



REPUBLIC OF KENYA



**Kapenju v Republic (Criminal Revision E153 of 2024)  
[2025] KEHC 1288 (KLR) (17 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 1288 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL REVISION E153 OF 2024  
DO CHEPKWONY, J  
JANUARY 17, 2025**

**BETWEEN**

**ESTHER NJAMBI KAPENJU ..... APPLICANT**

**AND**

**REPUBLIC ..... STATE**

**RULING**

1. This is a ruling in respect of an undated Notice of Motion Application, basically seeking a revision of the sentence order that was passed against the Applicant.
2. The Applicant was charged, tried, convicted and sentenced to serve twenty (20) years imprisonment for the offence of Robbery with Violence in Limuru Criminal Case No 489 of 2015.

The particulars were that: “ On 28<sup>th</sup> day of March, 2015, at Mafuta Area in Mai –Mahiu within Nakuru County, jointly with others not before court, being armed with dangerous and offensive weapon namely a pistol and a knife robbed John Mbugua Ikigu of one Lorry Registration No KBC 854S Mitsubishi white in colour valued at Kshs 2,600,000/= (Two million, six hundred thousand shillings)”.

3. The Applicant has filed undated Notice of Motion application under Certificate of Urgency seeking that the time spent in custody of eight (8) years to be considered in the sentence computation. According to the Applicant, she has transformed her behaviour through prison rehabilitation programs and thus prays for a non-custodial sentence for the remainder of his sentence.
4. When the matter came before court on 21<sup>st</sup> November, 2024, the prosecution’s counsel indicated that she was not opposed to the prayer for computation of the time spent in custody during trial pursuant to Section 333 of the *Criminal Procedure Code*.



5. Having listened to the Applicant and Counsel for the Respondent/State in their respective oral submissions with regard to the undated application, this court finds the issue for determination being whether or not the trial court took into account the period spent in custody during trial as provided for by Section 333 (2) of the *Criminal Procedure Code*.
6. The Applicant filed submissions which were similarly undated where she has raised several issues for determination being:
  - a. Whether this court has jurisdiction to hear and determine the application.
  - b. Whether she is entitled to time spent in custody since arrest being considered.
  - c. Whether she has been rehabilitated/reformed to warrant sentence reduction being considered.
  - d. Whether she is remorseful for a non- custodial sentence and reintegrate back in the society.
7. The power of revision in Criminal Cases has in exercise of the High Court’s supervisory jurisdiction as provided for under Sections 362 to 366 of the *Criminal Procedure Code*. Section 362 provides that: -  
(362) The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court”

Section 364 states as follows:-

(364) Powers of High Court on revision

- (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
  - (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
  - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
- (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.



- (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”
8. When called upon to consider the period an accused/applicant spent in custody during trial in passing sentence, the relevant and guiding provision is Section 333(2) of the [Criminal Procedure Code](#) which states: -
- “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. This provision has been restated in 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.”
10. In the instant case, the Applicant was charged with the offence of Robbery with Violence Contrary to Section 296 (2) of the [Penal Code](#) and was arraigned in court for plea taking on 22<sup>nd</sup> June, 2015. His trial commenced on 20<sup>th</sup> July, 2022, and the Applicant was found guilty and convicted for the said offence whereby he was sentenced to serve twenty (20) years imprisonment on 31<sup>st</sup> of January, 2024. In essence the Applicant had spent a period of eight (8) years, six (6) months and nine (9) days in custody at the time of being sentenced. In regard to the provisions of Section 333 (2) of the [Criminal Procedure Code](#), this period ought to have been considered in computing his sentence. A review of the trial court’s ruling on sentence clearly shows that the period was not taken into account in sentencing the Applicant.
11. In sentencing the Applicant, the trial court had this to say.
- “Accused 3 also absconded and it was indicated that she fled to Tanzania. The surety was able to trace her in Naivasha after some time and she was availed in court on 24/2/2020. She has been in custody since then. Taking into consideration the period the first and third accused have been in custody, the seriousness of the offence and guided by the decision of the Court of Appeal in the above quoted case, I sentence the first and third accused to serve imprisonment for twenty (20) years each. Right of appeal fourteen (14) days”.
12. In this case, the Applicant was arraigned in court on 22<sup>nd</sup> June, 2015, and the sentence was issued on 31<sup>st</sup> January, 2024, which confirms that the period spent in custody was eight (8) years, six (6) months and nine (9) days in accordance to Section 333 of the Criminal Code the period should be considered in the sentence computation.
13. With respect to the prayer of reduction of the sentence, under Section 296 (2) of the [Penal Code](#) prescribes for a death sentence for the offence of robbery with violence, which, the Supreme Court in the case of Murateru II declared unconstitutional but only with regard to the offence of Murder.



Therefore, the sentence of twenty years, meted by the trial court is found lawful and commensurate to the offence the Applicant was convicted for. It is worth noting that given the seriousness of the offence, the law does not provide for alternative forms of punishment. Further, it would be against the interest of justice to set aside the said sentence and substitute it with a non-custodial sentence.

14. In view of the above findings, the court finds that the undated Notice of Motion application partly succeeds with orders that:-
- a. The period of eight (8) years, six (6) months and nine (9) days spent in custody by the Applicant be computed in her sentence.
  - b. The prayer for a non – custodial sentence is hereby declined.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 17<sup>TH</sup> DAY OF JANUARY, 2025.**

**D. O. CHEPKWONY**

**JUDGE**

