

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL REVISION NO. E205 OF 2025

HEZBON MONGARE MOGEKE.....APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. By a Notice of Motion dated 26th April, 2024 and expressed under Articles 165 (3)(b), 23, 22, and 50(6)(a) of the Constitution of Kenya, 2010 and section 333(2) of the Criminal Procedure Code (CPC, the Applicant herein sought for the following Orders;-
 - 1) *That the court is pleased to allow his application, which is filed under Articles 165 (3)(b), 23, 22, and 50(6)(a) of the Constitution and Section 333(2) of the Criminal Procedure Code (CPC).*
 - 2) *That the matter be certified as urgent and heard at the earliest possible instance.*
 - 3) *That the court declares he has been rehabilitated and is ready to be reintegrated into society.*
2. The basis of this application is that the Applicant herein was arrested on 8th September, 2017, charged with the offence of defilement and ultimately convicted on 2nd April, 2019. He was initially sentenced to life imprisonment but on appeal to the High Court, his sentence was reduced to 20 years imprisonment.
3. He stated that the time he spent in remand custody, which he calculated to be one year and seven months, was not factored into his reduced sentence.
4. The Respondent opposed the application vide the Replying Affidavit sworn on 9th July, 2025, by James Kihara, a Prosecution Counsel. Confirming that the Applicant was convicted and his sentence was reduced

to 20 years on appeal, he argued that the High Court cannot review a sentence handed down by a court of concurrent jurisdiction.

5. He asserted that the Applicant's proper course of action would be to appeal to the Court of Appeal and that the current application lacks merit and is an abuse of the court process.

Applicant's Submissions

6. In his submissions, the Applicant argued that Section 333(2) of the CPC mandates the courts to consider the period an Applicant has been in custody when imposing a sentence. In support of this, he cites the case of **Elizabeth Mwiathi Syego Vs Republic, Miscellaneous Application No. 62 of 2018.**
7. Further that the Court in the cited case noted that the 2007 amendment to Section 333(2) of the Criminal Procedure Code gave courts this power. That it was also clarified that simply stating the period was considered is not enough; it must be demonstrably reflected in the final sentence.
8. The Applicant also cited the case of **Vincent Sila Jona and 87 others Vs Republic [2021] eKLR** and argued that George Odunga J (As he then was) declared that trial courts are obligated by Section 333(2) of the Criminal Procedure Code to consider the period spent in custody when imposing any sentence other than the death penalty.
9. He further submitted that the said Court declared that individuals sentenced in violation of this section have the right to have their sentences reviewed by the High Court to determine the appropriate sentence and also that Section 333(2) applies to both the original sentence and any sentence imposed during resentencing. Finally, that Justice Odunga declared that reviews of sentences should be conducted on a case-by-case basis.
10. Based on these cases, the Applicant urged this court to allow his Application as prayed. He argued that as a first-time offender, he has a right to the least severe sentence, and his sentence should be reviewed accordingly.

Determination

11. After hearing the parties, the issues for determination are :
 1. ***Whether the period spent in custody should be considered by in this application for revision .***
 2. ***Whether this Court can reduce further a sentence passed by a court of concurrent jurisdiction.***
12. On the first issue, Section 333 (1) and (2) of the Criminal Procedure Code thus:-

"(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. Indeed, courts are bound to consider period spent by a person in custody as stated above.
14. Upon perusal of the lower court file, Criminal Case No. 200 of 2017, it is indicated that the Applicant herein was arrested on 9th September, 2017 , arraigned in Court on 11th September, 2017 and charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. In the alternative he was charged with

indecent act with a child contrary to section 11(4) of the Sexual Offences Act No. 3 of 2006.

15. After conclusion of the case, the learned trial magistrate Hon Eunice Kelly (SRM) convicted him of the main charge on 21st March, 2019 and sentenced him to life imprisonment on 2nd April, 2019.
16. The lower court record also shows that the Applicant was in custody since the date of arrest on 9th September, 2017 to 2nd April, 2019 when he was sentenced to life imprisonment.
17. Aggrieved by the sentence and conviction by the trial court, the Applicant filed an Appeal to this Court being High Court Criminal Appeal No. 36 of 2019. In her Judgement delivered on 30th September, 2020, Rachel Ngetich, J dismissed the Appeal on conviction but reduced the sentence from life imprisonment to 20 years imprisonment, stating that the sentence would run from the date the Appellant was sentenced in the lower Court.
18. While explaining the application of Section 333 (2) of the Criminal Procedure Code, the Court of Appeal in the case of **Ahamad Abolfathi Mohammed & another v Republic [2018] KECA 855 (KLR)** held that:-

“ The appellants have been in custody from the date of their arrest on 19th June 2012. 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(s) 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

17. This Court notes that the Applicant herein was arrested on 9th September 2017 and arraigned in court on 11th September 2017 when he took plea. The Respondent opposed the Applicant's release on bond .
18. Consequently, the Applicant remained in custody and though the Respondent intimated to the trial court on 3rd October 2017 that they were no longer object to the Applicant being released on bond. Consequently, the court promptly ordered that he be released on a cash bail of Kshs. 200,000/- but he never raised it.
19. Further review of the bond terms on 19th April 2018 to a bond of Kshs. 300,000 with a surety of similar amount with an alternative of Cash bail of Kshs. 150,000/-. However, there is no evidence that he indeed went out on bond or cash bail.
20. Though it is clear that the time spent in custody since his arrest was not considered by High Court , this Court cannot correct any error or irregularity by a Court of concurrent jurisdiction. The Applicant's recourse lay in an appeal to Court of Appeal.
21. On the prayer seeking for a further reduction of the sentence and give the less severe sentence, the court record shows that the Honourable Judge did reduce the sentence from life imprisonment to 20 years.

22. There are no special circumstances tabled before this court to warrant further reduction of sentence period and in any event, this Court cannot review the sentencing made by a Court of concurrent jurisdiction.
23. In conclusion thereof, the Applicant's Notice of Motion dated 26th April, 2024 is devoid of merit and therefore dismissed.

Dated, signed and delivered at Nakuru this 25th Day of November , 2025.

PATRICIA GICHOHI
JUDGE

In the presence of:

Hezbon Mongare Mogeke -Applicant

Mr. Kihara for the Respondent

Kamau, Court Assistant