



**Wanjiru v Republic (Miscellaneous Criminal Application
E096 of 2024) [2025] KEHC 10111 (KLR) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10111 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CRIMINAL APPLICATION E096 OF 2024**

FN MUCHEMI, J

JULY 10, 2025

BETWEEN

JOSEPH NJOROGE WANJIRU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. The application for determination is dated 4th December 2024 in which the applicant seeks to have his sentence reviewed under Section 333(2) of the *Criminal Procedure Code*.
2. The applicant says he was convicted by Thika Chief Magistrate in Criminal Sexual Offence Case No. 1532 of 2014 with the offence of defilement contrary to Section 8(1) as read with 8(3) of the *Sexual Offences Act* No. 3 of 2006 and was sentenced to serve twenty (20) years imprisonment on 12th October 2015. The applicant lodged an appeal in High Court in Kiambu being Criminal Appeal No. 163 of 2016 but says he withdrew it on 10th July 2018. However, no orders of withdrawal was annexed to this application.
3. The applicant seeks for review of sentence urging the court to invoke section 333(2) of the *Criminal Procedure Code* by taking into account the period he served in remand custody pending the hearing and disposal of his case. The applicant states that he was arrested on 4th April 2014 and convicted and sentenced on 12th October 2015 which is a period of 1 year and 6 months.
4. The respondent filed Grounds of Opposition dated 28th May 2025 and states that although the applicant alleges that he withdrew his appeal in Kiambu High Court Criminal Appeal No. 163 of 2017 but failed to annex any evidence of withdrawal of appeal.



5. The respondent states that the offence the applicant was found guilty of is a felony which attracts twenty years imprisonment, which sentence is lawful. Further, recent decisions of the Supreme Court have held that life imprisonment is legal and not in contravention of the constitution in defilement cases.
6. Parties put in written submissions.

The Applicant's Submissions.

7. The applicant relies on Section 333(2) of the Criminal Procedure Code and the cases of Ahamad Aboulfathi Mohammed & Another vs Republic (2018) eKLR and Vincent Sila Jona & 87 Others vs 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 Respondent's Submissions.

8. The respondent reiterates what she depones in her affidavit and relies on the decisions of the Supreme Court in Petition No. E002 of 2024 Republic vs Evans Nyamari Ayako and Petition No. E013 of 2024 Republic vs Julius Kitsao Manyeso.

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 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 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.”

12. 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 period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”

13. 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.”

14. 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.

15. From the original record, it is noted that the applicant was arrested on 15th April 2014. His plea was taken on 16th April 2014 and he was released on bond of Kshs. 200,000/- with one surety of a similar amount. The trial court delivered its judgment on 12th October 2015 and sentenced the applicant on the same day. As such, the applicant spent one (1) year, 5 months and twenty-seven (27) 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 and only seeks to have the duration he spent in custody be taken into account which is his legal right.

16. 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 imprisonment in line with Section 8(3) of the *Sexual Offences Act*. It is however evident that the trial court was silent on the issue of the time spent in remand by the applicant. For the foregoing considerations, I find this application merited and hereby allow it as prayed.

17. The period of one (1) year and six (6) months is hereby taken into account in the sentence. The applicant shall serve eighteen (18) years and six (6) months effective from the date of conviction, 12th October 2015.



18. It is hereby so ordered.

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

F. MUCHEMI

JUDGE

