



**Wambua v Republic (Miscellaneous Application E032 of 2024)
[2025] KEHC 1244 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1244 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E032 OF 2024
EN MAINA, J
FEBRUARY 27, 2025**

BETWEEN

ANTONY MUENDO WAMBUA APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Application before me is twofold. Firstly, the Applicant seeks review of his sentence pursuant to Section 333(2) of the [Criminal Procedure Code](#). Secondly, he has urged this court to consider substituting the remainder of the sentence with a non-custodial one.
2. It is the Applicant's case that the period he spent in remand custody was not taken into account during sentencing despite Section 333(2) of the [Criminal Procedure Code](#) obligating the trial court to do so.
3. The Application brought pursuant to Section 333(2) of the [Criminal Procedure Code](#) is not opposed. Learned Prosecution Counsel was however silent on the second prayer to serve what remains of the sentence on probation.
4. Section 333(2) of the [Criminal Procedure Code](#) obligates a court to consider the period spent in remand custody when sentencing the accused. I have perused the record of the lower court and indeed the trial magistrate does not appear to have complied with Section 333(2) of the [Criminal Procedure Code](#) as he should have. In the premises and as the application is not opposed prayer 1 of the undated Notice of Motion filed herein on 8th March, 2024 is allowed and it is ordered that the sentence meted by the trial magistrate should have been ordered to commence from the date of arrest, to wit 29th December, 2023, so as to take into account the one (1) month and seventeen (17) days spent in remand custody.
5. As for the prayer to serve the remaining sentence on probation, I note that whereas; firstly, this is not an appeal against sentence; secondly, that the offence with which the accused was convicted and sentenced is a serious offence; thirdly, that the injuries inflicted upon the complainant were of a serious



nature (grievous harm); the Learned Magistrate nevertheless imposed a sentence of imprisonment for three (3) years in which case even a non-custodial sentence would have been suitable. Indeed, the pre-sentence report had recommended a non-custodial sentence. The trial magistrate did not explain why he disregarded the pre-sentence report although it was positive.

6. I have considered that the Applicant has now served more than one year of his sentence and as stated the Pre-sentence Report had indeed recommended a non-custodial sentence of probation for 18 months premised upon the circumstances of the offence and the fact that the Applicant was a first offender. I am therefore inclined to grant his application to serve the balance of the term on probation. Accordingly, he shall be placed on probation for a period of 18 months as recommended in the Pre-sentence Report.

It is so ordered.

File closed.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 27TH DAY OF FEBRUARY, 2025.

E. N. MAINA

JUDGE

27/02/2025

In the presence of:

Ms Nyauncho for the state

Applicant in person (online)

C/A: Geoffrey

