

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CRIMINAL REVISION NO. E067 OF 2025

**SIMON NGIGI WANGARI.....
APPLICANT**

VERSUS

**REPUBLIC.....
.....RESPONDENT**

R U L I N G

Brief Facts

1. The application for determination dated 15th August 2025 seeks for orders of review of sentence based on the provisions of **Section 333(2) of the Criminal Procedure Code.**
2. The applicant was convicted by Thika Chief Magistrate in Criminal Case No. E1981 of 2024 with the offence of malicious damage to property contrary to Section 339(1) of the Penal Code and was sentenced to serve two (2) years imprisonment.
3. The applicant herein seeks for review of sentence and urges this court to invoke **section 333(2) of the Criminal Procedure Code** by considering the period he served in remand pending the hearing and disposal of his

case. The applicant states that he was arrested on 4th July 2024 and has spent nine (9) 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 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. E1981 of 2024 with the offence of malicious damage to property contrary to Section 339(1) of the Penal Code. On 03/04/2025, the applicant was sentenced pay a fine of Kshs. 130,000/- in default two (2) years imprisonment. The applicant did not appeal against conviction and sentence. **Article 50 of the Constitution** prohibits review where a convict has gone through the 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 having not filed an appeal against the judgment of the court below, his 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.

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 1st July 2024 and upon taking plea magistrate granted him cash bail of Kshs. 100,000/- which was later reviewed to Kshs. 50,000/- and finally to Kshs. 20,000/-. The applicant thereafter changed his plea to one of guilty and the trial court convicted him on his own plea of guilty and sentenced the applicant on 3rd April 2025. There is no evidence on record that the applicant was ever released on cash bail during the trial.
14. From the date of arrest of 1st July 2024 the court record is clear that the applicant spent nine (9) months in custody. By virtue of **Section 333(2) of the Criminal Procedure Code**. The said duration ought to have been considered during sentencing which is the duty of the trial court.

15. I have perused the court record and noted that during sentencing, the trial court took into account the mitigation of the applicant as well as other factors and circumstances of the case. the victim's sentiments were also considered. The court then sentenced the applicant to pay a fine of Kshs. 130,000/- in default two (2) years imprisonment in line with Section 339(1) of the Penal Code. It is evident that the trial court did not take into consideration the time spent by the applicant in custody which would have reduced the sentence imposed.
16. It is my considered view that the applicant having served the defaulters sentence of nine months is hereby deemed to have served sufficient sentence.
17. The applicant shall be released forthwith unless otherwise lawfully held.
18. It is hereby so ordered.

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

**F. MUCHEMI
JUDGE**