

KENYA / JUDGMENT

Wamugunda v Republic

[2026] KEHC 13691 (KLR)

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COURT

High Court

BEFORE

DKN Magare

CASE / FILE NUMBER

Criminal Revision E034 of 2026

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Wamugunda v Republic (Criminal Revision E034 of 2026) [2026] KEHC 13691 (KLR) (16 September 2026) (Ruling) Neutral citation:

[2026] KEHC 13691 (KLR) Republic of Kenya In the High Court at Nyeri Criminal Revision E034 of 2026 DKN Magare, J September 16, 2026 Between Patrick Githuhi Wamugunda Applicant and Republic Respondent

Ruling

1. This is a ruling over an application by the Applicant seeking to review sentence meted out against him in Karatina PMCCR No. E119 of 2026. 2. The trial court sentenced the Applicant on his own plea of guilty on the offence of stealing contrary to section 268(1) as read with Section 275 of the Penal Code. He was sentenced to pay a fine of Ksh. 30,000/= in default imprisonment for 1 year. 3. The Application dated 7.7.2026 sought an order that the time spent in custody between 6.2.2026 and 30.3.2026 be considered and deducted from the sentence of one year that was imposed. 4. The Applicant opted for the sentence as opposed to the paying the fine. He did not challenge the legality or severity of the sentence as imposed. The Respondent was not opposed to time spent in custody being considered.

Analysis

5. The only issue is time spent in custody. The law under Section 333(2) of the Criminal Procedure Code provides as doth: “ 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. 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. 6. The charges that the Applicant faced derived from Section 268(1) of the Penal Code which

provides: “ (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.” 7. With respect to the charge of stealing Section 275 of the Penal Code provides as follows:- “ Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.” 8. Whereas sentencing is the discretion of the court, the same is governed by sentencing guidelines and surrounding circumstances. The court cannot interfere with discretion unless the same was meted out injudiciously. In the case of Shadrack Kipkoech Kogo -vs- R Eldoret Criminal Appeal No. 253 of 2003 the Court of Appeal stated thus:- “ Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka -vs- R. (1989 KLR 306)” 9. Sentence is a matter that rests in the discretion of the trial court. The Court of Appeal, on its part, in Bernard Kimani Gacheru vs. Republic [2002] eKLR restated that: “ It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.” 10. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody. The Court of Appeal in Ahamad Abolfathi Mohammed & Another vs Republic [2018]eKLR stated as follows as regards time spent in custody: “ 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. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19 th June 2012.” 11. This is buttressed in the Judiciary Sentencing Policy Guidelines, 2023 as follows: The proviso to Section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial. 12. The Applicant was arrested on 6.2.2026. The Applicant remained in custody after taking plea until 9.02.2026. Section 333(2) of the Criminal Procedure Code provides that the period spent in custody pending trial shall be taken into account during sentencing. It is clear that the time spent in custody was not considered. The period spent in custody must mean something and the imposed sentence be reduced mathematically. 13. In its ruling dated 30.3.2026 on sentence, the court did not indicate whether time spent in custody was considered or was to be considered. This was in error. The sentence of one year ought to have been indicated to commence from the date of arrest.

Determination

14. I therefore make the following orders: - a. The application dated on 7.7.2026 for revision is allowed. b. The sentence imposed shall commence from the date of arrest, 6.2.2026. c. The file is closed. DELIVERED, DATED AND SIGNED AT NYERI THIS 16 TH DAY OF SEPTEMBER THE YEAR OF OUR LORD TWO THOUSAND AND TWENTY-SIX. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM. KIZITO MAGARE JUDGE In the presence of:- Mr. Kihara for the state Pro se Applicant Court Assistant – Timothy

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