

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**HIGH COURT MISCELLANEOUS CRIMINAL APPLICATION NO.**

**E070 OF 2024**

**JOB KIBICHO MWANGI.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....PROSECUTOR**

**RULING**

1. The Applicant herein **JOB KIBICHO MWANGI** has filed this Notice of Motion dated **5<sup>th</sup> August 2024** seeking the following orders;-

**“(a) A declaration that the applicant has been denied his**

**benefit of the right to have the period spent in custody during trial included in computing his current 5 years sentence.**

**(b) Issue an order to the Officer-In-charge where the applicant is currently held to compute the applicant’s sentence from the date of arrest on**

**5/4/2024 instead of his date of conviction which was 24/8/2023.**

**(c) Any other order that the court may deem appropriate in the circumstances.”**

2. The Hon. State Counsel did not oppose the application but left it to the court to decide.
3. The Applicant was arraigned before the **Mukurweini Law Courts** facing two (2) charges, the first charge was that of **MALICIOUS DAMAGE TO PROPERTY CONTRARY TO SECTION 339 (1) OF THE PENAL CODE.** The particulars were that

**“On the 5<sup>th</sup> day of April 2003 at around 22 hours at Wachee Village in Kangurwe location of Mukurweini Sub-county, you willfully and unlawfully broke 2 windows and 2 window panes worth Kshs. 5,000/= a GOTV aerial worth Kshs. 500/= and a door worth Kshs. 2,000/= by cutting with a panga a all totaling Kshs. 7,500/= the property of MONICAH KALONDU.”**

4. The Applicant faced a second count of **THREATENING TO KILL CONTRARY TO SECTION 223 (1) OF THE PENAL CODE**. The particulars were that

**“On the 5<sup>th</sup> day of April 2023 at around 2200 hours at Wachee village in Kangurwe location of Mukurweini Sub-County within Nyeri County, without lawful excuse, uttered words “I will kill you” to one MONICAH KALONDU WHILE ARMED WITH A PANGA”**

5. The Applicant entered a plea of **‘NOT GUILTY’** to both charges and his case was fully heard in the Lower Court. Thereafter vide the judgment delivered on **24<sup>th</sup> August 2023 Hon. D.N BOSIBORI Senior Resident Magistrate** convicted the Applicant on both counts.
6. On **4<sup>th</sup> August 2023** the Applicant was sentenced to serve **five (5) years** imprisonment on **Count No. 1** whilst he on **Count No. 2** was fined **Kshs. 10,000/=** in default to serve **three (3) months** imprisonment. It was ordered that the sentences would be served con-currently.

7. The Applicant now prays that the period which he spent in Remand be deducted from his sentence.
8. The High court is empowered by **Article 165 (6)** of the **Constitution of Kenya 2010** to review a decision by a subordinate court. **Article 165 (6)** provides:-

**“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.”**

9. **Section 333(2)** of the **Penal Code Cap 63** Laws of Kenya 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 of the date on which it was pronounced, except where otherwise provided in this code. Provided that where the person sentenced under sub-section (1) has, prior to such sentence, been**

**held in custody, the sentence shall take account of the period spent in custody.” [Own emphasis]**

10. The provisions of **section 333(2)** of the Criminal Procedure Code were considered in this case of **AHAMAD ABOLFADHI MOHAMMED & Another vs REPUBLIC [2018 eKLR** where the **Court of Appeal** held as follows:-

**“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 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 332 (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 appellant’s sentence of imprisonment to run from

**the date of their arrest on 19<sup>th</sup> June 2012.” [Own emphasis]**

11. The ***Judiciary Sentencing Policy Guidelines clauses 7:10 and 7:11*** state that:-

**“The proviso to section 332 (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 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.”**

12. The Applicant alleged that the trial court failed to take into account the period of time he had spent in remand during the pendency of his trial.

13. I have carefully perused the Ruling on sentencing which was delivered on **4<sup>th</sup> August 2023**. In that ruling the learned trial magistrate noted that

**“The Accused has been in custody since 6/4/2025. The duration is discounted from sentence.”**

14. However the Committal warrant shows that the sentence imposed upon the applicant began to run from the date of sentence. This is contrary to what the Magistrate said. It would be helpful if trial courts would in compliance with **Section 333 (2), CLEARLY** indicate **THE DATE** when the sentence is to begin to run. This would help stem the barrage of application for review which the **High Court** is faced with.

15. Finally and for avoidance of doubt it is directed that the sentence of **five (5) years** imposed on the Applicant is to run from the date of his arrest being **6<sup>th</sup> April 2023**. It is so ordered.

**Dated in Nyeri this 14<sup>th</sup> day of November 2025**

.....  
**MAUREEN A. ODERO**  
**JUDGE**

ORIGINAL