



**Wambugu v Republic (Miscellaneous Criminal Application  
E047 of 2024) [2024] KEHC 14064 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14064 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
MISCELLANEOUS CRIMINAL APPLICATION E047 OF 2024  
DKN MAGARE, J  
NOVEMBER 13, 2024**

**BETWEEN**

**SOLOMON KIAI WAMBUGU ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This is a ruling over an application filed on 8/7/2024 seeking the revision of sentence to take into consideration time spent in custody pursuant to Section 333(2) of the [Criminal Procedure Code](#).
2. The application is supported by the affidavit of the Applicant and it was deposed in material as follows:
  - a. The Applicant was convicted of grievous harm contrary to Section 234 of the [Penal Code](#) and sentenced to 7 years imprisonment.
  - b. The Applicant was arrested on 20/8/2022 and convicted on 19/6/2023.
  - c. The time spent in custody was not considered during sentencing.
3. The Respondent did not oppose the issue of time spent but indicated that the court indicated that it had discounted 6 months.

**Submissions**

4. Parties submitted orally. The state maintained that time spent was considered and the Applicant was of the opposite view. It is my duty to resolve the dispute without undue regard to procedural technicalities.



## Analysis

5. The power to revise sentence arises from the court's powers under Article 165(6) of the Constitution of Kenya which states that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
6. The revisionary powers of this court are for purposes of satisfying itself as to the correctness, legality or propriety of any finding by the subordinate court as set out under Section 362 and 367 of the Criminal Procedure Code, that:
  362. The High Court may call for 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 such subordinate court.
  367. When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.
7. The Applicant was charged with the offence of causing grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence were that on 24/9/2020, at Itiini village, Karundu sub-location of Mukurweini sub-county within Nyeri County unlawfully did grievous harm to Wambugu Kabiru.
8. The matter proceeded to full hearing, wherein the court convicted the Applicant on 8/6/2203. The sentence was meted out on 19/7/2023 in the following terms: -

I sentence him [the Appellant] to 7 years in prison.
9. The prosecution is relying on a statement in paragraph 8 of the judgment to the following effect.-

The accused has been in custody for 6 months and the same is discounted herein.
10. I have been trying to see the discounting in vain. The Applicant was in custody from 20/8/2022 until conviction and thereafter proceeded with sentence. He spent a total of 296 days in custody before sentencing. It is not 6 months as the court indicated. In any case simple rhetoric that the court has taken into consideration without doing so does not suffice.
11. It is important to note that taking into consideration the period spent in custody is not a general phrase but is a mathematical exercise. It is not a general surmise or conjecture. The Court of Appeal addressed the court's obligation to take into account the period that they had spent in custody during sentencing in the oft quoted case of Abamad Abolfathi Mohammed & Another vs Republic [2018] eKLR where it 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.”

12. The Court of Appeal addressed the same obligation in the case of [\*Bethwel Wilson Kibor vs Republic\*](#) [2009] eKLR:

“By proviso to Section 333(2) of the Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the 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 22nd 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 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.”

13. Failure to take into consideration the period spent in custody impacts on the overall period of detention and may result in an excessive punishment that is not proportional to the offence committed. This is succinctly postulated in 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.”

14. Discounting the period must be on record. Was the 6 months part of the 7 years or the sentence was 7 years and 6 months, out of which the court discounted 6 months? If either scenario is true, what happens to those days in custody that are outside both the 7 years and the 6 months? The Applicant had been in custody for 296 days from 20/8/2022. There appears to have been a 3 and half months lull before the appellant was charged on 1/12/2022.

15. In a revision under Section 333(2) of the [\*Criminal Procedure Code\*](#), the court has no discretion. The section is mandatory in nature. Precious time will have been saved, if the magistrates could strictly adhere to the section.



16. In this particular matter, the issue of taking into consideration the time spent in custody under Section 333(2) of the *Criminal Procedure Code* is not discretionary. The court should indicate when a sentence is to begin. The said section provides as follows; -
- (2) 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.
17. The period from 20/8/2023 and 19/6/2023 was not taken into consideration. The court indicated it was to discount 6 months but said nothing of it. In the circumstances, the 7 years meted out shall start from 20/8/2022, the date of arrest.
18. I find that this application under Section 333(2) of the *Criminal Procedure Code* has merit and it is hereby allowed.

### **Determination**

19. I therefore make the following orders: -
- a. The sentence of 7 years imprisonment shall run from the date of arrest on 20/08/2022.
  - b. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2024.**

Ruling delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

Mr. Mwakio for the State

Pro se Applicant – present

Court Assistant – Jedidah

**M. D. KIZITO, J.**

