



**Mutui v Republic (Criminal Revision Application 028 of 2022)  
[2023] KEHC 1775 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1775 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CRIMINAL REVISION APPLICATION 028 OF 2022  
F WANGARI, J  
FEBRUARY 16, 2023**

**BETWEEN**

**ZACHARIA BENARD MUTUI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The applicant herein was charged with the offence of threatening to kill contrary to section 223 (1) of the *Penal Code*<sup>1</sup>. He was also charged with the offence of malicious damage to property contrary to section 339 (1) of the *Penal Code*. The applicant was subsequently convicted in both counts. In count 1, he was sentenced to serve 3 years imprisonment. In count 2, he was sentenced to serve 1 year imprisonment. The imprisonment term was to run concurrently.
2. The appellant has now moved this court via an application filed on September 15, 2022, seeking to have the computation of the period spent in custody under section 333 (2) of the *Criminal Procedure Code*. The application was not opposed.
3. Section 333 (2) of the *Criminal Procedure Code* states;

‘Subject to the provisions of section 38 of the *Penal Code* (cap 63) every sentence shall be deemed to commence from, and to include 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 into account of the period spent in custody’

<sup>1</sup> Chapter 63 Laws of Kenya



4. In his application, the appellant states that he does not seek to interfere with his conviction or sentence but the application of section 333 (2) of CPC. From the provision of the above section, it is mandatory for the court while sentencing, to consider the time spent in custody during trial. This is also amplified by The Judiciary Sentencing Policy Guidelines and Directions, where the courts are obligated to consider time already served in custody if the convicted person was in custody during trial.<sup>2</sup>
5. In *Ahamad Abolfathi Mohammed & another v Republic*<sup>3</sup>, the Court of Appeal faulted the High Court for misdirecting itself by ordering that the appellants substituted sentence to run from the date of conviction instead of the date of the arrest. In this case, the trial court stated that it considered the time spent in custody and directed that the imprisonment term would start counting from the date of sentence which was June 15, 2022.

#### **Determination**

6. From the above discussion, the trial court ought to have considered the time spent in custody while sentencing the applicant. I find that the application has merits and is therefore allowed as prayed and the sentence to run from January 24, 2022 when the appellant was first presented in court.

**DATED AND DELIVERED AT MOMBASA THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023.**

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**F. WANGARI**

**JUDGE**

<sup>2</sup> The Judiciary Sentencing Policy Guidelines and Directions, Clause 7.10

<sup>3</sup> Ahamad Abolfathi Mohammed & Another v Republic (2018) eKLR

