

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CRIMINAL REVISION NO. E055 OF 2025

DAVID NJUGUNA KARANJA.....
APPLICANT

VERSUS

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

R U L I N G

Brief Facts

1. The application for determination dated 28th May 2025 seeks for orders of review of sentence under **Section 333(2) of the Criminal Procedure Code.**
2. The applicant states that he was convicted by Thika Chief Magistrate in Criminal Case No. E187 of 2024 with the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code. He pleaded guilty to the charge and was sentenced to serve three (3) years imprisonment.
3. The applicant herein seeks for review on sentence and urges the court to invoke **Section 333(2) of the Criminal Procedure Code** and take into account the period he served in remand pending the trial of his case.

The applicant states that he spent three months in custody which period the trial magistrate failed to consider during

sentencing. The applicant further states that he is remorseful and rehabilitated. He further states that he is married with two children who depend on him and further that he suffers from AIDS and his health is deteriorating due to lack of specialized treatment and diet in prison.

4. The respondent did not file any response to this application.
5. The applicant put in written submissions.

The Applicant's Submissions

6. 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 Law

7. 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.

8. The applicant herein was convicted in Chief Magistrate's Court in Thika in Criminal Case No. E187 of 2024 with the offence of obtaining money by false pretences contrary to Section 313 of the Penal Code. The applicant changed his plea of not guilty to one of guilty on 7th March 2024 and was sentenced to three years imprisonment without an alternative of a fine. 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.

9. 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.

10. **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.”

11. It is clear from the above proviso that the law requires courts to take into account during sentencing the period the convict spent in custody pending trial.

12. 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.”

13. 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.”

14. 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.”

15. The applicant was arrested on 17th January 2024 and plea was taken on 18th January 2024. He was given a release order of bond of Kshs. 800,000/- with one surety of similar amount. The applicant later changed his plea to one of guilty on 7th March 2024. There is no evidence on record that the applicant was ever released on bond pending trial of his case. The trial court sentenced the applicant on 9th April 2024. The applicant thus spent two (2) months and twenty three (23) days in custody. By virtue of **Section 333(2) of the Criminal Procedure Code**, this duration ought to have been considered during sentencing which was not done .

16. I have perused the court record and noted that during sentencing, the trial court took into account the mitigation by the applicant, the presentence report which provided that the applicant is a habitual and perennial obtainer and he or his family were not in a position to refund the complainant. The trial court further considered the relevant provisions of law and then sentenced the applicant to three (3) years imprisonment in line with Section 313 of the Penal Code. It is therefore evident that the trial court did not take into consideration the time spent by the applicant in custody. Under Section 333(2) of the Criminal Procedure Code, the applicant is entitled to review of sentence.

17. As for the other factors raised by the applicant in mitigation for review his sentence downwards, I find them

to have no legal basis based on the fact that the trial court considered his mitigation, during sentencing.

18. I find this application partly merited and hereby order that the applicant do serve the three (3) year imprisonment sentence to commence on 17th January 2024, being the date of arrest.

19. It is hereby so ordered.

***RULING DELIVERED VIRTUALLY, DATED AND SIGNED
AT THIKA THIS 19TH DAY OF FEBRUARY 2026.***

**F. MUCHEMI
JUDGE**