



**Mutinda v Republic (Miscellaneous Criminal Application  
E007 of 2024) [2025] KEHC 7797 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7797 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MISCELLANEOUS CRIMINAL APPLICATION E007 OF 2024**

**EN MAINA, J**

**MAY 29, 2025**

**BETWEEN**

**DAVID MAKAU MUTINDA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Review arising from the Sentence by Hon. P. Wechuli (P.M) at the Principal Magistrate's  
Court Kithimani in Criminal Case No. E402 of 2020 delivered on 31/10/2023)*

**JUDGMENT**

1. The Applicant brings this application under Section 333(2) of the *Criminal Procedure Code* which obligates a court which is sentencing an accused person to take into consideration the period the accused person may have spent in remand custody. The section states:

“[Section 333(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.”

2. I have considered the application carefully. From the record of the lower court, the Applicant was charged before the Senior Principal Magistrate Court Kithimani, with the offence of Manslaughter Contrary to Section 202 as read with Section 205 of the *Penal Code*. The particulars were that on 23<sup>rd</sup> July, 2020 in Kithuia Village, in Kivaa Location Masinga Sub-County within Machakos County, he unlawfully killed Peter Wambua Kioko. By a judgment delivered on 31<sup>st</sup> October, 2023 the Applicant was found guilty, convicted and subsequently sentenced to imprisonment for ten (10) years.



3. The Applicant contends that the sentence was deemed to run from the date it was pronounced and the time spent in custody was not taken into account.
4. I have perused the record of the lower court and it is evident that the Learned Magistrate overlooked the provisions of Section 333(2) of the *Criminal Procedure Code*. To quote his exact words:-

“ 31/10/2023

Prosecutor – No record. He is a first offender

Accused – I was defending myself. He followed me.

Court – Mitigation by accused noted. However, as noted, the defence of self defence is not available.

The accused to serve 10 years imprisonment.

Right of appeal 14 days.

Wechuli

Principal Magistrate

31/10/2023”

5. The Applicant was arrested on 24<sup>th</sup> July, 2020. On 3<sup>rd</sup> August, 2020 when the plea was taken, he was granted a bond of Kshs. 100,000/- with one surety of similar amount or bail of Kshs. 50,000/-. He did not post the bail and the record shows that on 18<sup>th</sup> January, 2025 he sought to review and have it reduced but the application was declined. He therefore remained in custody throughout the trial.
6. Section 333(2) of the *Criminal Procedure Code* is couched in mandatory terms and the trial magistrate erred in failing to comply with the mandatory provisions.
7. In the premises the application is allowed and so as to cure the error and so that the sentence is Section 333(2) compliant it is hereby ordered that the sentence of imprisonment for ten (10) years imposed by the trial court shall be construed to run from the date the Applicant was arrested to with 24<sup>th</sup> July, 2020.

Orders accordingly.

**JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 29<sup>TH</sup> DAY OF MAY, 2025.**

**E. N. MAINA**

**JUDGE.**

In the presence of:

Ms Kaburu for the ODPP

The Applicant (Virtually from Machakos Main Prison)

Geoffrey – Court Assistant

