



REPUBLIC OF KENYA



**Njoroge v Republic (Criminal Revision E123 of 2024)  
[2025] KEHC 4885 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4885 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CRIMINAL REVISION E123 OF 2024  
FN MUCHEMI, J  
APRIL 24, 2025**

**BETWEEN**

**LUKAS MUKUNDI NJOROGE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Brief Facts**

1. The application for determination is dated 17<sup>th</sup> May 2024 in which the applicant seeks to have his sentence reviewed pursuant to Section 333(2) of the *Criminal Procedure Code*.
2. The applicant was convicted by Ruiru Senior Principal Magistrate, in Criminal Sexual Offences Case No. E038 of 2020 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 12 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 factored in his sentence as per Section 333(2) of the *Criminal Procedure Code*.
3. The applicant states that he has not filed any appeal to any superior court. The applicant avers that he was convicted on 7<sup>th</sup> December 2023 and he has been sick after conviction.
4. The respondent states that from the trial record, the trial court considered the time spent in custody and the mitigation. The respondent further states that the applicant has fully served his sentence.
5. Parties disposed of the application by way of written submissions.

**The Applicant's Submissions.**

6. 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 13<sup>th</sup> June 2020 and



convicted on 7<sup>th</sup> December 2023, which is a period of 3 years and 6 months. The applicant further relies on the cases of Ahamad Abolfathi Mohammed & Another vs Republic (2018) eKLR; Bethwell Wilson Kibor vs Republic (2009) eKLR and Vincent Sila Jona & 87 Others vs 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.

7. The applicant relies on the Sentencing and Policy Guidelines (2023) paragraphs 5.1.15 and the cases of S vs Muchunu & Another (AR 24/11 (2012) ZAKZPHC 6 ICON ZULO Natal High Court, Bethwell Wilson Kibor vs Republic (2009) eKLR and Sebastian Okwero Mrefu vs 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 4 years and 9 months

### **The Law.**

8. 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.

9. 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.”

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

11. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in Ahamad Abolfathi Mohammed & Another vs 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."

12. The same court in *Bethwel Wilson Kibor vs 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."

13. 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."

14. The applicant was arrested on 14<sup>th</sup> July 2020 and convicted on 7<sup>th</sup> December 2023. 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, and his singular prayer is to have the duration he spent in custody taken into account which is his legal right.

15. The court pronounced itself on this issue after the accused said in mitigation that he had spent three (3) years in custody pending the trial. I quote.

"Having considered that the accused has spent three(3) years in custody, I then sentence him to serve twelve (12) years imprisonment."

The record is clear that the magistrate complied with Section 333 (2) of the Criminal procedure Code. The date of arrest was 14<sup>th</sup> July 2020 and sentenced on 7<sup>th</sup> December 2023. As such he spent three (3) years and five (5) months in custody. The minimum sentence for defilement under Section 8 (3) of the *Sexual Offences Act* is a term of imprisonment of not less than twenty (20) years imprisonment. The applicant was sentenced to twelve (12) years imprisonment, the court having complied with the law. The three (3) and a half year spent in custody was therefore, taken into consideration.

16. Accordingly, it is my considered view that the application lacks merit and is hereby dismissed.



17. It is hereby so ordered.

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

**F. MUCHEMI**

**JUDGE**

