



**Cheruiyot v Republic (Criminal Miscellaneous Application
E213 of 2024) [2026] KEHC 5236 (KLR) (23 April 2026) (Ruling)**

Neutral citation: [2026] KEHC 5236 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL MISCELLANEOUS APPLICATION E213 OF 2024**

PN GICHOHI, J

APRIL 23, 2026

BETWEEN

DAVID CHERUIYOT APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Before this Court is the Notice of Motion dated 11th November, 2024, where the Applicant seeks the following Orders:-
 1. That the Honourable Court be pleased to order that his sentence in CMS Court Molo in Criminal Case Number S.O 3 of 2018 to run from the date he was remanded.
 2. That the Honourable Court be pleased to invoke the provisions of Section 333 of the Criminal Procedure Code and all other enabling provisions in the interest of Justice.
 3. That the Honourable Court of Law be pleased to make any other Order that it will deem fit in the interest of justice.
2. The application is premised on the grounds set forth on its face and the Supporting Affidavit sworn by the Applicant, on even date. The Applicant depones that he was charged, convicted and sentenced to fifteen (15) years' imprisonment by the Molo Chief Magistrate's Court for the offence of Rape, contrary to Section 3(1) as read with Section 7 of the Sexual Offences Act No. 3 of 2006 in Criminal Case No. S.O. 3 of 2018.
3. He subsequently appealed against both conviction and sentence in the High Court under Criminal Appeal No. 4 of 2019. The Court dismissed the appeal against conviction but allowed the appeal against sentence, substituting the original term with a reduced sentence of ten (10) years.



4. He contends that he remained in custody throughout his trial, but the trial court failed to account for this period when passing sentence, as required under Section 333(2) of the *Criminal Procedure Code*. He therefore urges this Court to take into account the time served in remand and order that his sentence be computed from the date of his initial arrest.
5. The Applicant confirms that he did not further appeal the High Court's decision and has no intention of doing so. Instead, he prays for a computation of sentence, asserting that the High Court maintains the requisite jurisdiction to determine this matter pursuant to Article 165 of the *Constitution*.
6. The Respondent has opposed the application vide a Replying Affidavit sworn on 3rd April, 2025 by James Kihara, Prosecution Counsel and while acknowledging the Applicant's prayer to have his remand period accounted for under Section 333(2) of the *Criminal Procedure Code*, Counsel however argues that the High Court is legally precluded from reviewing a sentence handed down by a court of concurrent jurisdiction.
7. Consequently, the Respondent submits that the application is misdirected and lacks merit. It is the Respondent's position that the only forum to deal with the Applicant's prayer for review is the Court of Appeal.

Analysis and Determination

8. After considering the application and the affidavits both in support and opposition to the Application, the only issue for determination herein is whether this Court has the power to review the sentencing while putting into consideration the provisions of Section 333 of the *CPC*.
9. Section 333 of the *Criminal Procedure Code* provides that;-
 - “(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.”
10. In its Final Orders in the judgment delivered on 9th December 2020 in the Criminal Appeal No. 4 of 2018, the Judge stated:-
 1. The Appeal on conviction is hereby dismissed.
 2. Appeal on sentence is allowed and sentence reduced to 10 years imprisonment.
 3. Sentence to run from the date of sentence before the trial Court.



11. The powers of the Court under section 333 (2) of the *Criminal Procedure Code* and the proviso thereto were explained in the Court of Appeal in the case of *Abamad Abolfatbi Mohammed & another v Republic* [2018] KECA 855 (KLR), where the Court of Appeal held that:-

“.....The second is the failure by the Court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *Criminal Procedure Code*...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 provision to section 333(2) 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. We find that the first appellate Court misdirected itself in that respect and should have directed the appellants’ sentence of imprisonment to run from the date of their arrest on 19th June 2012.”

12. The record shows that the Applicant was arrested on 2/1/2018 and arraigned in Court on 3/1/2018. He deposited a cash bail of Kshs. 30,000/- and a release Order issued on 14/2/2018. The said cash bail was released to the depositor upon the Applicant’s conviction and sentence by the trial court on 14/1/2019.
13. From the provision of Section 333 (2) of the *Criminal Procedure Code* and bearing in mind the above decision by the Court of Appeal, the sentence should run from the date of arrest and, in this case, less the period he was out on bond.
14. By asking this Court vide this application to invoke Section 333 (2) of the *Criminal Procedure Code*, the Applicant herein is in effect asking this Court to sit on appeal of the decision of a Court of concurrent jurisdiction, which this Court cannot do.
15. Accordingly, the Applicant’s proper recourse lay in the Court of Appeal, not this Court.
16. In light of the foregoing, the application dated 11th November 2024 is hereby dismissed.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 23RD DAY OF APRIL, 2026.

PATRICIA GICHOHI

JUDGE

N/A by David Cheruiyot -Applicant

Ms Mwaura for the Respondent present

Erickson, Court Assistant

