



**Muriithi v Republic (Criminal Revision E236 of 2025)
[2026] KEHC 3027 (KLR) (4 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 3027 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL REVISION E236 OF 2025
RM MWONGO, J
MARCH 4, 2026**

BETWEEN

STANLEY MURIGI MURIITHI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

The Application

1. The applicant through an undated notice of motion seeks, essentially, the following orders:
 1. That this court has discretion to order for non-custodial sentence in its powers of review of a sentence considering that the applicant has, all along, been remorseful and his defense can attest to this fact;
 2. That this Honourable court be pleased to grant the prayers sought which invoke the provisions of section 4 of the *Probation of Offenders Act*;
 3. That the applicant has used his period of incarceration well by engaging in productive rehabilitative courses which have equipped him with skills that would benefit his family and the society;
2. In his supporting affidavit (para 5 (d)), he prays that the court should apply Section 333 (1) (2) CPC and deduct the time he spent in custody from his sentence.
3. The application is supported by an affidavit sworn by the applicant. In it, he states that he has a constitutional right which can be exercised under section 4 of the *Probation of Offenders Act*. That he was charged in the subordinate court and convicted of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*. He was sentenced to 10 years imprisonment. He deposed that he did not appeal against the decision of the trial court but he seeks that the sentence be reduced by



applying section 333(2) of the Criminal Procedure Code. In his view, the time spent in lawful custody pending trial should be removed from the sentence imposed and it should be considered so that the sentence reduces to 6 years imprisonment. The foregoing notwithstanding, the applicant is hoping that the court would release him from prison altogether under the *Probation of Offenders Act* in a bid to decongest the prison facility. At the time of the application, he had 2 years and 10 months left on his sentence.

Written Submissions

4. The application was canvassed by way of written submissions.
5. The applicant stated that the revisionary jurisdiction of this court and section 364-366 of the Criminal Procedure Code allows it to make a probation order under the *Probation of Offenders Act*. He relied on section 4 of the *Probation of Offenders Act* and the case of Joseph Bahati v Republic (2024) eKLR in support of the prayers made. He also relied on the objectives of sentencing as stated in the Judiciary Sentencing Policy Guidelines 2023. He argued that while in prison, he has exercised exemplary behavior, a fact that the prison officers endorse without reservation. He urged the court to set aside the remainder of the custodial sentence and set him free through a probation order.
6. The respondent referred to section 4(1) of the *Probation of Offenders Act* and submitted that a probation order can only be made by a subordinate court before conviction and by the High Court while exercising its original jurisdiction in a criminal case after conviction. It argued that in the present case, the case was tried by the subordinate court where the applicant was convicted and sentenced, hence it is too late to make a probation order.

Issue for Determination

7. The issues for determination are:
 - (a) whether the application has merit; and
 - (b) whether section 333 (1) (2) applies to his sentence.

Analysis and Determination

8. The applicant was charged with an offence that was tried in the subordinate court. Where a matter is tried before the trial court, a probation order may be made before or after conviction but before sentencing. Section 4(1) of the *Probation of Offenders Act* provides:

“Where a person is charged with an offence which is triable by a subordinate court, and the court thinks that the charge is proved but is of the opinion that, having regard to age, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may—

- (a) convict the offender and make a probation order; or
 - (b) without proceeding to conviction, make a probation order, and in either case may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.” (Emphasis added)
9. Clearly, section 4(1) above, provides that the factors for consideration for probation are to be taken into account before an offender is sentenced by the trial court. In this case, the applicant was sentenced and



is serving the imprisonment term. Therefore, a probation order cannot be made at this stage, thus the provision does not apply. This Court held as aforesaid in the cases of *Njue v Republic* [2026] KEHC 564 (KLR) and *Njagi v Republic* [2026] KEHC 333 (KLR).

10. The applicant also raised the issue of section 333(2) of the Criminal Procedure Code and stated that time spent in custody was not considered during sentencing. From a perusal of the trial court proceedings, the applicant was sentenced to 6 years imprisonment after considering the mitigating factors in the case. However, in its ruling, the trial court failed to indicate whether it had considered time spent in lawful custody. This is a constitutional right of an accused person to fair hearing under Article 50 and it is enforced through section 333(2) of the Criminal Procedure Code which provides:

“Subject to the provisions of section 38 of the Penal Code (Cap. 63) 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”
(Emphasis added)

Conclusion and Disposition

11. The applicant herein was sentenced to 6 years imprisonment on 05th December 2023. Upon perusal of the trial court’s record and warrant of commitment, the time spent in lawful custody was not taken into account. The pre-sentence period since the time of arrest is a total of 375 days until the date of sentencing. This time must be considered and taken into account.
12. On the first issue, section 4 of the *Probation of Offenders Act* is inapplicable.
13. The application is allowed on the second issue. Accordingly, the 375 days spent in lawful custody should be considered in the 6-year imprisonment sentence.
14. Accordingly, it is ordered that the sentence of 6 years imprisonment is deemed to start on the date of arrest, that is, 16th November 2019.
15. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 04TH DAY OF MARCH, 2026.

R. MWONGO

JUDGE

Delivered in the presence of:

Applicant Present in Court

Ms. Mwaniki for the Respondent

Francis Munyao - Court Assistant

