



**Mutirithia v Republic (Criminal Appeal E188 of 2022)  
[2024] KEHC 6562 (KLR) (28 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6562 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E188 OF 2022**

**LW GITARI, J**

**MAY 28, 2024**

**BETWEEN**

**JULIUS GITONGA MUTIRITHIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The appellant has applied before this court that the time he spent in custody which was not considered by the trial magistrate be taken into account to reduce the sentence.
  1. The application is based on the provisions of Section 333(2) of the [Criminal Procedure Code](#) (Cap 75 Laws of Kenya).
  2. The respondent did not oppose the application. I have considered the application. Section 333(2) of the [Criminal Procedure Code](#), provides as follows:-
 

“(2) 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.”
  3. This section is couched in mandatory terms. As such the trial magistrate or Judge is required to consider the time an accused person has spent in custody while awaiting trial. That period must be taken into account to reduce the sentence which is finally imposed. This is an issue of right to fair trial and the court should consider that period to prevent a situation where the accused person may end up serving a longer sentence than the one intended by the trial court when the sentence and time spent in custody is combined. This was the holding by the Court



of Appeal in the case of *Ahmad Aboffathi Mohammend & Another v Republic* (2015) eKLR the Court of Appeal held that-

"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."

The court has a duty to determine whether –

- Whether the accused spent time in custody.
  - If the answer is in the affirmative, determine the period that an accused person spent in.
  - Reduce the sentence proportionately with the time spent in custody.
2. From the record of the learned trial magistrate, the time the appellant spent in custody was not considered. The prayer by the appellant that the time spent in custody be considered is meritorious. From the record of the trial court, the appellant was remanded in custody as follows:-
  3. He was charged in court on 4/9/2019 and remanded in custody upto 25/11/2019 when he was released on bond. That period account for eighty (81) one days. On 24/6/2021 he failed to attend court and warrant of arrest was issued. He was arrested and was on 21/7/2021 and the court remanded him in custody up to 7/12/2021 when his bail was reinstated. The appellant in total spent 217 days in custody in aggregate during his trial. This period should have been taken into account to reduce the sentence.

**Conclusion:**

4. I allow the application by the appellant. The sentence be reduced by 217 days, the time the appellant spent in custody awaiting trial.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 28<sup>TH</sup> DAY OF MAY 2024.**

**L.W. GITARI**

**JUDGE**

