

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**HIGH COURT CRIMINAL REVISION CASE NO. E093 OF 2025**

**JOHN IRUNGU MAKENA.....**

**APPLICANT**

**-VERSUS-**

**REPUBLIC.....PROSECUTOR**

**RULING**

1. The Applicant **JOHN IRUNGU MAKENA** filed this application dated **23<sup>rd</sup> May 2025** seeking revision of his sentence.
2. The Applicant had been charged before the **Karatina Law Courts** vide **MCCR E123 of 2024** with the Offence of **CHILD STEALING CONTRARY TO SECTION 174 (1) (a) of THE PENAL CODE.**
3. The particulars of the charge were that

**“On 31<sup>st</sup> day of January 2024 at around 0800 hrs at Kiamabara Village in Mathira East Sub-county within Nyeri County jointly forcibly took MARGARET WANJUGU a child aged Two and half**

**(2<sup>1/2</sup>) years with intent to deprive Ann Wanjiru Mwai parent who had the lawful care and possession of the said Margaret Wanjugu.”**

4. The Applicant pleaded '**Not Guilty**' to the charge and the case was fully heard in the Lower Court. On **12<sup>th</sup> May 2025**, the Learned trial Magistrate delivered her judgment in which she convicted the applicant for the offence of child stealing. Thereafter the Applicant was sentenced to serve **five (5) years** imprisonment.

5. The Applicant has now filed this present application seeking to have the period which he spent in pre-trial detention factored into his sentence.

6. The court is empowered by **Article 165(6)** of the **Constitution of Kenya 2010** 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.”**

7. **Section 333(2)** of the **Penal Code Cap 63 Laws of Kenya** provides as follows;-

**“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, been held in custody, the sentence shall take account of the period spent in custody.” [Own emphasis]**

It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody.

8. The provisions of **section 333(2)** of the Criminal Procedure Code were expounded on in this case of **AHAMAD ABOLFADHI MOHAMMED ANOTHER -VS- REPUBLIC [2018] eKLR** where the **Court of Appeal** 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 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 332 (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 appellant's sentence of imprisonment to run from the date of their arrest on 19<sup>th</sup> June 2012.” [Own emphasis]**

9. The ***Judiciary Sentencing Policy Guidelines clauses 7:10 and 7:11*** state that:-

**“The proviso to section 332(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.”**

10. Following his conviction the trial court did accord to the applicant the

opportunity to mitigate. The trial court then proceeded to consider the pre-sentence report filed by the probation officer. Most pertinent the trial court did take into account the period which the applicant had spent in remand.

11. The record indicates that the applicant was arrested on **31<sup>st</sup> January**

**2024** and was arraigned in court on **1<sup>st</sup> February 2024**. The trial court specifically directed that the sentence imposed upon the applicant was to run from **1<sup>st</sup> February 2024**, I am satisfied that the court did take into account the period he spent in remand.

12. This application is frivolous, vexatious and is an abuse of court process.

The same is dismissed in its entirety. The sentence imposed by the trial court is confirmed and upheld.

**Dated in Nyeri this 14<sup>th</sup> day of November 2025**

.....  
**MAUREEN A. ODERO**  
**JUDGE**

ORIGINAL