



**Kimitei v Republic (Miscellaneous Criminal Application  
E127 of 2024) [2026] KEHC 1064 (KLR) (5 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1064 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS CRIMINAL APPLICATION E127 OF 2024**

**RN NYAKUNDI, J  
FEBRUARY 5, 2026**

**BETWEEN**

**KENNETH KIPKEMOI KIMITEI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Before this court is an application dated 4<sup>th</sup> day of September 2024 seeking the following orders:
  - a. That the prayers sought are on sentence only.
  - b. That the petition be allowed, admitted, heard and determined in the soonest time possible.
  - c. That the petition is seeking enforcement of Section 333(2) of the CPC in relation to sentences that have not factored the time spent in custody.
  - d. That I am seeking reduction of my sentence by 5 years the period I spent in remand custody but was not factored in the 10 years sentence.
  - e. That I beg to be present during hearing thereof.
2. The application is supported by an affidavit sworn by the applicant who deposed as follows:
  - a. That I was arrested, charged, convicted and sentenced to serve 10 years imprisonment for the offence of murder contrary to Section 203 as read with 204 of the penal code on 07/03/2019 at High Court Eldoret.
  - b. That I spent 5 years in remand, the time which the trial court did not factor in the 10 years sentence.



- c. That may this honorable court invoke the provisions of section 333(2) of the CPC and allow my sentence to commence as mitigated.
- d. That I am a first offender.
- e. That I beg to be present during hearing thereof.

## Decision

3. In the sentencing regime one of the key doctrine which cuts across the application of the principles and objectives in sentencing is that of proportionality. The other side of the proportionality equation relates to the calculation of penalty severity and matching the sanction to the crime. The utilitarian response to this issue is straightforward: the type and degree of punishment imposed on the offender should cause him or her to experience a level of pain commensurate with the amount of unhappiness caused by the offence. The harm caused by crime and the unpleasantness inflicted through punishment are calculated by reference to the same variable, happiness.
4. The principle of proportionality requires that the severity of the sanction is equal to the seriousness of the offence. This concept has proved difficult to implement. There have been two main reasons for this. First, there is no true appreciation of what factors are relevant to the seriousness of an offence. It has been suggested that this is gauged solely by reference to the amount of unhappiness caused by the offence. Secondly, there is no principled method for ascertaining the severity of punishment.
5. This court whether sitting on appeal or review is bound by the stare decisis in *Benard Kimani Gacheru vs Republic* [2002] eKLR must be met:

“It is now settled law, following several authorities by this court and by the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong principle. Even if, the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

6. In the instant application there is only one cardinal issue of concern to the applicant being on pre-trial detention period applicable under Section 333(2) of the CPC. The principles which governed the interpretation of this section on our code is well captured in the case of *Ahamad Ablofathi 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, the court was obliged to take into account the period that they 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 proportionality by the period 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.

7. The issue of giving credit for the period spent in pre-trial remand as provided under Section 333(2) of the CPC is further toned by *the Constitution* imperatives in Chapter 4 on the Bill of Rights. This provision received emphasis during the drafting and promulgation of the Sentencing Policy Guidelines of the Judiciary 2019. In this regard I exercise judicial discretion to invoke the provisions of the court and Articles 20, 22, 23, 24, 25(A), 27(1) & (4), Article 50(2)(p)(q) as read with Section 362 & 364 of the Criminal Procedure Code to have the committal warrants amended to provide for a credit period of 5 years spent in pre-trial detention by the applicant before the conclusion of his case on 7<sup>th</sup> March 2019.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 5<sup>TH</sup> DAY FEBRUARY, 2026**

.....

**R. NYAKUNDI**

**JUDGE**

