Kinuthia v Republic (Criminal Revision E111 of 2024)
[2025] KEHC 10153 (KLR) (10 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10153 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL REVISION E111 OF 2024

FN MUCHEMI, J

JULY 10, 2025

BETWEEN

JULIUS MUTUNGA KINUTHIA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

Brief Facts

1. This undated seeks for orders of review of sentence under Section 333(2) of the *Criminal Procedure Code* to the effect that the period spent in custody during the trial be taken into account in the sentence the applicant is currently serving

2. The applicant states he was convicted in Thika CM Criminal Case No. 4157 of 2016 of the offence of robbery with violence contrary to Section 296(2) of the *Penal Code* and was sentenced to serve twenty (20) years imprisonment. The applicant appealed to the High Court in Kiambu Criminal Appeal No. E020 of 2021 whereas his appeal was dismissed on 10th November 2021.

3. The applicant seeks for review of sentence by invoking the provisions of section 333(2) of the *Criminal Procedure Code* and consider the period he spent in remand pending hearing and disposal of his case taken into account. The applicant states that he was arrested on 27th May 2016 and sentenced on 7th July 2020 which was a period of 4 years and 2 months which period the trial court failed to consider during sentencing.

4. In opposition to the application, the respondent filed Grounds of Opposition and submissions dated 27th May 2025. It was stated that the applicant was charged in Thika Chief Magistrate Court Criminal Case No. 4157 of 2016 of the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*. He was found guilty of the offence and sentenced to twenty (20) years imprisonment

which sentence is constitutional and legal. The respondent argued that the trial magistrate took into consideration the time spent in custody and thus sentenced him to twenty years imprisonment.

5. The respondent states that the applicant filed an appeal at the High Court vide Criminal Appeal No. E020 of 2021 which was dismissed. The respondent argues that upon conviction, the accused choose to either appeal or apply for revision and in the instant case. In this matter, the applicant appealed in the High Court in Kiambu High Court Criminal Appeal No. E020 of 2021 As such, the applicant has no remedy for revision of sentence.

6. The respondent states that this court has become functus officio and has no jurisdiction to resentence since a court of concurrent or similar jurisdiction upheld the sentence of the trial court and dismissed the appeal on conviction. This application for review is equivalent to asking the court to sit as an appellate court against its own judgment and determine that appeal has chances of success.

7. The respondent argues that the issue of sentence was dealt with conclusively and concluded to the effect that the entire appeal was found to have no merit. Further, the sentence passed by both the trial court and High Court was proper lawful and reasonable for the courts considered the aggravating and mitigating circumstances.

8. The respondent states that the offence which the applicant was found guilty of a felony which attracts a death sentence under is Section 296(2)of the *Penal Code*.

The Law

9. 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."

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

11. The Court of Appeal 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 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."

12. 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."

13. 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.

14. The applicant was arrested on 27th May 2016 and upon taking plea, the trial court granted him bond of Kshs. 1,000,000/- with one surety of a similar amount. The trial court delivered its judgment on 29th June 2020 and sentenced the applicant on 7th July 2020. Thus the applicant spent four (4) years, 1 month and ten (10) days 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. He seeks 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 of the applicant, the period the applicant spent in custody and then sentenced him to twenty (20) years imprisonment.

15. The trial magistrate in sentencing the applicant said: "Mitigation considered and the period spent in custody ..... The accused is hereby sentenced to serve twenty (20) years imprisonment." The wording of the sentencing proceedings leaves no doubt that the period spent in custody was taken into account by the court. This informs the soft sentence imposed compared to life imprisonment provided for under Section 290(2) of the *Penal Code*. Allowing review of sentence herein would amount to a repeat of the task performed by the trial court,

16. It is very clear from the judgment of the judge D.S. Majanja that the High Court on appeal dealt with conviction and sentence and found no merit in the entire appeal. The said appeal was dismissed for lack of merit. This court is of equal and concurrent jurisdiction with the court that determined the appeal and as such it has no jurisdiction to review the judgment of that court.

17. In conclusion, I find no merit in this application and it is hereby dismissed.

18. It is hereby so ordered.

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

F. MUCHEMI

JUDGE