



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kawinzi v Republic (Criminal Revision E005 of 2023)  
[2024] KEHC 11553 (KLR) (22 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 11553 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CRIMINAL REVISION E005 OF 2023  
FN MUCHEMI, J  
AUGUST 22, 2024**

**BETWEEN**

**JOSEPH KIOKO KAWINZI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The application for determination dated 11<sup>th</sup> September 2023 seeks for orders for review of sentence under Section 333(2) of the *Criminal Procedure Code*.
2. The applicant was convicted by Thika Resident Magistrate, in Criminal Case No. 7250 of 2015 with the offence of rape contrary to Section 3(1)(a)(b) as read with Section 3(3) of the *Sexual Offences Act* No. 3 of 2006 and was sentenced to serve ten (10) years imprisonment.
3. The applicant seeks for review of his sentence urging the court to invoke section 333(2) of the *Criminal Procedure Code* and consider the period he spent in remand custody pending the hearing and disposal of his case. He states that he was convicted on 14<sup>th</sup> August 2019 and that the period of one (1) year and seven (7) months ought to have been taken into consideration.
4. The respondent states that the applicant was charged with the offence of rape and sentenced to ten (10) years imprisonment. The respondent argues that from the record, the applicant was granted bond but he jumped bail on three occasions being 13<sup>th</sup> September 2017, 27<sup>th</sup> February 2018 and 21<sup>st</sup> June 2018 which led to cancellation of his bond on 22<sup>nd</sup> October 2018. The respondent argues that it is difficult to quantify the 1 year 7 months the applicant alleges was not considered.
5. The respondent states that the trial court considered the mitigation of the applicant before passing his sentence. The respondent further states that the sentence passed was proper and legal as it considered the aggravating and mitigating circumstances and the present report.



### **The Applicant's Submissions**

6. The applicant submits that he was arrested on 21<sup>st</sup> December 2015 and was convicted on 14<sup>th</sup> August 2015 which is a period of 4 years and 8 months he spent in custody. The applicant submits that the trial court did not consider this period during sentencing and thus urges the court to review his sentence in line with Section 333(2) of the [Criminal Procedure Code](#).

### **The Respondent's Submissions**

7. The respondent reiterates what she deponed in her affidavit and submits that the applicant has not argued that the sentence passed is manifestly harsh and excessive, that the sentence passed was illegal or improper or that the trial court acted on the wrong principles or omitted relevant factors or took into account irrelevant factors in sentencing. The applicant gave generalized reasons which do not suffice interference with the discretion of the trial court in sentencing or warranting upsetting the sentence imposed by the trial court.

### **The Law**

8. Section 333(2) of the [Criminal Procedure Code](#) provides:-

“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 sub section (1) has prior, to such sentence shall take account of the period spent in custody.”

9. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody during the pendency of the trial.
10. The provisions of section 333(2) of the [Criminal Procedure Code](#) was the subject of the decision in [Abamad Abolfathi Mohammed & Another v Republic](#) [2018]eKLR where the Court of Appeal held that:-

“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<sup>th</sup> June 2012.”

11. The same court in *Bethwel Wilson Kibor v Republic* [2009]eKLR expressed itself as follows:-

“By proviso to section 333(2) of the *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22<sup>nd</sup> September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”

12. According to *The Judiciary Sentencing Policy Guidelines*:

“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.”

13. This court is empowered by Article 165(6) of the *Constitution* of Kenya to review a decision by a subordinate court. Article 165(6) provides:-

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

14. The applicant was arrested on 18<sup>th</sup> December 2015 and granted bond of Kshs. 500,000/- with one surety of similar amount. On 17<sup>th</sup> March 2016, the applicant made an application for review of the bond terms and an alternative of cash bail. The trial court reduced the bond to Kshs. 300,000/- with surety of a similar amount and a cash bail of Kshs. 200,000/-. The applicant paid cash bail of Kshs. 200,000/- on 5<sup>th</sup> April 2016 and was released.

15. On 30<sup>th</sup> October 2017, the applicant did not attend court and a warrants of arrest were issued. Similarly, the applicant failed to attend court on 9<sup>th</sup> November 2017, 11<sup>th</sup> December 2017, 21<sup>st</sup> June 2018, 26<sup>th</sup> June 2018, 6<sup>th</sup> August 2018, 7<sup>th</sup> August 2018, 9<sup>th</sup> August 2018, 6<sup>th</sup> September 2018 and 2<sup>nd</sup> October 2018. The court issued an order of forfeiture of the cash bail. On 22<sup>nd</sup> October 2018, the court cancelled the bond of the applicant and ordered that he remains in custody till the disposal of the case. Thus the applicant remained in custody as from 22<sup>nd</sup> October 2018 until he was convicted on 14<sup>th</sup> August 2019, which was a period of nine (9) months and 23 days. By virtue of Section 333(2) of the *Criminal Procedure Code*, this duration ought to have been considered during sentencing. Notably, the applicant has not contested the sentence, but seeks to have the duration he spent in custody be taken into account which is his legal right. I have perused the court record and noted that during sentencing, the trial court took into account the mitigation by the applicant and then sentenced the applicant to ten (10) years



imprisonment in line with Section 3(3) of the *Sexual Offences Act*. It is however evident that the trial court was silent on the issue of the duration the applicant spent in remand.

16. From the record, the applicant was in custody from the date of arrest which is 18<sup>th</sup> December 2015 until 5<sup>th</sup> April 2016 when he was released upon paying cash bail. The applicant was further held in custody from 22<sup>nd</sup> October 2018 after absconding bail until 14<sup>th</sup> August 2019, when he was convicted. Taking into consideration the duration of 3 months and 18 days and further nine months and 23 days respectively it is evident that the applicant spent a total of one (1) year and 1 month in custody. It is clear from the record that the said period was not considered during sentencing. As such, the applicant is entitled to benefit under the provisions of Section 333(2) of the *Criminal Procedure Code*.

17. I find that this application has merit and it is hereby allowed as follows:-

The applicant shall serve nine (9) years imprisonment to commence from 18<sup>th</sup> December, 2015 being the date of arrest.

18. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 22<sup>ND</sup> DAY OF AUGUST 2024.**

**F. MUCHEMI**

**JUDGE**

