Njoroge v Republic (Criminal Revision E136 of 2024)
[2025] KEHC 11151 (KLR) (24 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11151 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL REVISION E136 OF 2024

FN MUCHEMI, J

JULY 24, 2025

BETWEEN

PETER KAMAU NJOROGE ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

Brief Facts

1. The application for determination is dated 29th January 2024 in which the applicant seeks to have his sentence reviewed.

2. The applicant states that he was convicted by Thika Chief Magistrate in Criminal Case No. 4990 of 2010 with the offence of defilement contrary to Section 8(1) as read with 8(3) of the *Sexual Offences Act* and was sentenced to twenty years imprisonment. The applicant appealed on to the High Court Kiambu Criminal Appeal No. 59 of 2016 and the appeal was dismissed on 7th March 2019.

3. The applicant states that he is 58 years old, a family man and his children are continuing to suffer in his absence. The applicant further states that he spent a period of 4 years and 5 months in remand pending trial since he was arrested on 6/5/2010 and urges the court to consider the said period pursuant to Section 333(2) of the *Criminal Procedure Code*.

4. The applicant further states that he was diagnosed with epilepsy which renders him a health hazard in the prison environment and he has developed mental problems. He further states that he has lost his teeth due to dental cavity and requires a soft diet and specialized treatment.

5. The applicant states that he has enrolled in various rehabilitation courses and attained various certificates.

6. The respondent filed grounds of opposition and submissions dated 11th June 2025 and argues that the instant court became functus officio and has no jurisdiction to resentence since a court of concurrent or similar jurisdiction, that is, the Kiambu High Court vide Appeal No. 59 of 2016 upheld the sentence of the trial court. The respondent further argues that asking the current court to resentence is equivalent to asking the court to sit as an appellate court against its own judgment and determine whether the appeal has chances of success.

7. The respondent states that the issue of sentence has been dealt with conclusively to the effect that the appeal on conviction and sentence had no merit in the High Court. The respondent further states that the offence the applicant was found guilty of is a felony which attracts a death sentence and is legal and constitutional considering the circumstances. The respondent further states that the applicant is just testing the waters and trying his lack thus forum shopping which actions should be discouraged to deter other potential applicants with similar applications.

The Law

8. 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.

9. The applicant herein was convicted in the Chief Magistrate Court in Thika in Criminal Case No. 4990 of 2010 with the offence of defilement contrary to Section 8(1) as read with 8(3) of the *Sexual Offences Act*. The applicant was sentenced to twenty years imprisonment and being aggrieved by the conviction and sentence appealed to the High Court in Kiambu being Criminal Appeal No.59 of 2016. The court heard the appeal and dismissed the same on 7th March 2019 thereby upholding the conviction and sentence.

10. Article 50(2)(q) of *the Constitution* provides:-

> (2) Every accused person has the right to a fair trial, which includes the right:-
>
> (q) If convicted, to appeal to, or apply for review by a higher court as prescribed by law.

11. It therefore follows that this Honourable court has no power to review a decision of a court of similar or concurrent jurisdiction and reduce the sentence to a lesser sentence as sought by the applicant. Review can only be done by a court of higher jurisdiction in a situation where an appeal has not been preferred. The applicant already filed an appeal against the sentence which was dismissed for lack of merit. Thus the court has no legal basis to do review of the said sentence.

12. The applicant states has further argued that he spent 4 years and 5 months in custody which was not taken into consideration pursuant to Section 333(2) of the *Criminal Procedure Code*.

13. 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."

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

15. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in Ahamad Abolfathi Mohammed & Another vs 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
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> 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."

16. The same court 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
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> period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

17. 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."

18. The applicant was arrested on 3rd December 2010 and the trial court delivered judgment and sentenced the applicant on 7th October 2014. Thus the applicant spent three (3) years and 10 months in custody. By virtue of Section 333(2) of the *Criminal Procedure Code*, this duration ought to have been considered during sentencing. I have perused the court record and noted that during sentencing, the trial court took into account the mitigation by the applicant and then sentenced the applicant to twenty (20) years. It is however evident that the trial court was silent on the issue of the duration the applicant spent in remand which was a requirement of the law – that that period be considered.

19. It is my considered view that the application partly has merit and it is hereby allowed in regard to the prayer under Section 333(2) of the *Criminal Procedure Code*.

20. The applicant shall serve twenty years imprisonment to commence from 6/5/2010 being the date of arrest.

21. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 24TH DAY OF JULY 2025.

F. MUCHEMI

JUDGE