



**Njoroge v Republic (Criminal Revision E029 of 2024)  
[2025] KEHC 12690 (KLR) (9 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12690 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CRIMINAL REVISION E029 OF 2024  
FN MUCHEMI, J  
SEPTEMBER 9, 2025**

**BETWEEN**

**KELVIN KAMAU NJOROGE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The application for determination dated 4<sup>th</sup> March 2024 whereas the applicant seeks to have his sentence reviewed under Section 333(2) of the Criminal Procedure Code.
2. The applicant said that he was convicted by Gatundu Chief Magistrate, in Criminal Case No. 350 of 2023 with the offence of possession of narcotic drugs contrary to Section 3(1) as read with Section 2(A) of the Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994 as read with Section 4(A)(1) Amendment Act No. 2 of 2022 and was sentenced to serve four (4) years imprisonment.
3. The applicant herein seeks for review of sentence and urges 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 3<sup>rd</sup> May 2023 and sentenced on 4<sup>th</sup> July 2023 which amounts to two (2) months that the trial magistrate failed to consider during sentencing. The applicant further urges the court to consider giving him an alternative of a fine.
4. In opposition to the application, the respondent filed Grounds of Opposition and submissions dated 5<sup>th</sup> June 2025 and states that the applicant was charged with the offence of possession of narcotic drugs in Gatundu Chief Magistrate Court Criminal Case No. E350 of 2023 where he pleaded guilty and was sentenced to four years imprisonment which was legal and constitutional. The respondent argues that the aggravating circumstances outweighed the mitigating circumstances hence the sentence by the trial court.



## 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 there is no evidence on record to the effect that the appellant appealed the judgment of the court below. As such, this 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.

9. 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.”

10. 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.”

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 6<sup>th</sup> May 2023 and upon taking plea, he entered a plea of guilty. The trial court sentenced the applicant on 4<sup>th</sup> July 2023 upon receiving the social inquiry report. The applicant has not challenged the sentence imposed on him. His prayer is for this court to consider the duration he spent in custody pending trial. I have perused the court record and noted that during sentencing, the trial court noted that the applicant was not a first offender. The trial magistrate considered the amount of drugs involved which was noted and that the applicant had not learnt from the previous convictions on similar offences and the sentences one of which he was placed on probation. The court then stated that a deterrent sentence would be suitable. The trial court thus proceeded to sentence the applicant to serve 4 years imprisonment which was to run from 6<sup>th</sup> May 2023 when he was arrested. It is therefore that the trial court took into consideration the time spent in remand. It is my considered view that this application dated 4<sup>th</sup> March 2024 lacks merit and is hereby dismissed.

14. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 9<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**F. MUCHEMI**

**JUDGE**

