Njeru v Republic (Miscellaneous Criminal Application E051 of 2024)
[2025] KEHC 12601 (KLR) (9 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12601 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

MISCELLANEOUS CRIMINAL APPLICATION E051 OF 2024

FN MUCHEMI, J

SEPTEMBER 9, 2025

BETWEEN

MURIITHI NJERU ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

Brief Facts

1. The application for determination is dated 13th June 2024 the seeks for orders of review of sentence under Section 333(2) of the Criminal Procedure Code.

2. The applicant was convicted by Thika Chief Magistrate, in Criminal Case No. 81 of 2018 with the offence of sexual assault contrary to Section 5(1) as read with 5(2) of the *Sexual Offences Act* No. 3 of 2006 and was sentenced to serve seven (7) years imprisonment.

3. The applicant herein seeks for review of sentence and urges 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 he was arrested on 21st August 2018 and sentenced on 6th July 2022 which was two (2) years and five (5) months that the trial magistrate failed to consider during sentencing.

4. In opposition to the application, the respondent filed Grounds of Opposition and submissions dated 4th June 2025 and states that the sentence passed was illegal and improper. The respondent argues that the trial court acted on wrong principles and omitted relevant factors or took into account irrelevant factors in sentencing. The trial court failed to take into account the age of the complainant at the time which was only four years. Furthermore, the trial court did not give any reasons as to the sentence passed of 7 years as opposed to the prescribed sentence of a term of not less than 10 years imprisonment.

Thus there is need to interfere with the discretion or upsetting the sentence imposed by the trial court by this Honourable Court in order to impose the correct sentence as envisaged by the Act.

5. The respondent states that the applicant is just testing the waters and trying his luck which is kind of forum shopping. It is argued that such tendencies by convicts ought to be discouraged to deter other potential applicants with similar applications.

The Law

6. 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.

7. The above provision prohibits review where a convict has gone through the appeal process. In the instant matter the applicant says he did not appeal against the decision of the trial court and without any evidence to the contrary this application for review can be said to be properly before the 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 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."

11. 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."

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 21st August 2018 and when he took plea the trial court granted him bond of Kshs. 3 million/- with one surety of similar amount or a cash bail of Kshs. 200,000/-. On 13th May 2020, the trial magistrate reviewed the cash bail from Kshs. 200,000/- to Kshs. 50,000/-. On 20th January 2021, the applicant's sister paid the cash bail and he was released. The trial court delivered its judgment on 22nd June 2022 and sentenced the applicant on 6th July 2022. Thus the applicant spent two (2) years and four (4) months in custody. By virtue of Section 333(2) of the Criminal Procedure Code, this duration ought to have been considered during sentencing.

15. I have perused the court record and noted that during sentencing, the trial court took into account mitigation by the applicant and further considered the presentence report and the fact that the minor was a child of tender age and then sentenced the applicant to seven (7) years imprisonment in line with Section 5(2) of the *Sexual Offences Act*. It is however evident that the trial court was silent on the issue of the duration the applicant spent in remand.

16. It is, therefore, correct to find that the trial magistrate denied the applicant his right under Section 333(2) of the Criminal Procedure Code. In my considered view, this application has merit and it is hereby allowed.

17. It is hereby ordered that the applicant do serve the seven (7) years imprisonment less the duration of two (2) years and four (4) months he spent in custody which translates to a sentence of imprisonment of five years and eight (8) months.

18. It is hereby so ordered.

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

F. MUCHEMI

JUDGE