



**Ochieng alias Dan v Republic (Miscellaneous Application  
E126 of 2024) [2025] KEHC 8495 (KLR) (13 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8495 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS APPLICATION E126 OF 2024**

**A MABEYA, J**

**JUNE 13, 2025**

**BETWEEN**

**DANIEL OTIENO OCHIENG ALIAS DAN ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This ruling determines the 1<sup>st</sup> appellant's undated application in which he seeks to invoke the provisions of section 333(2) of the *Penal Code* and have his sentence computed from the date of arrest. The application was based on the grounds set out therein as well as his supporting affidavit sworn on the 3/7/2024.
2. The applicant was charged jointly with another not before this Court in Ksm High Court Criminal Case No 6 of 2012 with the offence of murder contrary to section 203 as read with section 204 of the *Criminal Procedure Code* and subsequently found guilty, convicted and sentenced to death.
3. Being dissatisfied with the trial court's decision, the 1<sup>st</sup> appellant moved the Court of Appeal vide Ksm Cr. Appeal No 112 of 2018, which appeal was heard and determined with the effect that the death penalty was substituted with a 20 years' jail term.
4. The applicant now seeks that his sentence be computed from the date of his arrest prior to his trial before the High Court so that his sentence can take into consideration the time spent in custody prior to his initial conviction.
5. The state opposes the application on the grounds that this Court lacks jurisdiction to review or revise the decision made by the Court of Appeal and as such section 333 (2) of the *Criminal Procedure Code* is not available to the applicant.



6. The application was disposed of by way of written submissions which I have considered. Section 333(2) of the [Criminal Procedure Code](#) provides as follows:

“(2) Subject to the provisions of section 38 of the [Penal Code](#) (Cap. 63) 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

7. The Judiciary [Sentencing Policy Guidelines](#) at paragraph 2.3.18 is also clear in this respect. It requires that the court should take into account the time already served in custody if the convicted person had been in custody during the trial. Further, that a failure to do so would impact on the overall period of detention which would result in excessive punishment that in turn would be disproportionate to the offence committed.

8. In my view, what the applicant is asking this court to resentence him taking into consideration the provisions of section 333 (2) of the [Criminal Procedure Code](#).

9. The Judiciary [Sentencing Policy Guidelines](#) provides for resentencing and provides that a re-sentencing court is clothed with the power to review a sentence by factoring in the weight of an offender’s mitigation in calculating a definitive term of imprisonment.

10. At paragraph 4.8.18, the Judiciary [Sentencing Policy Guidelines](#) provides which courts have the jurisdiction on resentencing. It provides as follows;

“4.8.18. Resentencing cases shall be handled by the ‘Sentencing Court’ – e.g., if the last court that sentenced the convict was the Court of Appeal, then the resentencing hearing shall also be handled at the Court of Appeal and not a lower court. This applies mutatis mutandis to cases in either superior or inferior courts.”

11. Remitting a matter to the trial court which had become functus officio after sentencing flies in the face of the doctrine of functus officio. It amounts to asking the trial court to clothe itself with the jurisdiction of an appellate court. See [Republic v Ongaro & another](#) (Criminal Case 62 of 2013) [2023] KEHC 2309 (KLR)].

12. Noting that the Court of Appeal has pronounced itself by substituting the applicant’s death sentence with one of 20 years’ imprisonment, this Court cannot reopen the same. It therefore follows that this Court lacks the requisite jurisdiction to review the finding by the Court of Appeal.

13. From the foregoing, I find that I have no jurisdiction to entertain the application in resentencing and as a consequence, the applicant’s prayer for resentencing is hereby declined. Let him go back to that harrowed Court and seek the re-sentencing, is need be.

It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 13<sup>TH</sup> DAY OF JUNE, 2025.**

**A. MABEYA, FCI Arb**

**JUDGE**

