Njenga v Republic (Criminal Revision E001 of 2025)
[2025] KEHC 17691 (KLR) (27 November 2025) (Ruling)

Neutral citation: [2025] KEHC 17691 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL REVISION E001 OF 2025

FN MUCHEMI, J

NOVEMBER 27, 2025

BETWEEN

JOSEPH NJENGA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

Brief Facts

1. This application for determination is dated 24th October 2024 seeks for orders of review of sentence under Section 333(2) of the Criminal Procedure Code.

2. The applicant was convicted by Thika Chief Magistrate, in Criminal (S.O.) Case No. E110 of 2022 with the offence of attempted defilement contrary to Section 9(1) as read with 9(2) of the *Sexual Offences Act* No. 3 of 2006 and was sentenced to serve fifteen (15) years imprisonment.

3. The applicant herein seeks for review on sentencing and urges the court to invoke section 333(2) of the Criminal Procedure Code and consider the period he spent in remand custody pending the hearing and disposal of his case. The applicant states that he was arrested on 21st November 2022 and spent one (1) year and four (4) months in custody during the pendency of his trial. The trial magistrate failed to consider the said period during sentencing. The applicant further states that he is remorseful and rehabilitated for the period he has spent in prison.

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 was convicted in Thika Chief Magistrate Court Criminal (S.O.) Case No. E110 of 2022 with the offence of attempted defilement contrary to Section 9(1) as read with 9(2) of the *Sexual Offences Act* No. 3 of 2006 and was sentenced to fifteen 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 properly 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 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."

11. 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."

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 21st November 2022 and was arraigned in court on 23/11/2022. The court granted the applicant bond of Kshs. 200,000/- with one surety of similar amount. There is no indication in the original record that the applicant was released on bond following the court's order. The trial court delivered its judgment on 14th March 2024 and sentenced the applicant on 27th March 2024. As such, the applicant spent one (1) year and four (4) months in custody. By virtue of Section 333(2) of the Criminal Procedure Code, this duration ought to have been considered during sentencing. The applicant's singular prayer is for consideration of the duration spent in custody. I have perused the court record and noted that during sentencing, the trial court took into account the pre-sentence report, the victim impact statement captured in the report and the nature of the offence. The trial court further considered the relevant provisions of law and then sentenced the applicant to fifteen (15) years imprisonment in line with Section 9(2) of the *Sexual Offences Act* No. 3 of 2006. It is evident that the trial court did not take into consideration the time spent by the applicant in custody.

14. I find this application merited and allow it accordingly. The applicant shall serve the sentence of fifteen (15) years imprisonment imposed by the magistrate to commence from the date of arrest 21st November 2022.

15. It is hereby so ordered.

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

F. MUCHEMI

JUDGE