



**Kimana v Republic (Miscellaneous Criminal Application  
E035 of 2024) [2025] KEHC 8115 (KLR) (5 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8115 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
MISCELLANEOUS CRIMINAL APPLICATION E035 OF 2024**

**FN MUCHEMI, J**

**JUNE 5, 2025**

**BETWEEN**

**PAUL KIBUE KIMANA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Brief Facts**

1. This application dated 12<sup>th</sup> May 2024 seeks for orders of review of sentence under Section 333(2) of the *Criminal Procedure Code*.
2. The applicant was convicted on 20<sup>th</sup> May 2021 in Gatundu Criminal (Sexual Offence) Case No. 30 of 2020 with the offence of attempted rape contrary to Section 4 of the *Sexual Offences Act* No. 3 of 2006 and was sentenced to serve seven (7) years imprisonment.
3. The applicant herein seeks for review of sentence and urges the court to invoke section 333(2) of the *Criminal Procedure Code* and consider the period he spent in remand custody pending the trial. He states that he was arrested on 23<sup>rd</sup> July 2020 and convicted and sentenced on 3<sup>rd</sup> June 2021. The applicant further avers that he withdrew his appeal Thika High Court Criminal Appeal No. 3 of 2023 on 26<sup>th</sup> February 2024.
4. The respondent does not oppose the application and states that the trial court did not take into consideration the time spent in custody whilst meting out the sentence against the applicant.

**The Applicant's Submissions**

5. The applicant relies on Section 333(2) of the *Criminal Procedure Code* and the cases of *Abamad Aboulfathi Mohammed & Another vs Republic* (2018) eKLR and *Vincent Sila Jona & 87 Others vs*



Republic Petition No. 15 of 2020 and submits that he was arrested on 23<sup>rd</sup> July 2020 and was convicted and sentenced on 3<sup>rd</sup> June 2021 which is a period of 11 months and 20 days 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 Law

6. 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.”

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

8. The provisions of section 333(2) of the Criminal Procedure Code was the subject of the decision in Abamad 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.”

9. 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.”

10. 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.”

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. The applicant was arrested on 23<sup>rd</sup> July 2020 and granted bond of Kshs. 200,000/- with one surety of similar amount. The applicant remained in custody for the duration of the trial until sentence was meted against him on 3<sup>rd</sup> June 2021, which is a period of 11 months and 20 days. 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, his only prayer is 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 seven (7) years imprisonment in line with Section 4 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.

13. As such, it is my considered view that the application has merit and it is hereby allowed. The period spent in custody of eleven (11) months and 20 days shall be taken into consideration.

14. The applicant shall serve seven (7) years imprisonment to commence from the date of arrest 23<sup>rd</sup> July 2020.

15. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 5<sup>TH</sup> DAY OF JUNE 2025.**

**F. MUCHEMI**

**JUDGE**

