

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CRIMINAL REVISION NO. E036 OF 2025

PETER KARIUKI.....
APPLICANT

VERSUS

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

R U L I N G

Brief Facts

1. This undated application seek for orders of review of sentence the under the provisions of **Section 333(2) of the Criminal Procedure Code.**
2. The applicant states that he was convicted by Ruiru Senior Principal Magistrate in Criminal (S.O) Case No. 49 of 2020 with the offence of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006 and was sentenced to serve fifteen (15) years imprisonment. The applicant further states that he filed a miscellaneous application being Miscellaneous Criminal Application No. E002 of 2024 in this court seeking leave to lodge an appeal out of time but the application was dismissed on 22nd August 2024.

3. The applicant herein seeks for review of sentence urging this court to invoke **section 333(2) of the Criminal Procedure Code** by

considering the period he stayed in remand pending the hearing and disposal of his case. The applicant states that he was arrested on 24th September 2020 and has spent one (1) year and four (4) months in custody that the trial magistrate failed to consider during sentencing. The applicant further states that he is remorseful and rehabilitated.

4. The respondent opposed the application in its Replying Affidavit dated 5th September 2025. It is deposed that the trial court considered the time spent in custody by the applicant as the trial court specified that the sentence was to run from the date of plea which was 28th September 2020. The respondent further states that the sentence passed by the trial court was proper and legal as it considered the aggravating and mitigating circumstances.
5. The respondent argues that the offence which the applicant was found guilty is a felony which attracts prison sentence not less than twenty years and the applicant is lucky that he was subjected to a lower sentence.
6. Parties put in written submissions.

The Applicant's Submissions

7. The applicant relies on the cases of **Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR; Musyiki Lemoya vs Republic [2014] eKLR; Bukenya vs Uganda (Cr. Appeal No. 17 of 2012 UGSC) [2013]** and **Jona & 87 Others vs Kenya Prison Service & 2**

Others (Petition 15 of 2020) 2021 KEHC 457 (KLR)

and submits that the trial court failed to take into account the time he spent in remand. He requests the instant court to direct that his sentence to run from the date of arrest being 24th September 2020.

The Respondent's Submissions

8. The respondent submits that the trial court took into consideration the time the applicant spent in custody as the trial court ordered that the sentence runs from the date of plea which is 28th September 2020.

The Law

9. 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.

10. The applicant herein was convicted in Senior Principal Magistrate's Court Ruiru in Criminal (SO) Case No. 49 of 2022 with the offence of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006 and was sentenced to fifteen years imprisonment. The applicant did not appeal the decision as he filed an application for leave to file an appeal out of time but the same was dismissed by the instant court on 22nd August 2024. **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.

11. In the instant matter the applicant did not appeal against the decision of the trial court and thus the application for review is proper before the court.

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. The applicant was arrested on 24th September 2020 and upon taking plea on 28th September 2020 the trial court granted him bond of Kshs. 400,000/- with one surety of similar amount. There is no evidence that the applicant was ever released on bond thereafter. The trial court delivered its judgment and sentenced the applicant on 23rd December 2021. Thus the applicant spent one (1) year and two (2) months in custody. By virtue of **Section 333(2) of the Criminal Procedure Code**, this duration ought to have been considered during sentencing.
18. I have perused the court record and noted that during sentencing, the trial court took into account the mitigation by the applicant, the fact that the applicant was a first time offender, the nature of the offence and the fact that the victim would have to live with the trauma the rest of her life. The trial court further considered the relevant provisions of law and then sentenced the applicant to fifteen (15) years imprisonment in line with Section 8(3) of the Sexual Offences Act No. 3 of 2006, and directed that the sentence to run from the date of plea. It is therefore evident that the trial court took into consideration the time spent by the applicant in custody.
19. In my considered view, this application lacks merit and it is hereby dismissed.

20. It is hereby so ordered.

***RULING DELIVERED VIRTUALLY, DATED AND SIGNED
AT THIKA THIS 11TH DAY OF DECEMBER 2025.***

**F. MUCHEMI
JUDGE**