



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kariuki v Republic (Miscellaneous Criminal Application  
E048 of 2024) [2025] KEHC 4880 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4880 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
MISCELLANEOUS CRIMINAL APPLICATION E048 OF 2024**

**FN MUCHEMI, J**

**APRIL 24, 2025**

**BETWEEN**

**JEREMIAH MAINA KARIUKI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Brief Facts**

1. The application dated 8<sup>th</sup> July 2024 seeks to have his sentence reviewed pursuant to Section 333(2) of the *Criminal Procedure Code*.
2. The applicant was convicted by Thika Chief Magistrate in Criminal (S.O.) Case No 4058 of 2015 with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* and was sentenced to serve 20 years imprisonment. The applicant argues that he is not opposed to the sentence meted upon him but wishes to have the period he spent in custody to be considered in his sentence as per Section 333(2) of the *Criminal Procedure Code*.
3. Parties disposed of the application by way of written submissions.

**The Applicant's Submissions.**

4. The applicant relies on Section 333(2) of the *Criminal Procedure Code* and submits that the trial court did not take into account the time he spent in custody as he was arrested on 3<sup>rd</sup> August 2015 and convicted on 15<sup>th</sup> July 2016, which is a period of 1 year. The applicant further relies on the cases of *Abamad Abolfathi Mohammed & another v Republic* (2018) eKLR; *Bethwell Wilson Kibor v Republic* (2009) eKLR and *Vincent Sila Jona & 87 others v Kenya Prisons & 2 others* (2021) eKLR and submits that the duty to take into account the period an accused person has remained in custody in sentencing under Section 333(2) of the *Criminal Procedure Code* is mandatory. The applicant argues that the trial



magistrate did not state when the meted sentence will commence and did not deduct the period he spent in custody prior his conviction.

5. The applicant relies on the cases of *Martin Bahati Makokha & another v Republic* (2018) eKLR and *Paul Eyanai Nakwanga v Republic* (2019) eKLR and submits he has been incarcerated for 9 years and 7 months and urges the court to consider that as sufficient time for serving his entire sentence.
6. The applicant relies on the *Sentencing and Policy Guidelines* (2023) paragraphs 5.1.15 and the cases of *S v Muchunu & another* (AR 24/11 (2012) ZAKZPHC 6 Icon Zulo Natal High Court, *Bethwell Wilson Kibor v Republic* (2009) eKLR and *Sebastian Okwero Mrefu v Republic* in Petition No 151 of 2012 and submits that he is a first offender and is currently rehabilitated. Thus the applicant urges the court to give him a second chance as he has acquired reformation skills and taken spiritual courses which have transformed him to be a different person and he can start a new life if given a chance. The applicant further submits that he is remorseful for the crime that has had him in custody for 9 years and 7 months.

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

7. The respondent submits that the issues of sentencing were dealt with by the trial court and the High Court at Kiambu in Criminal Appeal No 174 of 2016. The respondent argues that the applicant is seeking to have the current court sit on appeal of a decision made by a court of similar jurisdiction. The respondent submits that the sentence passed by the trial court and affirmed by the Kiambu High Court was proper and legal and therefore the current court becomes functus officio.
8. The respondent submits that it is the right of a person who has been convicted and sentenced for a criminal offence to appeal or apply for review by a higher court as prescribed by law.
9. The respondent submits that the applicant has not placed such material before the court to vary his sentence. He has neither stated that the sentence is manifestly harsh and excessive or argued or suggested that the sentence passed was illegal or improper or that the trial court acted on wrong principles or omitted relevant factors or took into account irrelevant factors in sentencing, or that the proceedings were irregular or in violation of his right or fundamental freedom. The applicant's reasons were generalized reasons which do not suffice interference with the discretion of the trial court in sentencing or warrant upsetting the sentence.
10. The respondent relies on the case of *Francis Karioko Muruatetu & another v Republic* (no citation given) and submits that the court has since pronounced that its earlier decision in the same case did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute and that its previous decision cannot be authority for stating that all provisions of law prescribing mandatory or minimum sentences are inconsistent with the *Constitution*. The respondent further relies on the Supreme Court case in Petition No E018 of 2023 *Republic v Joshua Gichuki Mwangi* and submits that the sentence passed by the trial court and confirmed by the High Court in Kiambu was legal and appropriate.

### **The Law.**

11. 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.



12. 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.”

13. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody.

14. The provisions of Section 333(2) of the *Criminal Procedure Code* was the subject of the decision in Ahamad *Abolfathi Mobammed & 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.”

15. 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.”



16. 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.”

17. The applicant was arrested on 3<sup>rd</sup> August 2015 and convicted on 15<sup>th</sup> July 2016 which is a period of about one (1) year. By virtue of Section 333(2) of the [Criminal Procedure Code](#), this duration ought to have been considered during sentencing. The applicant has not contested the sentence imposed on him by the trial court. He seeks to have the duration he spent in custody be taken into account which is his right under the law. I have perused the court record and noted that during sentencing, the trial court took into account mitigation by the applicant and noted that the offence committed was rampant and called for a deterrent sentence. The court takes note that the applicant herein filed an appeal to the High Court in Kiambu being Criminal Appeal No 174 of 2016 whereby the appellate court upheld the conviction and sentence on 3<sup>rd</sup> March 2017.

18. I have perused the judgment of judge (as he then was) Joel Ngugi delivered on 3<sup>rd</sup> March 2017. It is noted that the appellant challenged the issue of sentence of twenty (20) years imprisonment imposed on him in one of the grounds of appeal. In the said judgment, the court dealt with this issue in view of the sentence provided under Section 9 (3) of the [Sexual Offences Act](#) and affirmed the sentence accordingly. The applicant herein is not attacking the confirmation of the sentence by the High Court.

19. However, the applicant seeks for orders that the time he spent in custody be taken into account arguing that the trial court did not take this issue into consideration while sentencing him. I have perused the original file as well as the record of appeal. The record shows that the accused was arrested on 3<sup>rd</sup> August 2015 and was sentenced on 15<sup>th</sup> July 2016. It is evident from the record that the applicant remained in custody throughout the trial period. This was a period of one-year shy of twelve (12) days.

20. It is important to have a cursory look at the provisions of the Judiciary [Sentencing Guidelines](#), 2023. Clause 4:8: Provides: -

“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.”

21. Having perused the High Court judgment and noted that the issue in this application was neither raised or dealt with, it is my considered view that this court has power under the Judiciary Sentencing Guidelines, 2023 to determine this application.

22. I have considered this application and the issues raised in opposition by the respondent. However, I reach a conclusion that this application is successful.



23. This court orders that the applicant shall serve the sentence of twenty (20) years imprisonment imposed by the trial magistrate to commence from the date of arrest 3<sup>rd</sup> August 2015.

24. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 24<sup>TH</sup> DY OF APRIL 2025.**

**F. MUCHEMI**

**JUDGE**

