



**Musa v Republic (Criminal Revision E060 of 2025)
[2025] KEHC 17690 (KLR) (27 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17690 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL REVISION E060 OF 2025
FN MUCHEMI, J
NOVEMBER 27, 2025**

BETWEEN

ALI MOHAMED MUSA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The application for determination dated 9th April 2025 seeks for 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 Case No. E1641 of 2021 with the offence of grievous harm contrary to Section 234 of the Penal Code and was sentenced to serve ten (10) years imprisonment.
3. The applicant seeks for review of sentence and urges the court to invoke section 333(2) of the Criminal Procedure Code and consider the period he served in remand custody pending the hearing and disposal of his case. The applicant states that he was arrested on 4th April 2022 and spent ten (10) months in custody which period the trial magistrate failed to consider during sentencing. The applicant further states that he is the sole breadwinner of his young family and his continued stay in prison has a negative impact on their livelihood.
4. The respondent did not wish to oppose the application.

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 applicant herein was convicted in Chief Magistrate Court in Thika in Criminal Case No. E1641 of 2021 with the offence of grievous harm contrary to Section 234 of the Penal Code and was sentenced to ten years imprisonment. The applicant did not appeal the decision. 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.

7. In the instant matter the applicant has not appealed the decision of the trial court and thus the application for review is proper before the 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 clear from the above proviso that the law requires courts to take into account the period the convict spent in custody during sentencing.

10. The provisions of section 333(2) of the Criminal Procedure Code was the subject of the decision in *Ahamad Abolfathi Mohammed & Another v 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.”



11. The same court in *Bethwel Wilson Kibor v 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.”

12. 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.”

13. The applicant was arrested on 20th June 2021 and arraigned in court. The trial court granted him cash bail of Kshs. 400,000/-. The record does not show evidence of release of the applicant. The trial court delivered its judgment on 4th April 2022 and sentenced the applicant on 14th April 2022. Thus the applicant spent ten (10) months in custody which period by virtue of Section 333(2) of the Criminal Procedure Code ought to have been considered during sentencing.

14. I have perused the court record and noted that during sentencing, the trial court took into account the fact that the applicant was not a first time offender. The trial court further considered the relevant provisions of law and sentenced the applicant to ten (10) years imprisonment.

15. Section 234 of the Penal Code provides for a sentence of life imprisonment. By sentencing the applicant to ten (10) years imprisonment which was a very lenient sentence, the trial court took into consideration the period spent in custody in addition. The court stated: -

“This court takes into consideration the fact that the accused is not a first offender and the period he spent in custody.”

The record shows that accused had a previous conviction of the offence of murder at the age of 17 years.

16. In my considered view, the magistrate complied with Section 333(2) of the Criminal Procedure Code and in addition meted out a very lenient sentence to a convict who had a previous conviction.

17. I find no merit in this application and it is hereby dismissed with no orders as to costs.

18. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 27TH DAY OF NOVEMBER 2025.



**F. MUCHEMI
JUDGE.**

