

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
CRIMINAL MISC. APPLICATION NO. E002 OF 2025

WASHINGTON ODHAIMBO OLENDO.....
.....APPLICANT
VERSUS

REPUBLIC.....
RESPONDENT

RULING

[1] Before the Court for determination is the applicant’s undated Notice of Motion filed herein on 8th January 2025. It was brought pursuant to **Section 333(2)** of the Criminal Procedure Code, Cap 75 of the Laws of Kenya, for orders that:

[a] The application be certified as urgent and be heard or priority basis.

[b] That in accordance with **Section 333(2)** of the Criminal Procedure Code, the applicant’s pre-sentence detention be taken into account.

[2] The application was supported by the affidavit sworn by the applicant on 17th December 2024 in which he deposed that he was charged with two counts of attempted murder contrary to **Section 220(a)** of the Penal Code; and that pursuant to **Section 333(2)** of the Criminal Procedure Code, he now seeks that the period spent by him in pre-sentence detention be taken into consideration.

[3] The application was opposed by counsel for the respondent on the grounds that the appellant had already exercised his right of appeal to the High Court whereby his sentence was upheld. In her submission, the sentence of 20 years imposed on the applicant was lenient and does not warrant any further reduction by the Court. Counsel further submitted that, though not mentioned, the lower court considered the time spent by the applicant in custody prior to his conviction and sentence; and that is why the appellate courts upheld the sentence. Therefore, the respondent prayed for the dismissal of the appeal.

[4] The Court called for the record of the subordinate court in **Homa Bay Criminal Case No. 1271 of 2013: Republic v Washington Olendo & others** as well as **Homa Bay High Court Criminal Appeal No. 12 of 2012: Washington Odhiambo Olendo v Republic** and confirmed that indeed the applicant was charged with two counts of attempted murder; and that he was found guilty, convicted and sentenced to 20 years' imprisonment on each count, to run concurrently. The record of the High Court also confirms that the applicant's appeal was duly considered on the merits and dismissed on 22nd January 2018.

[5] If he was dissatisfied with the decision of the High Court on appeal, then the only option was for the applicant to proceed to the Court of Appeal.

[6] The Court is aware that there have been instances where, having exhausted their right of appeal, inmates approach the court for reduction

of sentence for purposes of **Section 333** of the Criminal Procedure Code. One such instance is **Jona & 87 others v Kenya Prison Service & 2 others (Petition 15 of 2020) [2021] KEHC 457 (KLR) (18 January 2021)** in which **Hon. Odunga, J.** (as he then was) held:

“A holistic consideration of the above provisions clearly show that this court has the power to redress a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights and one such violation is the denial or threat of denial of freedom without a just cause such as where the sentence that a person risks serving is in excess of the lawfully prescribed one by failing to comply with section 333(2) of the Criminal Procedure Code.”

[7] It is noteworthy however that, in that instance, the inmates filed a constitutional petition and argued their matter as such. I reiterate therefore that his appeal having been dismissed, the only avenue open for the applicant was by way of an appeal to the Court of Appeal. To entertain the application would amount to this Court sitting on appeal in respect of the decision of a court of concurrent jurisdiction. I therefore agree with the position taken in **Daniel Otieno Oracha v Republic [2019] eKLR**, that:

“The law abhors the practice of a judge sitting to review a judgment or decision of another judge of concurrent jurisdiction. Reduction of sentence could only be considered by the Court of Appeal or if this court was sitting on appeal of a judgment of the subordinate court or if the petitioner was seeking for resentence after exhausting appeal mechanisms and not otherwise”.

[8] In the result, I find no merit in the applicant’s Notice of Motion filed on 8th January 2025. The same is hereby dismissed.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF
APRIL 2026.**

.....

**OLGA SEWE
JUDGE**