

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APPLICATION NO. E112 OF 2025

COLLINS OTIENO

APPLICANT

VERSUS

REPUBLIC

RESPONDENT

RULING

1. This is the notice of motion dated 17th July, 2025 where the applicant (Collins Otieno) seeks the following orders:

- (i) Spent time in remand custody be taken into account in accordance with Section 333(2) of the Criminal Procedure Code, Cap 75 Laws of Kenya,*
- (ii) The Honorable Court be pleased to issue appropriate orders adjusting the Applicant's sentence to reflect the time already served in custody prior to conviction.*
- (iii) The honorable court be pleased to substitute his remaining sentence of imprisonment with a probation sentence.*
- (iv) Any other or further orders that the Honorable Court may deem fit to grant in the interest of justice.*

2. The applicant in his supporting affidavit avers that the period he was in remand custody was never considered by the lower court. He also seeks to have the remaining sentence substituted for a probation sentence.
3. In opposing the application Mr. Kihara prosecuting counsel submitted that the applicant had been heard by Justice Nang'ea Nakuru High Court No. 2 on a similar application. That he should pursue the matter before the Court of Appeal.
4. In response to the submission by the respondent he confirmed that this was the 2nd application he had made on the subject. He argued that the 1st one was wrongly filed. He then pleaded to be assisted by the court since he has small children who need his assistance. Further that the complaint had been withdrawn and he was forgiven.
5. I have had an opportunity of pursuing Nakuru High Court Misc. Criminal Application No. E126 of 2024 which was heard and determined by High Court No. 2 Nang'ea J. In that application the prayers sought by the applicant are as follows:

(i) THAT the honourable court be pleased to substitute his current sentence of imprisonment that he was serving with a probation sentence. (sic)

(ii) THAT the honourable court be pleased to invoke the provisions of Section 362, 363 and 364 (b) of the Criminal Procedure Code and provisions under the

Probation of Offenders Act and review the balance of his sentence to a non-custodial sentence. (sic)

(iii) THAT this honourable court has jurisdiction to determine this petition under the provisions of article 165(3) (9) of the new Constitution of Kenya 2010 and the relevant provisions under the probation of offenders acts respectively. (sic)

(iv) THAT he is utterly remorseful and repentant of what really happened and if given another chance, he will not repeat such an act again. (sic)

(v) THAT the application is further supported by the annexed affidavit of NAK/1889/023/LS COLLINS OTIENO amongst other grounds that shall be adduced during the hearing of this petition. (sic)

6. I have equally perused the lower court file Nakuru CM's Criminal Case no. E741 of 2023. The matter was fully heard and a Judgment delivered on 12th October, 2023. Sentence was passed on 9th November, 2023.

7. In one of the prayers in High Court Criminal Misc. Application No. E126 of 2024 the applicant at paragraph 9 of his affidavit stated:

"THAT I further pray that the honourable court be pleased to make any such other orders that it shall deem fit, fair and just in the interest of justice.

8. On further perusal of the lower court record I note that the applicant was arrested on 12th March, 2023 and presented to

court on 17th March, 2023. He was therefore in remand custody for only five (5) months plus ten 10 days before his release on bond. Justice Nang'ea mainly addressed the issue of the substitution of the sentence to probation. The element of section 333(2) of the Criminal Procedure Code was not addressed by Nang'ea Judge as it was not a clear prayer in the application before him.

9. There will be no harm or injustice done if that is dealt with now. The only bit addressed by the trial Magistrate was on the last remand custody upon conviction on 12th October, 2023 which was the date of Judgment. Hon Nyota - Senior Resident Magistrate stated in passing sentence as follows:

“The accused is sentenced to imprisonment for a period of five (5) years with effect from 12/10/2023 when he was remanded at G. K. Prison.

10. I therefore find it in order to have the period the applicant was in remand custody prior to his being released on bond to be considered in line with the provisions of section 333(2) of the Criminal Procedure Code which was omitted by the trial court. The said provision provides

Section 333(2):

(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

11. For avoidance of doubt the period to be considered in compiling sentence by the Nakuru G. K. Prison in charge is 12th March, 2023 - 22nd August, 2023. The application is therefore successful to that extent only. The Nakuru G. K. Prisons in charge to act accordingly.

12. Orders accordingly

Delivered, dated and signed this 12th day of November, 2025 in open court at Nakuru.

**H. I. ONG'UDI
JUDGE**