



Wekesa v Director of Public Prosecution (Criminal Miscellaneous Application E153 of 2021) [2025] KEHC 17210 (KLR) (25 November 2025) (Ruling)

Neutral citation: [2025] KEHC 17210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL MISCELLANEOUS APPLICATION E153 OF 2021
PN GICHOHI, J
NOVEMBER 25, 2025**

BETWEEN

FESTUS SAMSON WEKESA APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. Before this Court for determination is the Applicant's Notice of Motion dated 17th February, 2025, brought under section 333 of the Criminal Procedure Code and seeking for Orders;-
 1. This Honourable Court be pleased to invoke the provisions of section 333 of the criminal procedure Code and all other enabling provisions in the interest of justice.
 2. The Honourable Court be pleased to make any other orders that it will deem fit in the interest of justice.
2. The application is supported by the Affidavit sworn by the Applicant on even date. He states that he was charged, convicted, and initially sentenced to 25 years imprisonment by the Chief Magistrates Court of Nakuru Criminal case number 164 of 2013 on 14th February, 2014 for the offense of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offenses Act. However, that when the trial court was tabulating his sentence, the time already spend in remand was not factored in the calculation. He is relying on Section 333(2) of the Criminal Procedure Code to argue that the sentence should run from the date of his arrest.
3. The Respondent opposed the Application through its Replying Affidavit sworn on 2nd April, 2025 by Mr. James Kihara, the Prosecution Counsel in conduct of this matter. He termed, the application unmeritorious and an abuse of Court process.



4. He stated that on 14th February, 2014, the Applicant was convicted and sentenced to life imprisonment for the offense of defilement but he appealed to the High Court vide Criminal Appeal No. 52 of 2014, where the Court reviewed the sentence from 25 years to 20 years.
5. The Respondent's position is that a court of concurrent jurisdiction cannot interfere with a sentence passed by the same court. In addition, he stated that the decision of the Supreme Court in Petition No. E018 of 2023, Joshua Gichuki Mwangi set the bar in regard to minimum mandatory sentences.
6. He argued that Courts cannot use their discretion where minimum sentences are provided for under the law. In the circumstances, the Respondent deponed that this Court lacks the locus to consider the case under Section 333 of the Criminal Procedure Code.

Determination

7. The only issue for determination herein is whether this Court can grant orders sought.
8. 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.”
9. To be specific, Section 333 (2) of the Criminal Procedure Code was explained by the Court of Appeal in the case of *Ahamad Abolfathi Mohammed & another v Republic* [2018] KECA 855 (KLR) it was 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.”

10. In the present case, the Applicant's Appeal against both the conviction and sentence was presided over by Prof. Joel Ngugi J (as he then was) in High Court Criminal Appeal Case No. 52 of 2014. The applicant had appealed against both his conviction and sentence but the conviction was upheld while the 25 years imprisonment was reduced to 20 years imprisonment.
11. However, neither the trial court (Hon F. Muguongo-RM) in its judgement delivered on 14th February, 2014 nor the the Appellate Court considered complied with Section 333 (2) of the Criminal Procedure Code.
12. Despite that omission, this Court cannot purport to review that sentence by a Court of concurrent jurisdiction even in the circumstances herein. The Applicant's proper recourse would be the Court of Appeal , not this court.
13. In light of the foregoing, the Applicant's Notice of Motion dated 17th February, 2025 and filed on even date is hereby dismissed.

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

PATRICIA GICHOHI

JUDGE

In the presence of:

Festus Samson Wekesa -Applicant

Mr. Kihara for the Respondent

Kamau, Court Assistant

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