



**Muli v Republic (Criminal Miscellaneous Application E077 of 2022)  
[2023] KEHC 23681 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23681 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL MISCELLANEOUS APPLICATION E077 OF 2022**

**FR OLEL, J**

**OCTOBER 18, 2023**

**BETWEEN**

**ALBANUS KYALO MULI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**A. Introduction**

1. The applicant was charged and convicted of the offence of Attempted Murder contrary to section 220 (a) of the penal code and was sentenced to serve five (5) years imprisonment on 25<sup>th</sup> January 2022. The applicant subsequently filed this undated petition on 23<sup>rd</sup> November 2022 and sought for orders that pursuant to the provisions of section 333(2) of the criminal procedure Act, this court to review the sentence and consider the period spent in remand as allowed by law. He further stated that he was in remand for a period of fourteen (14) months which he prayed be factored in the sentence.
2. The respondent did file submission's dated 27<sup>th</sup> April 2023, opposing the orders as sought. They stated that the trial magistrate exercised his discretion while sentencing in the right manner and could not be faulted as the trial court did factor in the period the applicant had already spent in custody. The application as filed was frivolous and unmerited and therefore should be dismissed.



## B. Analysis of Law

3. Section 333(2) of the [criminal procedure code](#) specifically provides as follows: -

“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 on which it was pronounced, except where otherwise provided in the code”.

“Provided that where the person sentenced under sub section (1) has prior to such sentence shall take account of the period spent in custody”.

4. It is clear from this provision that the law requires the trial court to consider and take into account the period the convict has spent in custody while sentencing.

5. In the case of [Bethwel Wilson Kibor Vs Republic](#) {2005} Klr , the court stated that ;

“By proviso to section 333(2) of the [criminal procedure code](#) where a person sentenced has been held in custody prior to such sentence shall take into 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 22<sup>nd</sup> September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. in view of the forgoing, we are satisfied that the appellant has been sufficiently punished. We therefor 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.

6. As provided under 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 has been in custody during trial. Failure to do so impacts on the overall period of detention which may result in excessive punishment that is not proportional to the offence committed. In determination the period of imprisonment that should be served by the offender, the court must take into account the period in which the offender was held in custody during trial.

7. Sentencing is thus a discretion of the court. But the court should look at the facts and the circumstances of the case in its entirety so as to arrive at appropriate sentence. The Court of Appeal [Thomas Mwambu Wenyi Vs Republic](#) (2017) eKLR cited the decision of the Supreme Court of India in Alister Anthony Pereira Vs State of Maharashtra at paragraph 70-71 where the court held the following on sentencing:

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence



in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

8. Section 333(2) of the CPC creates an obligation on the court to take into account the time spent in custody and its purpose is to prevent subjecting a person to more severe sentence than prescribed in law. Accordingly, the section pertains to fair trial and justice. Failure to give full effect of this section will lead to a violation of right in particular Article 50(2)(q), and Article 27(1) and (2). This court must give effect to these provisions to give effect to the law. Article 165(6) of the constitution of Kenya also allows the high court to exercise revisionary power over the subordinate court's and thus where there is an error of law, the court can intervene and correct the same.
9. The appellant was charged on 20<sup>th</sup> December 2020 with the offence of attempted Murder and pleaded not guilty. He was held in custody until 25<sup>th</sup> January 2022, when he was sentenced based on his own plea of guilty to serve five (5) years imprisonment. During sentencing the trial court did consider the victim impact statement and also did consider that the applicant had been in custody for a period of one year, before proceeding to sentence the appellant.
10. In light of the above and given the serious nature of the offence committed, the appellant cannot have a second bit to the cherry. The trial court did consider the period he spent in remand before sentencing. There is therefore no basis upon which this court can review the same as the courts discretion was properly exercised.
11. This application for review is thus unmerited and is dismissed.
12. The applicant had filed a similar petition seeking similar orders in Machakos Petition No E007 of 2022. The same be and is hereby marked as withdrawn.
13. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 18<sup>TH</sup> DAY OF OCTOBER, 2023.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**Delivered on the virtual platform, Teams this 18<sup>th</sup> day of October, 2023.**

**In the presence of;**

Appellant

.....for ODPP

.....Court Assistant

