



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kibiru v Republic (Criminal Revision E226 of 2024)
[2025] KEHC 10081 (KLR) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10081 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL REVISION E226 OF 2024
FN MUCHEMI, J
JULY 10, 2025**

BETWEEN

YOWERI KIBIRU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. The application for determination dated 14th October 2024 seeks for orders of review of sentence under Section 333(2) of the [Criminal Procedure Code](#) to the effect that time spent in custody during the pendency of the trial be considered.
2. The applicant states that he was convicted by Thika Chief Magistrate in Criminal (S.O.) Case No. 99 of 2020 with the offence of defilement contrary to Section 8(1) as read with 8(4) of the [Sexual Offences Act](#) No. 3 of 2006. He was sentenced to serve fifteen (15) years imprisonment on 9th September 2021. The applicant says he filed an application for leave to appeal out of time in this court Thika HC Miscellaneous Criminal Application No. E006 of 2024 and the same was dismissed on 22nd August 2024 for lack of merit.
3. The applicant herein seeks for review of sentence and asks the court to invoke section 333(2) of the [Criminal Procedure Code](#) and consider the period he served in remand custody pending the hearing and disposal of his case. The applicant states that he was arrested on 4th November 2020 and convicted and sentenced on 9th September 2021 which is a period of nearly one year.
4. The respondent does not oppose the application and states that the trial magistrate did not take into consideration the time the applicant spent in custody.
5. Parties put in written submissions.



The Applicant's Submissions.

6. The applicant relies on Section 333(2) of the *Criminal Procedure Code* and the cases of *Abamad Aboulfathi Mohammed & Another v Republic* (2018) eKLR and *Vincent Sila Jona & 87 Others v Republic* Petition No. 15 of 2020 and submits that he was arrested on 4th April 2014 and sentenced on 12th October 2015, thus the duration of 1 year 6 months ought to be considered during sentencing which the trial magistrate failed to do.

The Law

7. 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.”

8. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody.
9. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in *Abamad Aboulfathi 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.”

10. 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.”

11. 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.”

12. This court is empowered by Article 165(6) of the *Constitution of Kenya* to review decisions by subordinate courts. 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.

13. The applicant was arrested on 5th November 2020 and when he took plea the trial court granted him bond of Kshs. 200,000/- with one surety of similar amount. The trial court delivered its judgment on 9th September 2021 and sentenced the applicant on the same day. Thus the applicant spent ten (10) months in custody. By virtue of Section 333(2) of the *Criminal Procedure Code*, this duration ought to have been considered during sentencing. Notably, the applicant has not contested the sentence. His singular prayer is for the court to have the duration he spent in custody taken into account. I have perused the court record and noted that during sentencing, the trial court took into account the mitigation by the applicant and then proceeded to sentence the applicant to fifteen (15) years imprisonment in line with Section 8(4) of the *Sexual Offences Act*.

14. It is evident from the record that the trial court was silent on the issue of the duration the applicant spent in remand. This confirms that Section 333 (2) was not complied with. As such, it is my considered view that the application has merit and it is hereby allowed. The applicant shall serve fifteen (15) years imprisonment to commence from 4th November 2020 being the date of arrest.

15. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 10TH DAY OF JULY 2025.

F. MUCHEMI

JUDGE

