

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CRIMINAL REVISION NO E039 OF 2025

FRANCIS KAMAU NDUATI.....
.....APPLICANT

VERSUS

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

R U L I N G

- 1.** The Applicant, **FRANCIS KAMAU NDUATI** moved this court vide an undated ‘sentence review’ application filed in court on 26/03/2025 seeking that the period he spent in remand of 8 months and 17 days be taken into account in line with ***Section 333(2)*** of the **Criminal Procedure Code**.
- 2.** The application is supported by an affidavit and he deposed that he was sentenced to 6 and 12 years imprisonment for the offence of housebreaking in *Criminal Case No. 1462 of 2017* on 12/10/2021. He was arrested on 12/09/2017 and bonded out on 30/11/2017 and he was re-arrested on

13/04/2021 and was convicted on 12/10/2021, hence the period he spent in remand ought to have been considered.

3. In response, the Respondent's counsel filed a notice of preliminary objection on the ground that this court is *functus officio* as it already delivered a judgment dismissing *High Court Criminal Appeal No. E068 of 2021 on 16/01/2021*. Therefore, the application is an abuse of the court process.

4. The Applicant filed written submissions and argued that failure to deduct the period he spent in remand has resulted into a disproportionate, excessive and unjust sentence. That pursuant to **section 333(2)**, this court has jurisdiction to revise the sentence where injustice appears to have occurred.

5. The Respondent's counsel also filed written submissions. She maintained that this court is *functus officio* as it already delivered a judgment dismissing an appeal filed against the conviction and the sentence. It cannot therefore entertain further legal process in the same matter.

6. I have considered the application, the preliminary objection by the Respondent and the submissions by the Applicant and Respondent's counsel. It is noted that the Applicant

herein was charged in **Nanyuki Criminal Case 1462 of 2017** with the offence of **housebreaking** and he was convicted and sentenced to 6 and 12 years imprisonment. He appealed to this court against both conviction and sentence vide **High Court Criminal Appeal No. E068 of 2021** and the appeal was dismissed by this court on 16/01/2025.

7. The Applicant now seek that the period spent in remand be considered pursuant to **Section 333(2)** of the **Criminal Procedure Code**.

8. The jurisdiction of the High court is provided for under **Article 165(3)** of the **Constitution** and includes **unlimited original jurisdiction in criminal and civil matters; jurisdiction to enforce bill of rights; appellate jurisdiction; interpretative jurisdiction; and any other jurisdiction, original or appellate, conferred on it by legislation**. The High court further has **supervisory jurisdiction over subordinate** courts donated by **Article 165(6)** of the **Constitution** which states that;

(6) 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.

9. This jurisdiction is expounded under **sections 362 and 364** of the **Criminal Procedure Code**.

10. The power of criminal review (called **revision**) of this court is provided for in **sections 362 and 364** of the **Criminal Procedure Code** and extends only to -

“...the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

11. The details of those powers of the High Court in revision are set out in **Section 364**.

12. As per **Article 165(6)** and the above section, the High Court can only review or exercise revisionary powers over a subordinate court.

13. There is no law which bestows this court with jurisdiction to review a decision by a court of concurrent jurisdiction and/or its own decision. No judge of the High Court can superintend over fellow judges of that court or of the superior courts. The Court of Appeal in ***Peter Ng’ang’a Muiruri Vs.***

Credit Bank Ltd & 2 Others Civil Appeal No. 203 of 2006 held that;

“It would be a usurpation of power to push forward such an approach, and whatever decision emanates from a court regarding itself as a constitutional court, with powers of review over decisions of concurrent or superior jurisdiction, such decision is at best a nullity.”

14. This court having dealt with the Applicant’s appeal on the sentence cannot again review its decision. I have not come across any statutory provision that gives this court any criminal revisionary jurisdiction over its own findings, sentences or orders made or passed in exercise of its original or appellate criminal jurisdiction.

15. The court in ***David Mutai v Republic [2021] eKLR*** held that;

“Though the High Court has unlimited original jurisdiction in Criminal and Civil matters under Article 165(3)(a) of the Constitution, holding it that it encompasses revisiting issues dealt with by the same Court and a step higher by the Court of Appeal, is equivalent to according the High Court cosmic jurisdiction of which it doesn’t have. Litigation just like everything else bad or good, has an end. The end point in this one was at the Court of Appeal, but probably there’s a slight vent to the supreme Court. Having observed the foregoing, I do find that this Court lacks

jurisdiction to re-sentence the petitioner as urged. The petition therefore lacks merit and is hereby dismissed.”

16. The court in **Stephen Mugendi Ndwiga v Republic**

[2021] eKLR observed that;

“It is my considered view that this court cannot review a judgment of Hon. S. Chitembwe J and in doing so resentence the petitioner herein...Further this court is bereft of jurisdiction to review the said judgment as doing so would be tantamount to sitting as an Appellate court on the judgment of the Learned Judge and which act the law abhors. In the same breath, this court cannot review the said judgment and in doing so take into account the time the petitioner had spent in custody. The same ought to have been dealt by Hon. Chitembwe J as the first appellate court. Failure by the said first appellate court to consider the said period cannot be rectified by this court as the same shall be akin to reviewing the decision of a court of concurrent jurisdiction.”

17. From the foregoing, this court can only review the judgment of a subordinate court under the jurisdiction provided by **sections 362** and **364** of the **Criminal Procedure Code** and has no jurisdiction to review its own decision. This court cannot also consider the time he spent in remand as that would amount to reviewing this court’s decision. Once the Applicant appealed to this court, all the issues he was dissatisfied with in the outcome at the trial court ought to have been raised in the appeal before the

High Court. It is not feasible for him to re-open the case as he cannot litigate piecemeal and litigation must come to an end. The recourse open to him is to appeal the judgement of the High Court to the Court of Appeal.

18. The application lacks merit and is dismissed.

Dated signed and delivered virtually this 19th day of February 2026.

A.K. NDUNG’U
JUDGE