



**Mutuma v Republic (Criminal Miscellaneous Application E001 of 2025)
[2025] KEHC 4018 (KLR) (Crim) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4018 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ISIOLO
CRIMINAL
CRIMINAL MISCELLANEOUS APPLICATION E001 OF 2025
SC CHIRCHIR, J
MARCH 27, 2025**

BETWEEN

JOHN MUTUMA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. What is coming up for determination is the undated Notice of Motion by John Mutuma (The Applicant). He prays that the period he spent in custody prior to conviction in Isiolo Chief Magistrate's court Criminal case No. 590 of 2015 be considered. In his Affidavit however he is pleading for extension of time to file appeal.
2. In view of this obvious conflict in his pleadings, when the matter came up for hearing, the court asked him to clarify his prayers. In response he verbally stated that his prayer is as per the Notice of Motion, and not the Affidavit. I took note of the fact of non-representation and considered his clarification as adequate.

Determination

3. The Lower Court record shows that on 3rd of February, 2017 the Applicant was sentenced to serve 20 years in prison following a conviction on offence of defilement. A further perusal of the record shows that the Applicant was in custody throughout trial.
4. During sentencing, there is no indication on whether the period spent by the Accused in remand was factored in, in arriving at the sentence of 20 years.



5. The proviso to Section 332 (2) of the *Criminal Procedure Code* requires the court to factor in the time that a convicted person had spent in remand, prior to conviction. The section provides as follows:

“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 as 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”.

6. The court of Appeal interpreted the proviso to section 333(2) in the case of *Abamad Abolfathi Mohammed & Another vs Republic* [2018]eKLR 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 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” (Emphasis added)

7. In the present case , the record is silent on whether the Trial magistrate complied with the requirements of section 333(2) of the *Criminal Procedure Code*. In the circumstances this court will treat the silence to mean that the section was not complied with.
8. This powers of revision bestowed on the high court under section 362 to 367 of the *Criminal Procedure Code* is to check on the correctness, legality or propriety of any finding , sentence or order recorded or passed and as to the regularity of any proceedings of a subordinate court. To the extent that there was no compliance with the proviso to section 333(2) of *Criminal Procedure Code* then the sentence passed was irregular ,warranting the intervention of this code.
9. Consequently the sentence of 20 years is varied to the extent that the sentence is deemed to have taken effect from 28/12/2015 being the date in which the Applicant first took plea.

DATED, SIGNED AND DELIVERED AT ISIOLO, THIS 27TH DAY OF MARCH, 2025.

S. CHIRCHIR

JUDGE.

In the presence of :

Roba Katelo- Court Assistant

John Mutuma- The Applicant.



Mr. Ngetich- For the Respondent.

