



**Wachira & another v Republic (Criminal Revision E153 & E229 of 2024
(Consolidated)) [2025] KEHC 4549 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4549 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL REVISION E153 & E229 OF 2024 (CONSOLIDATED)**

FN MUCHEMI, J

APRIL 3, 2025

BETWEEN

BONIFACE GATINGI WACHIRA 1ST APPLICANT

JOHN NYONGESA WAFULA 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicants were jointly charged and convicted in Thika CM Criminal No. E281 of 2021 for the offence of Handling Stolen goods contrary to Section 322 (1) of the *Penal Code* and sentenced to serve Seven (7) years imprisonment. The applicants filed separate applications for review of sentence which were consolidated on 10/03/2024 and were heard together. The first application by John Nyongesa Wafula HC Criminal Revision No.229 of 2024 seeks for review of his one (1) year remaining term to non-custodial sentence. The second application by Boniface Gatinga Wachira seeks for orders to take into account the period of six (6) months he spent in custody during the pendency of the trial be taken into account to reduce his remaining sentence.
2. The 1st applicant says he filed an appeal in this court No.8 of 2023 he later withdrew it. The record bears a Notice of Withdrawal dated 4th October 2024 signed by the 1st applicant and forwarded by a letter dated 4th October 2024 signed by one Anne Mumenya for the officer in-charge, Kiambu Prison. Having withdrawn the appeal, the 1st applicant filed this application for review.
3. The 2nd applicant avers that he is first offender and has currently served three years and eight months leaving one year left which he is urging the court to consider and give him a non-custodial sentence. The applicant further states that he suffers from breathing problems which condition has been made worse by the current congestion being experienced in the institution.



4. The respondent filed a Replying Affidavit dated 6th March 2025 in opposition to the said applications. The respondent avers that the applicants were charged with the offence of church breaking and committing a felony contrary to Section 306(a) of the Penal Code. The applicants were further charged with an alternative charge of handling stolen property contrary to Section 322(1) of the Penal Code. The applicants were found guilty of the alternative charge and were sentenced to each serve seven (7) years imprisonment.
5. The respondent argues that the applicants have not stated that the sentence is manifestly harsh and excessive, that the sentence was illegal or improper or that the trial court acted on a wrong principle or omitted relevant factors or took into account irrelevant factors in sentencing. The respondent further states that the applicants have given generalized reasons which do not suffice interference with the discretion of the trial court in sentencing warranting upsetting the sentence imposed by the trial court.
6. The respondent further states that both mitigating and aggravating circumstances were considered but the aggravating circumstances outweighed the mitigating circumstances hence the sentence by the trial and high court. The respondent states that the sentence passed by the trial court was proper and legal as it considered the aggravating and mitigating circumstances. Further, the respondent argues that the offence which the applicants were found guilty is a felony which attracts a prison sentence on a term not exceeding fourteen years. Thus the trial court was very lenient in passing the seven years sentence.
7. The respondent avers that the applicant alleges to suffer from back pain and breathing problems but he has not attached any medical documents to prove that he is unwell.
8. The respondent states that the applicants are abusing the court process, wasting precious judicial time and thus the applications ought to be dismissed.

The Law.

9. 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.
10. 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.”
11. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody.
12. 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 19th June 2012.”

13. 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 22nd 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.”

14. 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.”

15. The 1st applicant was arrested on 29th January 2021 and convicted on 29th July 2021. By virtue of Section 333(2) of the Criminal Procedure Code, this duration ought to have been considered during sentencing. Notably the 1st applicant has not contested the sentence, he only 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 did not take into account the period spent in custody. The trial court was silent on the duration spent in custody and proceeded to sentence the applicant to each serve 7 years in prison. Therefore, by virtue of Section 333(2) of the Criminal Procedure Code, the sentence ought to run from 29th January 2021 being the date of arrest. The period of five months ought to be considered in computing the sentence.



16. The 2nd applicant argues that his sentence ought to be reviewed and he be granted a non-custodial sentence. Section 322(2) of the [Penal Code](#) provides the sentence for the offence of handling of stolen goods and it provides:-

A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.
17. Although the 2nd applicant did not apply for orders under Section 333 (2), the benefit should also apply to him in that the two applicants were convicted together for the same offence and stayed in custody for the same period pending disposal of their case.
18. The second applicant said he is sick of asthma and back pain and that he seeks for review of the remainder of his one (1) year imprisonment sentence to non-custodial. The 2nd applicant failed to annex any medical report or treatment note to the application. It is trite that illness of any kind can only be verified through evidence of an expert. I find that this prayer was rendered moot by failure to attach medical documents.
19. Consequently, I dismiss the application of the 1st application for review of sentence due to lack of merit.
20. As for the application of the 2nd applicant based on Section 333 (2) of the [Criminal Procedure Code](#), I find it successful and allowed.
21. Both applicants shall continue serving the sentence of seven (7) years imprisonment imposed by the trial magistrate which shall run from the date of arrest being 21st January 2021.
22. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 3RD DAY OF APRIL 2025.

F. MUCHEMI

JUDGE

