



Nyangena v Republic (Miscellaneous Criminal Application E164 of 2024) [2025] KEHC 9666 (KLR) (16 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9666 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS CRIMINAL APPLICATION E164 OF 2024**

TA ODERA, J

JUNE 16, 2025

BETWEEN

EZRA JOHN NYANGENA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The application for determination is dated 11.11.2024 in which the applicant seeks to have the period he spent in custody be considered in computing his sentence under section 333 (2) of the Criminal Procedure Code. He also sought that the sentence be reviewed so that he serves the remainder of the sentence on probation. The applicant was sentenced by Kilgoris Senior Resident Magistrate with the offence of Child Trafficking contrary to Section 13 a of the Sexual offences Act and defilement contrary to section 8 (1) as read with 8 (3) of the Sexual Offences Act and was sentenced to 10 and 20 years imprisonment respectively.
2. He filed High Court Criminal Appeal No. 10 of 2017 and his conviction and sentence on count 1 was quashed while his conviction on count 2 was upheld
3. The applicant herein seeks for review of sentence to probation and also consideration of the period he spent in remand custody pending the hearing and disposal of trial under section 333(2) of the criminal procedure code. He states that the 6 months he spent in remand ought to have been taken into consideration.

Issues for Determination

4. On perusal of the application the main issues for determination herein are:
 - a. Whether the applicant is entitled to review of sentence



- b. Whether the applicant is entitled to consideration of the remand period under Section 333(2) of the *Criminal Procedure Code*.

The Law

5. On the issue of sentence, Justice Majanja a Judge of the High Court dealt with the issue of sentence in the appeal. This court has no jurisdiction to sit on appeal on a decision of a court of concurrent jurisdiction.
6. On the remand period. 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.”

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

8. 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.”

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. The applicant was arraigned in court on 26.2.2014 and sentenced on 28.8.2014, by virtue of section 333(2) of the [Criminal Procedure Code](#), this duration ought to have been considered during sentencing. Notably, the applicant seeks to have the duration he spent in custody be taken into account which is his legal entitlement in my considered view.
11. I find that this application under Section 333(2) has merit and it is hereby allowed.
12. The remand period between 26.2.2014 and 28.8.2014 be considered in computing his sentence of serve 20 years imprisonment.
13. It is so ordered. This file is closed.

T.A ODERA

JUDGE

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF:

Court Assistant - Kipchirchir

