

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CRIMINAL MISCELLANEOUS APPLICATION NO.E140 OF 2024**

**JOSEPH BOSIRE KUMUKU.....APPLICANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**RULING**

1. What is before this Court for determination is the undated **Notice of Motion** application in which the Applicant, **Joseph Bosire Kumuku** seeks the following orders:-

a) *Spent.*

b) *THAT this Honourable Court be pleased to note that the period served under the orders of court from the date of arrest was not factored into he imposed sentence, contrary to Section 333 of the Criminal Procedure Code(CPC).*

c) *THAT this Honourable Court be pleased to review the imposed sentence downwards and order the sentence to run from the date of arrest.*

d) *Any other orders this Honourable Court will be pleased to make in the circumstances of the matter.*

2. The Application is based on the grounds as set out on its face and on the Supporting Affidavit of the Applicant. The Applicant avers that he was

charged, tried, convicted and sentenced to serve fifteen (15) years imprisonment for the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code vide Kiambu HCCRC No. 27 of 2017, Republic –vs- Joseph Bosire Kumuku** which the Applicant is seeking for a review of the Sentence that was meted against him by taking into consideration the time spent in custody as enjoined by the provision of **Section 333 of the Criminal Procedure Code**. The Applicant has also sought for the review of the remainder sentence period to be converted to a con-custodial sentence, most probably, a probation period as provided for under **Section 4 of the Probation Offenders Act**. He urged the court to consider that he was arrested on 25<sup>th</sup> June, 2017 and has been in custody since then. He gives his age as thirty-two (32) years and contends that it would in the interest of justice that society benefits from his skills and he rebuild his life. The Applicant filed submissions dated 20<sup>th</sup> May, 2025, in which he has reiterated his prayers to court.

3. In response, the Prosecution's counsel orally submitted and stated that he is not opposed to the application and confirmed that the time spent in custody be considered in line with the provisions under **Section 333 of the Criminal Procedure Code**.

## **Analysis and Determination**

4. I have considered the application, written and oral submissions by the parties herein together with the record of proceedings and Judgment of the trial Court in **Kiambu HCCRC, No.27 of 2017**. In essence what the Applicant has done is to invoke this Court's revisional jurisdiction as provided for under **Section 362 as read with Section 363 of the Criminal Procedure Code**.

5. **Section 362** states as follows:-

### ***[363] Power of High Court to call for records***

***The High Court may call for and examine 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.***

6. **Section 364** goes on to state:-

### ***[364]. Powers of High Court on revision***

***1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—***

***a) in the case of a conviction, exercise any of the***

*powers conferred on it as a Court of Appeal by Sections 354, 357 and 358, and may enhance the sentence;*

*b) in the case of any other order other than an order of acquittal, alter or reverse the order.*

7. From the above statutory provisions, it is clear that this Court's revisional jurisdiction can only be exercised over orders or decisions made by the subordinate courts in criminal proceedings. The power of the court in the above provision is bestowed upon the High Court pursuant to the provisions of **Article 165(6) of the Constitution of Kenya, 2010**, which provides for the supervisory jurisdiction of the High Court over inter alia subordinate courts. 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.*

8. Further, **Article 50(2) of the Constitution** guarantees the accused person the right of fair trial as follows:-

*[2]Every accused person has the right to a fair trial, which includes the right—*

*a) ...*

*b) ....*

...

*q) if convicted to appeal to appeal to, or apply for review by a higher court as prescribed by law”.*

9. In the case of Samuel Kamau Macharia & Another –vs- Kenya Commercial Bank Ltd & 2 Others, Applicant No.2 of 2019, the Supreme Court of Kenya held that:-

*“ ...A court’s jurisdiction from either the Constitution or Legislation or both. Thus, a court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that what is conferred upon it by law.”*

10. In the instant case, the court has gone through the record and established that indeed the Applicant was arraigned in court on 27<sup>th</sup> June, 2016 having been charged with the offence of Murder and he remained in custody during the entire period of his trial despite having been granted bail. It is therefore evident that at the time of trial, the Applicant had spent one (1) year nine (9) months in custody which period ought to have been taken into consideration when sentence was meted against him, a result of which the Applicant could end up serving a served a higher sentence than the prescribed one. And yet, **Section 333(2) of the Criminal Procedure Code** enjoins the courts to take into consideration the period spent in custody by an accused during trial

**Section 333(2)** states as follows:-

*“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.This has been emphasized in **The Judiciary’s Sentencing Policy Guidelines** wherein it has been stated that:-

*“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.”*

12.The next issue for determination is whether the remainder sentence period can be converted to probationary or non-custodial sentence as per the provisions of **Section 4 of the Probation of Offenders Act**. The Section provides for the power of a court to permit conditional release of offenders

in the following terms:-

***[4]. Power of court to permit conditional release of offenders***

***(1) 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 youth, 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 recognisance, with or without sureties, in such sum as the court may deem fit.***

***(2) Where any person is convicted of an offence by the High Court and the court is of the opinion that, having regard to the youth, 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, in lieu of sentencing him to any punishment, make a probation order, and may require the offender to enter into a recognisance, with or without sureties, in such sum as the court may deem fit.***

***(3) Before making a probation order under subsection (1) or***

*(2), the court shall explain to the offender in ordinary language the effect of the order and that, if he fails in any respect to comply therewith or commits another offence, he will be liable to be sentenced for the original offence, and the court shall not make a probation order unless the offender expresses his willingness to comply with the provisions of the order.*

*(4) Where any offender against whom a probation order has been made commits a subsequent offence or fails to comply with any of the terms of the probation order, any sum the subject of any recognisance entered into by or on behalf of the offender may, in the discretion of the court, be forfeited.*

13. In this case, the Applicant had initially been charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code**. He requested and the prosecution agreed to enter into a Plea Bargain Agreement with him for a lesser charge of **Manslaughter contrary to Section 202 as read with section 205 of the Penal Code**. He pleaded 'Not Guilty' to the said offence and was convicted on his own 'Plea of Guilt'. He was then sentenced to serve a sentence of fifteen (15) years imprisonment for an offence which carries a penalty of life imprisonment for anyone found guilty of the same.

14. Considering the penalty prescribed for the offence of Manslaughter is life

imprisonment, a sentence of fifteen (15) years imprisonment while factoring period served in custody during trial, is quite lenient. Further, the provisions under **Section 4 of the Probation of Offenders Act** hardly apply to offenders charged with offences punishable by death or life imprisonment.

15. In regard of the aforesaid findings, the **undated Notice of Motion** application is partially allowed in the following terms:-

*a) The sentence of fifteen (15) years that was meted against the Applicant is hereby upheld save that the term of sentence be calculated from the 27<sup>th</sup> June, 2016 when he was arraigned in court to 7<sup>th</sup> February, 2019.*

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU  
THIS 17<sup>TH</sup> DAY OF MARCH, 2026.**

**D. O. CHEPKWONY  
JUDGE**

In the presence of:-

Applicant in person – present

M/S Muriu counsel for State

Court Assistant – Martin/Sakina