JKM v Republic (Criminal Revision E130 of 2024)
[2025] KEHC 12709 (KLR) (9 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12709 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL REVISION E130 OF 2024

FN MUCHEMI, J

SEPTEMBER 9, 2025

BETWEEN

JKM ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

Brief Facts

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 says was convicted by Thika Chief Magistrate in Criminal (S. O) case No. E042 of 2022 of the offence of incest contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006 and was sentenced to serve ten (10) years imprisonment.

3. The applicant herein seeks for review on sentencing urging this court to invoke section 333(2) of the Criminal Procedure Code and consider the period he served in remand custody pending the hearing and disposal of his case. The applicant states that he was arrested on 18th May 2022 and sentenced on 30th October 2023 which amounts to one (1) year and five (5) months that the trial magistrate failed to consider during sentencing. The applicant further states that he is remorseful, a first offender and is rehabilitated.

4. In opposition to the application, the respondent filed Grounds of Opposition and submissions dated 26th May 2025 and states that the applicant has not argued that the sentence passed was manifestly harsh and excessive, illegal or improper or that the trial court acted on wrong principles or omitted relevant factors or took into account irrelevant factors. The applicant made generalized reasons which do not suffice interference with the discretion of the trial court in sentencing or warranting upsetting the sentence imposed by the trial court.

5. The respondent argues that the trial court considered the mitigation by the applicant. Both the mitigating and aggravating circumstances were considered but the aggravating circumstances outweighed the mitigating circumstances hence the sentence by the court below as the complainant was only 9 years old.

6. The respondent states that the sentence imposed by the court below was proper and legal. Further, the offence which the applicant was found guilty is a felony which attracts a prison term not less than ten years and can be enhanced to life imprisonment. Thus, the sentence imposed was reasonable.

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.

8. The above provision prohibits review where a convict has gone through the appeal process. In the instant matter there is no evidence on record that the applicant has appealed the decision of the trial court and thus the application for review is properly before the court.

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. The applicant was arrested on 18th May 2022. The court delivered its judgment on 3rd October 2023 and sentenced the applicant on 30th October 2023. The applicant's prayer is to have the duration spent in custody be taken into account which is his legal right. Section 20 (1) of the *Sexual offences Act* provides for sentence of not less than ten (10) years imprisonment.

16. I have perused the court record and noted that during sentencing, the magistrate took into account mitigation by the applicant and the duration the applicant spent in prison since. The applicant was charged on 19th May 2022 and sentenced to ten (10) years imprisonment as provided under Section 20(1) of the *Sexual Offences Act*. It is evident that the trial court took into consideration the time spent in remand by imposing a sentence of ten (10) years imprisonment and not more.

17. Thus, the application has no merit and for avoidance of doubt, the sentence of ten years imprisonment shall run from 18th May 2022.

18. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 9TH DAY OF SEPTEMBER 2025.

F. MUCHEMI

JUDGE