



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gatere v Republic (Criminal Revision E013 of 2025)  
[2025] KEHC 12695 (KLR) (10 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12695 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CRIMINAL REVISION E013 OF 2025  
FN MUCHEMI, J  
SEPTEMBER 10, 2025**

**BETWEEN**

**MICHAEL MITHAMO GATERE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The application for determination is undated whereas the applicant seeks to have his sentence reviewed under Section 333[2] of the Criminal Procedure Code.
2. The applicant was convicted by Thika Chief Magistrate, in Criminal Case No. 2783 of 2018 with the offence of obtaining by false pretence contrary to Section 313 of the Penal Code and was sentenced to serve two [2] years imprisonment.
3. The applicant herein seeks for review on sentencing and asks the court to invoke section 333[2] of the Criminal Procedure Code and consider the period he served in remand pending the hearing and disposal of his case. The applicant states that the two years imprisonment sentence imposed be computed from the date of admission to prison which is 28<sup>th</sup> March 2021.
4. The respondent concedes to the application.
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 Bethwel Wilson Kibor v Republic [2009] eKLR; Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR and Boniface Mugo Maingi in Criminal Revision No. 001 of 2021 Nyeri and submits that the trial court did not consider the period of four years that he spent in custody.



## The Law

7. The applicant has come to this Honourable court by way of review provided for under Article 50 of *the Constitution*. It 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.

The above provision does not provide for review where a convict has already appealed to a higher court. In the instant matter the applicant did not prefer an appeal against the decision of the trial court. As such, this application for review is properly before this court.

8. 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.”

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

10. The provisions of section 333[2] of the Criminal Procedure Code was the subject of the decision in *Ahamad Abolfathi 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 19<sup>th</sup> June 2012.”

11. 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 22<sup>nd</sup> 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 10<sup>th</sup> May 2018 and when he took plea the trial court granted him bond of KShs. 400,000/- with one surety of similar amount or cash bail of similar amount. The applicant was released on bond on 12<sup>th</sup> October 2018 upon meeting the bond terms. He then absconded court until he was arrested on 29<sup>th</sup> March 2021. The trial court cancelled the bond and the applicant was remanded in custody during the hearing and final disposal of his case. The trial court delivered its judgment on 2<sup>nd</sup> July 2024 and sentenced the applicant on 29<sup>th</sup> January 2025. Thus the applicant spent four [4] years and two [2] months in custody. By virtue of Section 333[2] of the Criminal Procedure Code, this duration ought to have been taken into account during sentencing. The single prayer in this application is to have the duration he spent in custody be taken into account which is his legal right.

15. I have perused the court record and noted that during sentencing, the trial court took into account the mitigation of the applicant and then sentenced him two [2] years imprisonment. It is however evident that the trial court was silent on the issue of the duration the applicant spent in remand. As such, it is my considered view that the application has merit and is hereby allowed.

16. The applicant was sentenced to serve two [2] years imprisonment in default, a fine of KSh.300,000/= on 29/01/2024. Considering remission normally granted in custodial sentences, the applicant has fully served his sentence.

17. For this reason, he is hereby set at liberty unless otherwise lawfully held.

18. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 10<sup>TH</sup> DAY OF SEPTEMBER 2025.**



**F. MUCHEMI**  
**JUDGE**

