



**Githinji & another v Republic (Miscellaneous Criminal Application E073 of 2024) [2025] KEHC 18967 (KLR) (17 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18967 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
MISCELLANEOUS CRIMINAL APPLICATION E073 OF 2024  
CW GITHUA, J  
DECEMBER 17, 2025**

**BETWEEN**

**STEPHEN MAINA GITHINJI ..... 1<sup>ST</sup> APPLICANT**

**FRANCIS GITHINJI GACHOGU ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. In their Notice of Motion dated 8<sup>th</sup> October 2024, the two applicants Stephen Maina Githinji and Francis Githinji Gachogu moved this court seeking review of their sentences imposed by the lower court in Murang'a criminal Case No.1285 of 2011.
2. They principally requested this court to revise the trial court's sentence by ordering that their respective sentences be reduced by the period they had spent in lawful custody both prior to the date they were released on bond and after their bonds were withdrawn. In support of their application, they relied on Section 333(2) of the Criminal Procedure Code, paragraphs 5.1.2 of the Judiciary's Sentencing Policy and the Court of Appeal decision in Ahamed Abolfathi Mohamed & another V Republic (2018).
3. In their respective supporting affidavits, each of the applicants deposed that he was convicted of the offences of assault and attempted escape from lawful custody and was sentenced to serve three years imprisonment in each count which sentences were ordered to run concurrently; that since the sentence was imposed on 26<sup>th</sup> March 2015, if the period they had spent in lawful custody which was two years, ten months and 28 days had been taken into account, they should have finished serving their sentences in the year 2013.
4. During the hearing, the applicants submitted that the learned trial magistrate erred when passing sentence against them as he failed to take into account the period they had served in lawful custody.



5. The applicants further complained that when they were admitted in prison, the prison authority wrongly combined the sentence imposed in criminal Case No.1285 of 2011 with the one imposed in Criminal Case No. 203 of 2011 and was asserting that they were yet to start serving sentence in criminal Case No.1285 of 2011 yet the sentence was imposed in the year 2015. In their view, they had already finished serving their sentence in criminal Case No.1285 of 2011.
6. The respondent through prosecution counsel Ms Muriu opposed the application and in her submissions, she supported the trial court's sentence and contended that the trial court must have considered the time the applicants had spent in lawful custody and that is why the court had meted out lenient sentences against the applicants.
7. I have carefully considered the application and the submissions made by the applicants and the respondent. I have also called for and read the lower court records in Criminal Cases No.1285 of 2011 and No.203 of 2011.
8. The court record in Criminal Case No.1285 of 2011 reveals that although the applicants were initially charged in Count 1 with the offence of attempted murder Contrary to Section 220(a) of the Penal Code, they were eventually convicted with the lesser offence of assaulting a police officer Contrary to Section 253(b) of the Penal Code. They were sentenced to serve three years imprisonment.

In count 2, they were charged and convicted of the offence of attempted escape from lawful custody Contrary to Section 123 as read with Section 389 of the Penal Code. They were sentenced to serve two years imprisonment.

The sentences were ordered to run concurrently.

9. . It is evident from the court record that in passing sentence, the learned trial magistrate did not take into account the period each of the applicants had spent in lawful custody. This was an error on the trial court's part because Section 333(2) of the Criminal Procedure Code particularly the proviso thereof requires in mandatory terms that the period an offender had spent in lawful custody must be taken into account during sentence so that the period reduces the sentence that is imposed.
10. . The Court of Appeal in *Furaha Charo Kazungu V Republic* [2024] KECA 635 (KLR) considered what the phrase "Taking into account" the period spent in lawful custody decreed in the proviso to Section 333 (2) of the Criminal Procedure Code (CPC) meant and cited with approval its previous decision in *Ahamed Abolfathi Mohamed & Another V Republic* (2018) eKLR in which the court expressed itself as follows;

"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."

11. In this case, the trial court's record further reveals that the applicants were first arraigned in court on 30<sup>th</sup> November 2011 and were admitted to a cash bail of Kshs.5,000. The 1<sup>st</sup> applicant was released on cash bail on 12<sup>th</sup> June 2012 while the 2<sup>nd</sup> applicant was released on 28<sup>th</sup> February 2013. Their cash bails were however forfeited to the State on 20<sup>th</sup> August 2013 and though they were subsequently granted



fresh bond terms, I did not come across any evidence on record indicating that they complied with the new bond terms. They were apparently held in custody till 26<sup>th</sup> March 2015 when they were sentenced.

12. The above means that the 1<sup>st</sup> applicant had been in lawful custody for a total period of 2 years and 6 days while the 2<sup>nd</sup> applicant was in lawful custody for a period of 2 years, 9 months and 6 days prior to the date they were sentenced. The learned trial magistrate ought to have directed that the above periods be computed as part of their sentences which he failed to do. This is an error which this court is duty bound to correct on revision which I hereby do by ordering that the period each applicant had spent in lawful custody shall be computed as part of his sentence.

13. That said, the applicants raised another issue in their submissions which I think deserves my consideration and comment.

They complained that the prison authority combined their sentences imposed in criminal case No.1285 of 2011 and criminal Case No.203 of 2011 and was insisting that they were yet to start serving their prison term in criminal case No.1285 of 2011 which in their view had expired.

14. I have perused the trial court's record in criminal case No.203 of 2011. I have noted that the two applicants were jointly charged and convicted in that case with the offence of Robbery with Violence Contrary to Section 296 (2) of the Penal Code. They were both sentenced to death.

15. The record further shows that they appealed against their conviction and sentence in HCRA No.43 as consolidated with HCCRA No.44 of 2015.

Their appeal against conviction failed but their appeal against sentence was successful. Their death sentence was set aside and was substituted with a sentence of 30 years imprisonment. This was on 13<sup>th</sup> December 2019.

16. Section 37 of the Penal Code which is the law applicable in the scenario described by the applicants states as follows;

“Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof:

Provided that is shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph (i) of paragraph © of subsection (1) of section 28 or any part thereof.”

17. In this case, it is clear that the applicants were initially convicted in criminal case No. 1285 of 2011 on 26<sup>th</sup> March 2015. They were subsequently convicted in criminal case No. 203 of 2011 on 30<sup>th</sup> April 2015. Given the provisions of Section 37 above, the applicants were by law required to finish serving the sentence imposed in criminal case No.1285 of 2011 before they could commence serving the sentence substituted with the death penalty by the High Court in HCRA No. 43 of 2015 on 13<sup>th</sup> December 2019.

18. Given my findings hereinabove, it is clear that the applicants have already finished serving their prison term in criminal case No.1285 of 2011. It is evident that the reason they are still in prison is because they are still serving sentence in respect of their subsequent conviction in criminal case No.203 of 2011.



19. The upshot is that the application succeeds to the extent stated in paragraph 12 above.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANGA THIS 17<sup>TH</sup> DAY OF DECEMBER 2025.**

**HON. C. W. GITHUA**

**JUDGE**

In the presence of:

Both Applicants

Ms. Muriu for the respondent

Ms. Susan Waiganjo, Court Assistant

