

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CRIMINAL REVISION NO. E034 OF 2025

DANIEL CHEGE MWANGI.....
APPLICANT

VERSUS

REPUBLIC.....
.....RESPONDENT

R U L I N G

Brief Facts

1. The application for determination is undated whereas the applicant 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 Sexual Offence Case No. 493 of 2010 with the offence of rape contrary to Section 3(1)(a) of the Sexual Offences Act No. 3 of 2006 and was sentenced to serve ten (10) years imprisonment.
3. The applicant herein seeks for review of sentence and urges the court to invoke Section 333(2) of the Criminal Procedure Code and consider the period of 8 months that he spent in custody from the

date of arrest being 28th January 2010.

4. The applicant further states that he was charged on three accounts of rape vide Criminal (SO) Case Nos. 435, 492 and 493 of 2010 where he was convicted and sentenced to 15 years, 10 years and 10 years respectively and seeks to have the sentences run concurrently pursuant to Section 12 of the Criminal Procedure Code and Section 37 of the Penal Code.
5. The application is unopposed.

The Law

6. 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.

7. The applicant was convicted in Chief Magistrate Court in Thika in Criminal (SO) Case No. 435 of 2010 with two counts of the offence of rape contrary to Section 3(1)(a)(3) of the Sexual Offences Act No. 3 of 2006 and Count II the offence of stealing from person contrary to Section 279(a) of the Penal Code and was sentenced to 15 years

imprisonment in Count I and 1 year imprisonment in Count II. The sentences were to run concurrently. In Criminal (SO) Case No. 492

of 2010 the applicant was convicted of the offence of rape contrary to Section 3(1)(a)(3) of the Sexual Offences Act No. 3 of 2006 and was sentenced to ten (10) years imprisonment. In Criminal (SO) Case No. 493 of 2010 the applicant was convicted of the offence of rape contrary to Section 3(1)(a)(3) of the Sexual Offences Act No. 3 of 2006 and was sentenced to ten (10) years imprisonment. The applicant filed an appeal against the decision in Criminal (SO) Case No. 435 of 2010 in the High Court in Nairobi vide Criminal Appeal No. 536 of 2010 and the same was dismissed on 12th June 2013. The applicant also filed an appeal against the decision in Criminal (SO) Case No. 493 of 2010 in the High Court in Nairobi vide Criminal Appeal No. 313 of 2011 and he later withdrew the said appeal on 12th March 2014.

8. **Article 50 of the Constitution** prohibits review where a convict has gone through an appeal process. It 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.

9. In the instant matter the applicant appealed the decision in Criminal (SO) Case No. 435 of 2010 and therefore

having filed an appeal, the applicant has no legal basis of approaching this court for a review under Article 50(2) (q).

10. It is therefore, evident that this court has no power to review the judgement of another High Court judge who dealt with both conviction and sentence in Cr. Case No. 435 of 2010. The application for review in this case must fail.
11. The applicant did not lodge appeals against the decision in Criminal (SO) Case No. 492 of 2010 and criminal (S. O.) case No.493 OF 2010 for he says that he withdrew the appeals, particularly Criminal (SO) Case No. 493 of 2010. In the circumstances, the application for review is properly before the court in respect of the Cr. Cases Nos. 492 of 2010 and 493 of 2010.
12. **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.”

13. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody.
14. 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."

15. The same court 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.”

16. 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.”

17. In Criminal (SO) Case No. 492 of 2010 the applicant was arrested on 28th January 2010 the trial court granted him bond but there is no evidence from the record that he raised a surety since he remained in custody. The trial

court delivered its judgment in Cr. Case No. 492 of 2010 and sentenced the applicant on 12th October 2017. Thus the applicant spent seven (7) years and eight (8) months in custody. In Criminal (SO) Case No. 493 of 2010 the applicant was arrested on 28th January 2010. The trial court granted him bond but never raised a surety. The trial court delivered its judgment on 27th October 2011 and sentenced the applicant on 10th November 2011. Thus the applicant spent one (1) year and nine (9) months in custody. By virtue of **Section 333(2) of the Criminal Procedure Code**, this duration ought to have been considered during sentencing. I have perused the court record and noted that during sentencing in both cases, the trial court took into account the mitigation by the applicant. And further considered the relevant provisions of law and the gravity of the offence. The court sentenced the applicant to ten (10) years imprisonment in accordance with Section 3(1)(a)(3) 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. As such, it is my considered view that the application in regard to criminal cases Nos 492 of 210 and 493 of 2020 has merit.

18. The applicant further seeks to have the sentences run concurrently instead of consecutively.

19. The Court of Appeal in **Peter Mbugua Kabui vs Republic [2016] eKLR** stated:-

As a general principle the practice is that if an accused person commits a series of offences at the same time in a single act/transaction concurrent sentence should be given. However, if

separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

In the instant case, the offences were not committed at the same time and in the same transaction; they occurred on diverse dates. Furthermore, the acts complained of were perpetrated against different complainants. Thus we find that the trial court and the High Court did not err in directing or ordering a consecutive term of imprisonment for the conviction in the two counts. It is our considered view that the exception in Section 149(3) of the Criminal Procedure Code is inapplicable to this case in light of the provision of Section 7(1) of the Criminal Procedure Code. We further observe that Section 14 of the Criminal Procedure Code stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences

at one trial, shall be deemed to be a single sentence. We

take the view that given the circumstances of this case, the consecutive sentences totalling to 20 years imposed on the appellant, cannot be said to be excessive. In any event, as we have pointed out earlier, severity of sentence is a question of fact and this court has no jurisdiction to consider issues of fact in a second appeal. Is the sentence illegal or unlawful. We find that the sentence was legal and lawful, and we have no legal basis for interfering with the same.

20. It is clear on the records of the lower court that the applicant committed separate and different offences on diverse dates against different victims. The applicant committed the offence of rape in all the three criminal cases on 19th, 20th and 23rd January 2010 against three different victims. The three cases were heard by three different courts and each court observed the law in meting out the sentence pursuant to section 3(1)(a)(3) of the Sexual Offences Act No. 3 of 2006. Each of the three cases are distinct from one another and cannot be joined in imposing sentence for it would be contrary to legal provisions. The sentences in each of the three cases cannot be ordered to run concurrently for the foregoing reasons. As such, this

prayer of sentences being ordered to run concurrently in the two cases fails and it is hereby declined.

21. In regard to the period spent in custody of seven (7) years and eight (8) months in Criminal Case No. 492 of 2010 and one (1) year and nine (9) months in Criminal Case No. 493 of 2010 this court makes the following orders: -

a) In Criminal Case No.435 of 2010 the application for review is not successful and the applicant shall serve fully the sentence of fifteen (15) years.

b) In Criminal Case No.492 of 2010, the accused shall serve the sentence of ten (10) years imprisonment less seven (7) years and eight (8) months.

c) In Criminal Case No. 493 of 2010, the applicant shall serve ten (10) years imprisonment less one (1) year nine (9) months.

22. It is hereby so ordered.

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

F. MUCHEMI
JUDGE

