his sentence be revised by factoring in the period he had spent in lawful custody prior to his sentence.
6. In her response, learned prosecution counsel Ms. Muriu did not oppose the applicant's prayer noting that the trial court's record revealed that the applicant was arraigned in court on 22<sup>nd</sup> December 2014 and he was released on bond on 6<sup>th</sup> of April, 2015.
7. I have duly considered the application, the record of the trial court and the brief oral submissions made by both parties. Having done so, I find that the application invokes the revisional jurisdiction of this court which is provided for by Section 362 as read with Section 364 of the *Criminal Procedure Code* (CPC).
8. Section 362 of the *CPC* empowers this court to call for and examine the record of the lower court in criminal proceedings to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order made by the trial court or the regularity of any proceedings before the trial court. When exercising revisional jurisdiction, this court is under Section 364 *CPC* granted all powers of an appellate court except the power of reversing an order of acquittal to a conviction.
9. Given the foregoing, it is clear that the powers of this court when exercising its powers of revision are wide and unfettered. However, like all other judicial discretions, this power must be exercised judiciously in accordance with the law.
10. In this case, the applicant urges this court to revise his sentence to factor in the period he had spent in lawful custody prior to his sentence. Section 333 (2) of the *Criminal Procedure Code* is therefore relevant. It states as follows;

“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.”
11. The Court of appeal in *Bethwel Wilson Kibor v Republic* (2009) eKLR expressed itself as follows regarding this issue:

“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.”
12. It is important to note that the proviso to Section 333 (2) of the *CPC* is coached in mandatory terms and therefore, failure to comply with it amounts to an error of law.
13. That said, I have perused the proceedings of the trial court and has noted that the applicant was arrested on 21<sup>st</sup> December 2014. He was arraigned in court on the following day and after denying the offence, he was admitted to bond of Kshs. 200,000 with one surety of a similar amount.
14. Although Ms. Muriu submitted that the applicant was in lawful custody from 22<sup>nd</sup> December 2014 to 6<sup>th</sup> April 2015 when he was released on bond, my reading of the trial court's certified typed proceedings show that the applicant's surety was examined and approved on the same date he took plea. The record also confirms that the applicant's bond was cancelled on 5<sup>th</sup> June 2028 immediately after he presented



his defence. He remained in custody till 5<sup>th</sup> September 2018 when he was sentenced. This means that the applicant was in lawful custody for a period of about three months prior to date of his sentence.

16. The record does not show that when passing sentence, the learned trial magistrate addressed his mind to the above period the applicant had spent in custody. In my view, this omission by the trial magistrate violated Section 333(2) of the CPC and constituted an error of law which must be corrected by this court on revision.
17. Consequently, I find merit in this application and I hereby allow it . The trial court's sentence is thus revised to the extent that the period the applicant had spent in lawful custody shall be computed as part of his sentence.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 23<sup>RD</sup> DAY OF OCTOBER 2024.**

**HON. C.W. GITHUA**

**JUDGE**

In the presence of:

The applicant

Ms. Muriu for the respondent

Ms. Susan Waiganjo Court Assistant

