



**Barasa v Republic (Criminal Miscellaneous Application E048 of 2023)
[2025] KEHC 14542 (KLR) (13 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14542 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL MISCELLANEOUS APPLICATION E048 OF 2023
S MBUNGI, J
OCTOBER 13, 2025**

BETWEEN

EZEKIEL JUMA BARASA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant herein filed a notice of motion application dated 23rd May 2023, where he sought the following orders;
 - a. That the applicant wishes to be present on the hearing date of this application
 - b. That, the Hon. Court be pleased to and invoke section 333 (2) and put into consideration the applicant's mitigation under sections 216 and 329 of the Criminal Procedure Code.
 - c. That this application be treated as urgent and be served on a priority basis or any other orders as the Hon. Court shall deem just and fit.
2. In his supporting affidavit, the applicant avers that he had been charged, convicted, and sentenced to 25 years for the offense of murder.
3. He has now approached this honorable court for leniency and seeks that the court considers the time that he spent while he was in remand custody.
4. According to the applicant, he was arrested on 4/4/2009 and later convicted on 15/2/2012, which he claims is a period of 15 years and 8 months.
5. He quoted the court of appeal case of Ahmed Abolifath Mohammed and Another vs. R (2018) eKLR and claimed that the omission by the trial court in considering his rights was not in promotion of his rights under Article 25 (2) of *the Constitution*.



6. He prays that the court reduce his sentence of 25 years to a less severe sentence, as he was a first offender.
7. He claims that he was the sole breadwinner and had 3 children and a wife who depended on him, and prays for a second chance to change his life.
8. The application was to be canvassed by way of a written submission.
9. The applicant filed his submissions dated 17th November 2023, where he admitted that he had been charged and convicted for the offence of murder and was sentenced to 25 years' imprisonment.
10. He acknowledged that he had appealed at the court of appeal in Kisumu in COA NO 2555 of 2015, where both the sentence and conviction were dismissed for lack of merit.
11. He has now filed an application seeking the court to consider the time that he had spent before being sentenced, which was 13 ½ years, that this court failed to take into consideration, which was a violation of his rights under Article 25 (a) and 165 (3) (b) of *the Constitution*.
12. He submits that he was the sole breadwinner of his family, a family man, and further states that he is remorseful of his actions and that he has since reformed and rehabilitated from his actions, claiming that he was arrested on 23/3/200 and convicted on 29/5/2012, which is 15 years down the line.
13. He claims that he has school-going children and that his wife abandoned her marital home because of his long period of incarceration. He states that he has other ailments, such as chronic ulcers, asthma, HIV/AIDS, and needs proper care and treatment.
14. He avers that he has been involved in life transformational courses and has enriched his spiritual growth by undertaking the courses, and feels that he has built skills that will help him integrate well in society, and prays for a reduction or a non-custodial sentence.

Analysis and determination

15. The offence of murder under Section 203 as read with Section 204 of the Penal Code attracts a maximum sentence of death, but post the Supreme Court decision in Francis Karioko Muruatetu & Another v Republic [2017] eKLR, the mandatory death sentence was declared unconstitutional as it deprives courts of discretion to consider mitigation, violating Article 50(2)(q).
16. The death penalty remains discretionary, guided by the Judiciary Sentencing Policy Guidelines, 2016, emphasizing proportionality, retribution, deterrence, rehabilitation, and community protection.
17. Section 333(2) of the CPC 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... Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”
18. This is mandatory for non-death sentences; however, the trial court exercised its discretion and sentenced the applicant to 25 years' imprisonment, which the applicant was aggrieved and appealed to the court of appeal in Kisumu No. 2555 of 2015, which was dismissed.
19. The applicant now seeks a review by stating that the trial court failed to consider the time of his arrest before he was sentenced.



20. In Ahmed Abolfath Mohammed & Another v Republic [2018] Eklr, the Court of Appeal held that failure to meaningfully account for custody time under Section 333(2) CPC violates fair trial rights under Article 50(2), as it ignores the period served, rendering the sentence excessive. The Court emphasized: “It is not enough... 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 conviction”
21. Sections 216 and 329 CPC empower courts to consider mitigation before sentencing. Section 216 allows adjournment for evidence on sentence.
22. Article 165(3)(b) vests the High Court with supervisory jurisdiction over subordinate courts, including revising sentences for illegality or irregularity under Sections 362 and 364 CPC.
23. However, where an appeal has been dismissed by the Court of Appeal (as here), this Court is functus officio unless a constitutional violation is demonstrated warranting review.
24. In Kenneth Kirimi v Republic [2021] Eklr, the High Court lacks jurisdiction to review Court of Appeal-confirmed sentences under Section 333(2) without fresh evidence of error.
25. The Applicant's appeal in COA No. 2555 of 2015 was dismissed, upholding the 25-year sentence, the record does not show that the court of appeal considered the time the Applicant spent in custody before conviction.
26. I have looked at the record the Applicant was arrested on 28th February, 2009 and the Judgment was Delivered on 6th March, 2012 a period of 37 Months and 15 Days was spent in custody therefore they should be subtracted from the term of the sentence.
27. Therefore, the application is allowed.
28. It is hereby so ordered.
29. Right of Appeal 14 days.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 13TH DAY OF OCTOBER, 2025

S.N. MBUNGI

JUDGE

In the presence of:

Court Assistant: Elizabeth Agong'a

Ms Osoro for DPP, Present

Applicant, present.

