

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT THIKA**  
**(CONSOLIDATED WITH CRIMINAL REVISION NO.E075 OF**  
**2025)**

**DAVID NJOROGE CHEGE.....1<sup>ST</sup>**

**APPLICANT**

**CHARLES NYAGA MITARU.....2<sup>ND</sup>**

**APPLICANT**

**VERSUS**

**REPUBLIC.....**

**.....RESPONDENT**

**R U L I N G**

**Brief Facts**

1. By an order of this court dated 24<sup>th</sup> November 2025, two applications filed by the applicants separately dated 15<sup>th</sup> and 16<sup>th</sup> October 2025 being HCCR. Rev. No.E075 and E077 both of 2025 were consolidated. The two applicants were convicted in Thika CM Criminal Case No. E1445 OF 2022 with the offence of escaping from lawful custody contrary to Section 123 of the Penal Code and were each

sentenced to serve fourteen (14) months imprisonment on 8<sup>th</sup> October 2025.

2. The applicants seek for orders or review of sentence under Section 333 (2) of the Criminal Procedure Code that provides that the period

spent in custody pending trial ought to be taken into consideration. The 1<sup>st</sup> applicant state that he was in custody from 7.06.2022 to 8<sup>th</sup> October 2025. The 2<sup>nd</sup> applicant states that he was in custody from 21<sup>st</sup> May 2022 to 8<sup>th</sup> October 2025. The two applicants were arrested on different dates as shown by the original court record.

3. The applicants state that they were convicted by Thika Chief Magistrate, in Criminal Case No. E1445 of 2022 with the offence of escaping lawful custody contrary to Section 123 of the Penal Code and upon pleading guilty to the charge they were sentenced to serve fourteen (14) months imprisonment.
4. The respondent conceded to the application and stated that the trial court did not take into account the time spent in custody.

### **The Law**

5. This court is empowered by **Article 165(6) of the Constitution of Kenya** to review a decision by a subordinate court. **Article 165(6)** provides:-

**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.**

6. The applicants herein were convicted in Chief Magistrate's Court in Thika in Criminal Case No. E1445 of 2022 with the offence of escape from lawful custody contrary to Section 123 as read with Section 36 of the Penal Code. The applicants changed their plea of not guilty

to one of guilty on 17<sup>th</sup> July 2025 and they were sentenced to fourteen (14) months imprisonment. The applicants did not appeal the decision. **Article 50 of the Constitution** prohibits review where a convict has gone through an appeal process. It provides:-

**(2) Every accused person has the right to a fair trial, which includes the right:-**

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

7. In the instant matter the applicants did not appeal against the judgment of the trial court and thus the applications for review are properly before this court.

8. **Section 333(2) of the Criminal Procedure Code provides:-**

**“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.”**

9. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody.

10. The provisions of **section 333(2) of the Criminal Procedure Code** was the subject of the decision in **Ahamad Abolfathi Mohammed**

**& Another vs Republic [2018]eKLR** 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 proviso 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 19<sup>th</sup> June 2012.”

11. The same court in Bethwel Wilson Kibor vs Republic [2009]eKLR expressed itself as follows:-

“By proviso to section 333(2) of the Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant

**did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22<sup>nd</sup> September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”**

**12. According to The Judiciary Sentencing Policy Guidelines:**

**“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.”**

13. The 1<sup>st</sup> applicant was arrested on 7<sup>th</sup> June 2022 and the 2<sup>nd</sup> applicant on 21<sup>st</sup> May 2022. The cases were consolidated on 11<sup>th</sup> August 2022 for hearing. The plea on the consolidated charge sheet was taken on 25<sup>th</sup> August 2022. The trial court declined to grant bond owing to the nature of the offence and the fact that both applicants were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code in Criminal Case No. 318 of 2021. The applicants later changed their plea to one of guilty on 17<sup>th</sup> July 2025. The trial court sentenced the applicants on 8<sup>th</sup> October 2025. Thus the 1<sup>st</sup> applicant spent three (3) years and three months and the 2<sup>nd</sup> applicant three years and four months in custody. By virtue of **Section 333(2) of the Criminal Procedure Code**, this duration ought to have been considered during sentencing. However, it is noted that the applicants were denied bond due to the nature of the offence that is, of escaping from lawful custody. It is important to note that the trial court had the option of imposing stringent conditions of release to ensure the applicants attended court for trial. However, the trial court had the discretion to do as was done.

14. I have perused the court record and noted that during sentencing, the trial court took into account the mitigation by the applicants and noted that the applicants did not waste the court's time going for full trial. The court further considered the relevant provisions of law and then sentenced the applicants to fourteen months imprisonment. It is therefore evident that the trial court

did not take into consideration the time spent by the applicants in custody. It is noted that the applicants were each sentenced to fourteen months

imprisonment. To date, the applicants have served about six (6) months in prison. The period remaining to complete sentence is less than one (1) year. All the facts herein considered this court allows the application of the following terms: -

**That the period served in prison is hereby deemed to be sufficient. The applicants are hereby set at liberty unless otherwise lawfully held.**

15. It is hereby so ordered.

***RULING DELIVERED VIRTUALLY, DATED AND SIGNED  
AT THIKA THIS 24<sup>TH</sup> DAY OF APRIL 2026.***

**F. MUCHEMI  
JUDGE**