



**Njumbe v Republic (Miscellaneous Application E008 of 2024)  
[2025] KEHC 13283 (KLR) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13283 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MISCELLANEOUS APPLICATION E008 OF 2024  
RC RUTTO, J  
SEPTEMBER 25, 2025**

**BETWEEN**

**DANIEL MACHARIA NJUMBE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant has filed his undated Notice of Motion under section 333 (2) of the Criminal Procedure Code seeking the following prayers reproduced verbatim:
  2. That this Hon. seized of competent jurisdiction to hear and determine this application;
  3. That section 333 (2) of the Criminal Procedure Code applies to the original sentence as well or the sentence imposed during the sentencing;
  4. That my ten (10) years sentence be backdated to the date of arrest to capture the time spent in remand custody;
  5. Any other favorable relief order of further orders that this Hon. Court may deem fit to grant.
2. The application is supported by the applicant's undated supporting affidavit. in it he states that he was convicted for the offence of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#) and sentenced to 10 years imprisonment. However, he contends that the trial court failed to consider the period spent in custody prior to sentencing. He therefore urged this court to take into account the period spent in custody and revise his sentence.
3. The application was unopposed by the prosecution when it came up for hearing on 11<sup>th</sup> June 2025. The applicant reiterated his plea for the court to grant the orders sought.



4. A brief background to the application is that the applicant was charged in Kithimani PMCC No. E059 of 2021 with the offence of committing an indecent act with a child, contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on 17<sup>th</sup> November 2021, at Kwa Kulu Market Ndalani Location within Machakos County, the applicant intentionally touched the breasts of AM, a child aged 13 years old. The applicant was arraigned in court on 22/11/2021 and entered a plea of ‘not guilty’. Upon conclusion of a full trial, the trial magistrate convicted him of the offence and sentenced him to serve ten years imprisonment. The court held that the accused to serve 10 years imprisonment count 1 and count 2 to serve one month imprisonment. Sentence to run consecutively.
5. The applicant is aggrieved by the sentence and now seeks a revision. He urges that the trial court ought to have directed that the sentence to run from the date of his arrest and not from the date of judgment.
6. 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.”

7. This provision was enunciated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs. Republic* [2018] eKLR when it held as follows:

“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.”

8. The Judiciary Sentencing Policy Guidelines provides as follows on the said provisions:

“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.”

9. This guidance underscored the need for proportionality and fairness in sentencing, particularly where the accused has already spent time in remand custody. In light of the foregoing jurisprudence and policy framework and pursuant to the revisionary jurisdiction conferred upon this court under Article 165 (6) of Constitution, I find merit in the applicant’s request.
10. Further, the application is unopposed and it is evident from the record that the trial court did not take into account the period the applicant had spent in custody prior to sentencing. Accordingly, I exercise this court’s discretion and direct the applicant’s sentence of ten years imprisonment imposed on the applicant to run from the date he was arrested.
11. It is so ordered.

**DATE, SIGNED AND DELIVERED AT MACHAKOS THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**RHODA RUTTO**

**JUDGE**

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant

