



**Livombolo v Director of Public Prosecution (Miscellaneous Criminal Application E186 of 2024) [2025] KEHC 9027 (KLR) (23 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9027 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS CRIMINAL APPLICATION E186 OF 2024**

**S MBUNGI, J**

**JUNE 23, 2025**

**BETWEEN**

**ALEXANDER LIVOMBOLO ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

**RULING**

1. The applicant herein filed a Notice of Motion dated 10<sup>th</sup> September 2024, seeking a review of his sentence in Kakamega SO Case No. 136 of 2021 under section 333[2] of the [Criminal Procedure Code](#). He also seeks leave for a lenient and definite sentence, citing Articles 50[2][p][q] and 165 of [the Constitution](#).
2. The applicant was arrested on 17th July 2021 and remained in remand until his conviction on 26th May 2022. His sentence of 10 years was later reduced to 9 years on appeal in HCCRA No. E041 of 2022. He now seeks that the period spent in remand be factored into the remaining sentence.
3. He argues that the trial court failed to consider the time already served in custody, which violates section 333[2] of the [Criminal Procedure Code](#) and his constitutional right to a fair trial. He further pleads for waiver of costs, citing his indigence.
4. In his supporting affidavit, the applicant reiterated that although his sentence was later reduced to 9 years on appeal in HCCRA No. E041 of 2022, he contends that the trial court failed to factor in the period spent in remand, contrary to section 333[2] of the [Criminal Procedure Code](#). He urged the court to consider this oversight, noting that he is a pauper and seeking a just and lenient sentence in line with his constitutional rights under Article 50.
5. I have perused the record. and find that the issue raised in the present application was already substantively addressed in HCCRA No. E041 of 2022, where the applicant appealed against both conviction and sentence.



6. In the judgment delivered by Hon. Lady Justice S.C. Chirchir, the court upheld the conviction but considered the applicability of section 333[2] of the Criminal Procedure Code with regard to the trial court sentence and expressly held as follows:

“This duty is further given emphasis by clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines where it is provided that:-

‘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 consider the period in which the offender was held in custody during the trial’

Looking at the trial court record, it attests to the fact that the Appellant was in custody throughout the trial. He was arraigned on 20/9/2021 and was convicted on 27/04/2022. This means that he was in custody for a period of almost six [6] months, a period the learned trial magistrate ought to have taken into consideration. In the end this Appeal partially succeeds. The sentence of 10 years is upheld but will run from 20th September 2021 being the date when the Appellant was first arraigned in court.”

7. The court acknowledged that the applicant was in custody throughout the trial, having been arraigned on 20<sup>th</sup> September 2021 and convicted on 27<sup>th</sup> April 2022, a period of approximately six [6] months, which the trial court had failed to factor in. The High Court therefore allowed the appeal partially and ordered that the 10-year sentence would run from 20<sup>th</sup> September 2021, being the date when the applicant was first arraigned.
8. Consequently, the present application seeking sentence review under section 333[2] of the Criminal Procedure Code is res judicata, as the issue has already been conclusively determined by a court of competent jurisdiction in the applicant’s appeal. This court, having already pronounced itself on the sentence, is functus officio.
9. That said, the court notes from the record that the judgment in HCCRA No. E041 of 2022 was initially slated for delivery on 21<sup>st</sup> March 2024 but was instead delivered on 20<sup>th</sup> March 2024 in the absence of the parties. There is no evidence on record showing that parties were served with notice of the change in date. It is plausible, therefore, that the applicant was unaware of the judgment and the orders made therein.
10. Consequently, the application is dismissed. The court cannot give the applicant what he already has. However, In the interest of justice, the Deputy Registrar is directed to ensure that a copy of the judgment in HCCRA No. E041 of 2022 is availed to the applicant for his record and information.
11. Orders accordingly.

**DATED, SIGNED and DELIVERED in open court at KAKAMEGA this 23<sup>rd</sup> Day of JUNE, 2025**

**S.N MBUNGI**

**JUDGE**

In the presence of :

Court Assistant – Elizabeth Angong’a

Osoro for ODPP



Applicant present online.

