

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VIHIGA
MISCELLANEOUS CRIMINAL APPLICATION NO E007 OF 2026

CYRUS KAVAYI.....
APPLICANT

VERSUS

REPUBLIC.....RESPONDEN
T

RULING

INTRODUCTION

1. The Applicant herein was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. He was also charged with an alternative count of handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the Penal Code. He was convicted on the main Count and was sentenced to death.
2. Being aggrieved by the said decision, he lodged first appeal at Kakamega **HCCRA No 184 of 2009**. The court dismissed his appeal and upheld his conviction and sentence.
3. Being aggrieved by the said decision, he lodged the second appeal at the Kisumu Court of Appeal **CRA No 166 of 2016**. The said court also dismissed his appeal and upheld his conviction and sentence.
4. On 17th October 2023, he filed an undated Petition seeking a review of the death sentence on the ground that it was inhuman, excessive, demeaning and torturous. On 19th December 2024, this court dismissed his said Petition on the ground that it could not review the decision of the Court of Appeal.

5. On 23rd April 2025, he filed a Notice of Motion application dated 17th April 2025. This court allowed the said application in its decision of 18th December 2025. This was pursuant to this court's decision of the case of **Mbugua & 6 Others vs Attorney General & 3 Others (Constitutional Petition E002 & E003 of 2024 (Consolidated)) [2025] KEHC 1248 (KLR) (24 February 2025) (Judgment)** wherein this court held that it was discriminatory to deny offenders who had been convicted of the offence of robbery with violence and attempted robbery with violence the right to have their mitigation during trial considered, while the non-capital offenders enjoyed that right. It reviewed the Applicant's sentence to thirty (30) years imprisonment and directed that he was at liberty to file an application under Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) as the Charge Sheet and the lower court file had not been placed before it.
6. On 16th February 2026, the Applicant, therefore, filed a Notice of Motion application in which he had sought to be granted the period that he spent in remand as was provided in Section 333 (2) of the Criminal Procedure Code. He stated that he was currently serving thirty (30) years imprisonment. He averred that he was reformed and rehabilitated and had not had any disciplinary issues while in prison.
7. He did not file any Written Submission in respect of his said Notice of Motion application. As the Respondent was not opposed to his

application, it did not file any Written Submissions. The Ruling herein is, therefore, based on the Applicant's affidavit evidence.

LEGAL ANALYSIS

8. Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides that:-

“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 court).”

9. Further, Clause 4.6.20 (ix) of the Judiciary Sentencing Policy Guidelines provides that:-

“The Sentencing Court shall be guided by the sentencing principles and objectives set out in Part I of these the Guidelines in all resentencing hearings. The following mitigating factors were set out by the Supreme Court as particularly relevant in a resentencing hearing:...

Time already spent in prison by the convict...”

10. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section

333(2) of the Criminal Procedure Code was restated by the Court of Appeal in the case of **Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR.**

11. According to the Charge Sheet, the Applicant was arrested on 9th June 2008. He was not released on bond. He was sentenced on 13th November 2009. As the sentence was now determinate, this is a period that ought to be considered when computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

DISPOSITION

12. For the foregoing reasons, the upshot of this court's decision was that the undated Applicant's Notice of Motion application that was filed on 16th February 2026 was merited and the same be and is hereby allowed.

13. It is hereby directed that the period between 9th June 2008 and 12th November 2009 be and is hereby taken into account while computing the Applicant's sentence in line with Section 333 (2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

14. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **19th** day of **March** 2026

J. KAMAU
JUDGE