



**Andayi v Republic (Criminal Miscellaneous Application E061 of 2024)
[2025] KEHC 12880 (KLR) (17 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12880 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL MISCELLANEOUS APPLICATION E061 OF 2024
JN KAMAU, J
SEPTEMBER 17, 2025**

BETWEEN

BIKO ANDAYI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Introduction

1. The Applicant herein was charged with others on two (2) Counts. On Count I, he was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code and on Count IV, he was charged with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* No 3 of 2006. He was convicted and sentenced to hang on Count 1. The sentence on Count II (sic) was suspended.
2. Being aggrieved by the said decision, he lodged an appeal against his conviction and sentence at the High Court in Kakamega HCCRA No 29 of 2016. His conviction was upheld but his sentence was reduced to twenty (20) years imprisonment on Counts 1 and IV.
3. On 15th May 2024, he filed a Notice of Motion application of even date herein seeking an order that the period of one (1) year and three (3) months he spent in remand while his trial was ongoing be considered as part of his sentence. He pointed out that he was arrested on 9th September 2014 and was sentenced on 23rd December 2015.
4. He averred that the omission by the Trial Court was not in promotion of his right as stipulated in Articles 19(2), 3(a), 21(1), 25(c), 50(1) and 50(2)(p) of *the Constitution* of Kenya, 2010. In this regard, he relied on Section 333(2) of the Criminal Procedure Code and the case of Bethwel Wilson Kibor vs Republic Criminal Appeal No 78 of 2009 (eKLR citation not given) where while guided by Section 333(2) of the Criminal Procedure Code, the appellate court therein, reduced the appellant's sentence



to time already served in remand before conviction as the trial court had not indicated whether it had taken into account the nine (9) years the offender served in custody.

5. The Respondent was not opposed to his application and hence, both parties did not file their respective Written Submissions. This Ruling is therefore based on the Applicant's application and his affidavit evidence.

Legal Analysis

6. Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides that:-

“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” (emphasis court).

7. Further, Clause 4.6.20 (ix) of the Judiciary Sentencing Policy Guidelines provides that:-

“The Sentencing Court shall be guided by the sentencing principles and objectives set out in Part I of these the Guidelines in all resentencing hearings. The following mitigating factors were set out by the Supreme Court as particularly relevant in a resentencing hearing:...

(ix) Time already spent in prison by the convict...”

8. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.

9. Notably, the Charge Sheet indicated that the Applicant was arrested on 14th September 2014. Although, he was granted bond, he did not seem to have posted the same. He was sentenced on 23rd December 2015. A reading of the decision by the High Court in *Kakamega Allan Juma & 2 Others vs Republic* [2019] KEHC 450 (KLR), Njagi J rendered himself as follows:-

“The appellants not only robbed the complainant but also raped her. I hereby set aside the death sentence imposed on them and re-sentence them as follows;

Count 1- Each appellant to serve 20 years imprisonment.

Count 2- 1st appellant to serve 20 years imprisonment.

Count 3- 2nd Appellant to serve 20 years imprisonment.

Count 4 -3rd appellant to serve 20 years imprisonment. Sentence to run concurrently commencing from the date of sentence by the lower court (emphasis court).”

10. It was evident that the learned Judge pronounced himself on when the sentence the Applicant would serve would start running. He was clear that the sentence could start running from the date of the judgment of the lower court. As he could have upheld the death sentence which was the minimum mandatory prescribed sentence, this court could not assume that he had not considered the period the Applicant spent in remand during trial while meting out to him a determinate sentence.

11. As the learned judge was of equal and competent jurisdiction as this court, this court could not sit on appeal on his decision and purport to alter the same. The only option that the Applicant had was to



have his decision reviewed by the Court of Appeal. This court held the view that its pronouncement relating to Section 333 (2) of the Criminal Procedure Code was res judicata.

Disposition

12. Accordingly, for the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated and filed on 15th May 2024 was not merited and the same be and is hereby dismissed. The Applicant's conviction and sentence be and is hereby upheld as they were both safe.
13. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 17TH DAY OF SEPTEMBER 2025

J. KAMAU

JUDGE

