John v Republic (Miscellaneous Criminal Application E039 of 2025)
[2025] KEHC 17345 (KLR) (20 November 2025) (Ruling)

Neutral citation: [2025] KEHC 17345 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

MISCELLANEOUS CRIMINAL APPLICATION E039 OF 2025

FN MUCHEMI, J

NOVEMBER 20, 2025

BETWEEN

DAVID KITONGA JOHN ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

Brief Facts

1. The application dated 11th March 2025 seeks for orders of review of sentence under Section 333(2) of the Criminal Procedure Code.

2. The applicant states that he was convicted by Thika Chief Magistrate in Criminal (S. O.) Case No. 82 of 2017 with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006 and was sentenced to serve fifteen (15) years imprisonment. The applicant states that he filed an appeal at Thika High Court Criminal Appeal No. 2 of 2024 but he later withdrew the same so as to pursue this application for review.

3. The applicant seeks for review of sentence seeking to be treated the same as his co-accused in Criminal Revision No. E009 of 2024 as his sentence was ordered to run from the date of his arrest on 24th January 2025. The applicant further states that he is remorseful and urges the court to consider his good character as a relevant factor in granting the orders sought in the instant application.

4. The respondent concedes to the instant application and states that the time spent in custody was not considered.

The Law

5. 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.

6. The record of the lower court shows that the applicant herein was convicted in Chief Magistrate Court Thika in Criminal (SO) Case No. 82 of 2017 with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006. He was sentenced to fifteen years imprisonment and being aggrieved by the conviction and sentence appealed to the High Court in Thika Criminal Appeal No. 2 of 2024. The applicant states that he later withdrew the said appeal. On perusal of the record, there is no record of the said appeal. The relevant law is Article 50 (2) of *the constitution* which 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.

7. In the instant matter the applicant did not file an appeal against conviction and sentence. As such, he is entitled to have his application for review heard and determined by this court.

8. 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."

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

10. Section 362 and 364 of the Criminal Procedure Code empowers this court with revision powers of orders of the Magistrates Court. Article 165 of *the Constitution* gives this court supervisory powers over subordinate courts.

11. The provisions of section 333(2) of the Criminal Procedure Code was the subject of the decision in Ahamad Abolfathi Mohammed & Another vs 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 19th June 2012."

12. The court of Appeal in Bethwel Wilson Kibor vs 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 22nd 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."

13. 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."

14. The applicant was arrested on 24th October 2017 and when he took plea the trial court granted bond of Kshs. 300,000/- with one surety of similar amount but he failed to raise a surety. On 20th March 2018, the applicant requested the trial court to review his bond the court reviewed his bond terms downwards to Kshs. 200,000/- with one surety. However, the applicant remained in custody. The trial court delivered its judgment and sentenced the applicant on 30th October 2019. From the date of arrest which was 24th October 2017, the applicant spent two (2) years and six (6) days in custody. By virtue of Section 333(2) of the Criminal Procedure Code, this duration ought to have been considered during sentencing by the trial court but this did not happen.

15. I have perused the court record and noted that during sentencing, the trial court took into account the mitigation by the applicant. The trial court further considered the relevant provisions of law and the gravity of the offence and then sentenced the applicant to fifteen (15) years imprisonment in line with Section 10 of the *Sexual Offences Act*. It is however evident that the trial court was silent on the issue of the duration the applicant spent in remand.

16. As such, it is my considered view that the application has merit and it is hereby allowed.

17. The applicant shall serve the fifteen (15) years imprisonment sentence imposed by the trial court to commence from 24th October 2017 being the date of arrest.

18. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 20TH DAY OF NOVEMBER 2025.

F. MUCHEMI

JUDGE