



**Ng'ang'a v Republic (Criminal Revision E031 of 2025)
[2025] KEHC 12675 (KLR) (10 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12675 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL REVISION E031 OF 2025
FN MUCHEMI, J
SEPTEMBER 10, 2025**

BETWEEN

SIMON NJUGUNA NG'ANG'A APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. The application for determination dated 11th July 2024 seeks for review of sentence under Section 333(2) of the Criminal Procedure Code.
2. The applicant states that he was convicted by Gatundu Chief Magistrate in Criminal Case No. E826 of 2023 of the offence of burglary contrary to Section 304(1)(b) of the Penal Code and was sentenced to serve three (3) years imprisonment.
3. The applicant herein seeks for review of sentence urging the court to invoke section 333(2) of the Criminal Procedure Code thus taking into account the period he spent in remand pending the hearing and disposal of his case. The applicant states that he was arrested on 6th October 2023 and sentenced on 13th June 2024 which translates to 8 months and some days that the trial magistrate failed to consider during sentencing.
4. The respondent concedes to the application and states that the trial magistrate did not consider the time spent in custody by the applicant during sentencing.

The Law

5. 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.
6. The above provision prohibits review where a convict has gone through the appeal process. In the instant matter the applicant has not appealed the decision of the trial court and thus the application for review is properly before the court.
7. 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.”
8. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody pending trial.
9. 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.”
10. 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.”

11. 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.”

12. 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.

13. The applicant was arrested on 6th October 2023 and when he took plea the trial court granted him bond of Kshs. 200,000/- with one surety of similar amount but remained in custody thereafter. I have perused the original record and there is no evidence of any appeal having been filed. This application was filed about one (1) year after conviction and sentence. The trial court delivered its judgment on 6th June 2024 and sentenced the applicant on 13th June 2024. Thus the applicant spent eight (8) months and seven (7) days 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. The trial court further considered the presentence report and the fact that the applicant was not a first time offender and then sentenced the applicant to three (3) 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.

14. It is hereby ordered that the applicant do serve the sentence imposed by the trial court less the eight (8) months that he spent in custody. The applicant shall therefore serve three (3) years imprisonment to commence from 6th October 2023 being the date of arrest.

15. It is hereby so ordered.

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

F. MUCHEMI

JUDGE

