REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CRIMINAL REVISION NO. E140 OF 2024

CHARLES KIMATHI NGUNUNGU……
APPLICANT

VERSUS

REPUBLIC……
……RESPONDENT

R U L I N G

Brief Facts

1. The application for determination dated 12th July 2024 seeks for orders of review of sentence under **Section 333(2) of the Criminal Procedure Code.**

2. The applicant says he was convicted by Thika Chief Magistrate in Criminal (S.O) Case No. 32 of 2018 with the offence of defilement contrary to Section 8(1) as read with 8(4) of the Sexual Offences Act No. 3 of 2006 and was sentenced to serve fifteen (15) years imprisonment.

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

Procedure Code and consider the period he served in remand pending the hearing and disposal

of his case. The applicant states that he has spent four (4) years and ten (10) months in custody that the trial magistrate failed to consider during sentencing. The applicant further states that he is remorseful and rehabilitated for the period he has served his sentence since conviction.

4. The respondent did not wish to oppose the application.

5. The applicant filed written submissions whereby he states that he was arrested on 13th April 2018 and got out on bond on 1st November 2018 after a period of 6 months and 18 days in custody. His surety was cancelled on 3rd February 2021 after he absconded the court's sessions and remained in remand custody until his conviction on 23rd February 2023, a period 2 years and 20 days. Thus the applicant argues that he spent a total of 2 years, 7 months and 8 days in custody, which period was not taken into consideration by the trial magistrate. The applicant relies on the cases of **Ahamad Abolfathi Mohammed & Another vs Republic (2018) eKLR**; **Bethwell Wilson Kibor vs Republic (2009) eKLR** and **Vincent Sila Jona & 87 Others vs Kenya Prison Service & 2 Others (2021) eKLR** to support his submissions.

The Law

6. This court is empowered under **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 Thika CM Criminal (S.O) Case No. 32 of 2018 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 (15) 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.

8. 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.

9. **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.”

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

11. 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."

12. 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.”

13. 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."

14. The applicant was arrested on 13th April 2018 and arraigned in court. Plea was taken on 16/04/2018 and he was granted bond of Kshs. 200,000/- with one surety of the same amount. The applicant was released on bond on 1st November 2018. On 3rd February 2021 the court cancelled the applicant's bond for failing to attend court on two occasions. He was arrested for absconding and arraigned in court where his bond was cancelled court. The trial court delivered its judgment and sentenced the applicant on 23rd February 2023. As such, the applicant spent a total of two (2) years, seven (7) months and eight (8) days in custody. By virtue of **Section 333(2) of the Criminal Procedure Code,** this duration ought to have been considered during sentencing. Notably, the applicant has not contested the sentence, he only seeks to have the duration he spent in custody be taken into account which is his legal right.

15. I have perused the court record and noted that during sentencing, the trial court took into account the mitigation by the applicant and the fact that the victim was 15 years and one month at the date of the incident. The trial court further considered the provisions in

Section 8(3) and 8(4) of the Sexual Offences Act regarding sentence. He was sentenced to serve fifteen (15) years imprisonment in line with Section 8(4) of the Act observing leniency towards the applicant.

16. It is the pre evident on record that the trial court did not take into consideration the time spent by the applicant in custody pending trial.

17. It is hereby ordered that the applicant do serve fifteen years imprisonment less two years and seven months spent in prison remand. The sentence as reviewed shall be twelve (12) years and five (5) months imprisonment commencing from the date of sentencing 23rd February 2023.

18. It is hereby so ordered.

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

F. MUCHEMI

JUDGE