



**Tirus v Republic (Miscellaneous Criminal Application E012 of 2025) [2026] KEHC 3028 (KLR) (4 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 3028 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
MISCELLANEOUS CRIMINAL APPLICATION E012 OF 2025**

**RM MWONGO, J**

**MARCH 4, 2026**

**BETWEEN**

**DANIEL NJIRU TIRUS ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

**The Petition/Application**

1. Through an undated petition, the petitioner is seeking the following:
  1. A declaration that failure to comply with section 333(2) of the Criminal Procedure Code institutes to unfair trial in sentencing. That the petitioner is satisfied with the conviction and approaches this honorable court for leniency, review the sentence of 35 years downwards and take into account the period spent in lawful custody in compliance with section 333 (2) of the Criminal Procedure Code, the case of Vincent Sila Jona & 87 others v Kenya Prison Service & 2 others [2021] KEHC 13027 (KLR) and Article 50(2) of *the Constitution* of Kenya 2010.
  2. A declaration that the petitioner herein is entitled with all benefits of law as stipulated in Articles 25 (c) 27(1)(2) and 51(1) of *the Constitution*.
2. The Petitioner stated that he was convicted and sentenced for robbery with violence contrary to section 296(2) of the Penal Code. He has exhausted all the channels of appeal and he now seeks further sentence review through the present motion. Upon first appeal, the court reviewed the sentence from life imprisonment to 35 years imprisonment which the applicant seeks a further review of. He stated that he has since reformed while in prison and he has acquired new skill which are meaningful to him. He urged the court to apply sections 216 and 329 of the Criminal Procedure Code since they were not applied by the trial court.



3. When the parties appeared in court, they were directed to file submissions on the question of whether ‘custody’ under section 333(2) of the Criminal Procedure Code also means ‘imprisonment’ pursuant to a sentence upon conviction; and, therefore, whether the provision applies in the present case.

### **Submissions**

4. In his submissions, the applicant relied on the cases of *Mulamba Ali Mabanda v Republic* [2018] KECA 7 (KLR) and *Ahamad Abolfathi Mohammed & another v Republic* [2018] KECA 743 (KLR) and argued that this mitigation and time spent in custody pending trial should be taken into account. He reiterated that he has acquired useful skills during his incarceration and that he can use once he is released back to society to avoid relapsing into crime. He urged the court to reduced his sentence downward as it is harsh and excessive and he relied on the case of *Robert Mutash Auda v Republic* [2013] KEHC 293 (KLR).
5. The respondent submitted that compliance with section 333(2) of the Criminal Procedure Code does not amount to reduction of the sentence; rather, it ensures that the sentence runs from the appropriate time. It added that the offence is a serious one and it poses a threat to the community hence a sentence of 35 years imprisonment, subject to section 333(2) of the Criminal Procedure Code, is lawful, proportionate and justified. It urged the court to dismiss the application and uphold the sentence of 35 years imprisonment.

### **Issue for Determination**

6. The core issues for determination is whether the petition has merit

### **Analysis and Determination**

7. Following conviction by the trial court in Embu MCCR 407 of 2010, the applicant was sentenced to life imprisonment. He unsuccessfully appealed the trial court’s decision to the High Court and Court of Appeal where the appeals were dismissed. He then proceeded to file a constitutional petition before this court in 2023, challenging the constitutionality of the life imprisonment sentence given its indeterminate nature. At the time, this court was guided by the decision of the Court of Appeal in *Ayako v Republic* [2023] KECA 1563 (KLR) and *Manyeso v Republic* [2023] KECA 827 (KLR) as good precedent: The two cases were subsequently overturned by the Supreme Court in 2025. To that end, the sentence was reduced from life imprisonment to 35 years imprisonment to run from the date of conviction. In her judgment delivered on 14<sup>th</sup> February 2024, the Judge ordered that the sentence runs from the date of conviction.
8. The applicant now seeks consideration of section 333(2) of the Criminal Procedure Code so that time spent in custody prior to trial be taken into account. The court herein asked the parties to submit on whether ‘time spent in custody’ would also mean ‘imprisonment’. When discussing section 333(2) of the Criminal Procedure Code, the same cannot be viewed as a means to reduce the sentence imposed by a court. This provision merely envisions time spent in custody as the period between arrest and sentencing. Section 333 of the Criminal Procedure Code provides:

“(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.



- (2) 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]

9. In the case of *Ahamad Abolfathi Mohammed & another v Republic (supra)*, the Court of Appeal held thus regarding that provision:

“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(s) 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.” [Emphasis added]

10. It is clear from the foregoing, that to take something into account means that the thing must be considered before or during the making of the decision. Given the wording of section 333(2) of the Criminal Procedure Code, the court is under no obligation to remove the period spent in custody from the sentence period imposed. Rather, this period is considered when the decision to sentence is being made. It has become common practice for courts to include the time spent in custody in the sentence imposed, such that the sentence is deemed to start from the date of arrest, excluding all the dates when the accused was not in custody due to release on bail/bond.
11. Time spent in custody is different from the imprisonment term. Time spent in lawful custody that is considered under this provision means the period between the date of arrest and that date when bond/bail terms were approved by the trial court. In cases where the accused person remained in prison remand, the whole period spent in remand counts as part of time spent in custody. Where an accused person is released on bond/bail, the court would have to consider the period between the date of conviction and sentencing. After sentencing and from that date, the accused/convicted person starts serving an imprisonment sentence.
12. In essence, section 333(2) of the Criminal Procedure Code should be used to ensure proportionality in sentencing to the intent that an accused person does not suffer a longer term of incarceration than the period for which he is duly sentenced. Therefore, a sentencing court ought to consider this period spent in lawful custody during sentencing. Article 50(2)(p) of *the constitution* provides that:

“Every accused person has the right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment



for the offence has been changed between the time that the offence was committed and the time of sentencing.”

13. The applicant has already benefitted through reduction of his life imprisonment sentence to 35 years imprisonment based on caselaw at the time of the sentence review. This amounted to a re-sentencing and the court ought to have taken into consideration the time spent in lawful custody during that re-sentencing. In fact, based on this provision of *the constitution*, section 333(2) of the Criminal Procedure Code is one of the ways in which the appellant can benefit from the least severe sentence.

### **Conclusions and Disposition**

14. That being said, from the trial court record, the cumulative period of time spent in custody amounts to 671 days prior to the date he was convicted. It was that date the High Court referred to in its judgment delivered on 14<sup>th</sup> February 2024 as the start date of the 35-year imprisonment sentence.
15. There is no doubt in my mind that the 671 days ought to be included in the 35-year imprisonment sentence so that the sentence of 35 years must include that period. Thus, the sentence of 35 years must be deemed to include the 671 days with the effect that the expected date of sentence completion will be earlier by that number of days. The sentence ought to be deemed to start on 02/07/2010.
16. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 04<sup>TH</sup> DAY OF MARCH, 2026.**

**R. MWONGO**

**JUDGE**

Delivered in the presence of:

1. Applicant Present in Court
2. Ms. Mwaniki for the Respondent
3. Francis Munyao - Court Assistant

