

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CRIMINAL MISC. APPLICATION NO. E027 OF 2024**

**PETER KIPRONO KERING .....APPLICANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**RULING**

1. Before this Court for determination is the Applicant's Notice of Motion filed on 22<sup>nd</sup> August, 2024, seeking for the following Orders;-
  - 1) *The court certifies the matter as urgent and deserving of priority in hearing at the first instance.*
  - 2) *The period spent in pre-trial detention by the Applicant, from 31<sup>st</sup> October, 2010, to 5<sup>th</sup> December, 2014 (4 years, 1 month, and 5 days), be computed into the twenty (20) years sentence imposed by the trial court.*
  - 3) *Any other order the court deems fit in the interest of justice.*
2. The application is based on the grounds on the face of the Application and the supporting affidavit of the Applicant sworn on even date. He stated that he was charged, convicted, and sentenced to twenty (20) years imprisonment for the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code in H.C. CR. Case No. 113 of 2010.
3. The Applicant's main grievance is that the trial court failed to account for the substantial period he spent in pre-trial detention, a time confirmed to be 4 years, 1 month, and 5 days. The failure to compute this period into the sentence, it is argued, results in a punishment that is disproportionate, contrary to paragraph 2.3.18 of the Revised Sentencing Policy Guidelines, 2023.
4. Statutorily, the Applicant relies on the proviso to Section 333(2) of the Criminal Procedure Code, which mandates that the sentence shall take account of the period spent in custody prior to such sentence.

5. Constitutionally, the Applicant invokes Article 50(2)(p), asserting his right to the benefit of the least severe of the prescribed punishments, which, he submits, is one that properly factors in the time served in remand custody.
6. Further judicial support for the application is drawn from two precedents: the Court of Appeal decision in *Ahamad Abolfathi Mohammed & another v Republic [2018] KECA 855 (KLR)* and the Constitutional Court decision in *Jona & 87 others v Kenya Prison Service & 2 others (Petition no. 15 of 2020 [2021]KEHC457(KLR) (18<sup>TH</sup> January 2021)(Judgment)*.
7. Finally, the Applicant confirms that he never appealed the trial court's decision and has no interest in pursuing an appeal, praying instead that this application for sentence computation be considered. He asserts that the High Court is vested with sufficient jurisdiction to hear the matter pursuant to Article 165 of the Constitution.
8. The prosecution opposed the Application by its Replying Affidavit sworn by **James Kihara**, its Prosecution Counsel. The prosecution counsel confirms the factual history: the Applicant's conviction for murder, the twenty-year sentence, and the confirmed period of remand custody being 4 years, 1 month, and 5 days.
9. The Respondent acknowledges that the Applicant seeks to have this period accounted for under Section 333(2) of the Criminal Procedure Code. However, the Prosecution Counsel strongly objects to the application on procedural grounds. The Respondent submits that, as a matter of law, the High Court cannot review a sentence that was handed down by a court of concurrent jurisdiction, the original sentencing court.
10. Accordingly, the Respondent contends that the application lacks merit and that the Applicant's prayer for review can only be heard and determined by the Court of Appeal, arguing that the entire application is nullity and void ab initio.

#### **Analysis and determination**

11. After considering the application, and the affidavits both in support and opposition of the Application, the only issue for determination herein is whether this Court has power to review the sentencing putting into consideration the provisions of section 333 of the Criminal Procedure Code.

12. Section 333 of the Criminal Procedure Code Provide that;-

***“(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death. (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.”***

13. The powers of the Court under section 333 (2) of the Criminal Procedure Code and the proviso thereto were explained in the Court of Appeal in the case of ***Ahamad Abolfathi Mohammed & another v Republic [2018] KECA 855 (KLR)*** 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.”*

14. The High Court’s criminal revision jurisdiction is donated to it by Sections 362 to 366 of the Criminal Procedure Code. The Court can only review the judgment of a subordinate Court under Section 364 which provides for powers of High Court on revision as follows:

*“In the case of a proceeding in a subordinate Court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—(a) in the case of a conviction, exercise any of the powers conferred on it as a Court of appeal by sections 354, 357 and 358, and may enhance the sentence(b)in the case of any other order other than an order of acquittal, alter or reverse the order”*

15. In accordance with the provisions of Section 364 of the law, a review is applicable only to decisions made by subordinate courts. This court does not have the statutory authority under that section to review its own decisions.
16. In the present case, this Court, presided over by Justice J Anyara Emukule, handled the original Criminal case No. 113 of 2010 and sentenced the appellant herein to 45 years to run from the date of the conviction.

17. The Court did not consider the time the Appellant herein had spent in custody during trial. However, that is a decision from a court of concurrent jurisdiction, this court cannot review its own ruling to incorporate the provisions of Section 333 of the Criminal Procedure Code. Such an action would be equivalent to this court sitting as an appellate body over its own decision.
18. Moreover, Article 165(6) of the Constitution empowers this Court to only review a decision by a subordinate Court and not a superior Court. For avoidance of doubt, 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.”***
19. Accordingly, the applicant's proper recourse is through the Court of Appeal, not this court. His application seeking for this Court to consider the time he has spent in remand can only be determined by the Court of Appeal.
20. In light of the foregoing, the Applicants Notice of Motion is hereby dismissed with no order to costs.

**Dated, signed and delivered at Nakuru this 20<sup>th</sup> Day of November , 2025.**

**PATRICIA GICHOHI  
JUDGE**

**In the presence of:**

**Peter Kiprono Kering -Applicant**

**Mr. Kihara for the Respondent**

**Kamau, Court Assistant**