

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CRIMINAL REVISION NO. E064 OF 2025

AUGUSTINE BARASA WEKESA.....
APPLICANT

VERSUS

REPUBLIC.....
.....RESPONDENT

R U L I N G

Brief Facts

1. This application dated 5th August 2025 seeks for orders of review of sentence under **Section 333(2) of the Criminal Procedure Code.**
2. The applicant states that he was convicted by Ruiru Chief Magistrate, in Criminal Case No. E1599 of 2024 with two counts of the offence of stealing contrary to Section 268 as read with Section 275 of the Penal Code and upon pleading guilty to the charge he was sentenced to serve three (3) years imprisonment.
3. The applicant seeks for review of sentence and urges the court to invoke **Section 333(2) of the Criminal**

Procedure Code and consider the period he spent in remand pending the disposal of his case. The applicant states that he spent two months in custody that the trial magistrate failed to consider during sentencing. The applicant further states that he is remorseful, a first time offender and has no previous record with the law. He further states that he is married with a child who depend on him. Additionally, the applicant states that he is reformed and found a talent in sports activities which have given him a positive mindset and perspective

4. The respondent did not oppose the application.

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 applicant herein was convicted in Chief Magistrate's Court in Ruiru in Criminal Case No. E1599 of 2024 with two counts of the offence of stealing contrary to Section 268 as read with Section 275 of the Penal Code. The applicant changed his plea of not guilty to one of guilty on 29th July 2024 and was sentenced to three years imprisonment. The applicant 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 applicant did not appeal against the judgment of the trial court and thus the application for review is properly before the 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. 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 19th June 2012."

10. 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 22nd 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."

11. 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.”

12. The applicant was convicted on his own plea of guilty on two counts of stealing contrary to Section 268 as read with Section 275 of the Penal Code. It is noted that the court after pronouncing the applicant guilty of both counts, he only sentenced the applicant on only one offence. The other offence was left hanging. This court has power under Section 362 and 364 of the Criminal Procedure Code to revise sentence and to correct any mistake, illegality impropriety or irregularity committed by the trial court. In this case, it appears the magistrate made an error of leaving one offence not dealt with in way

of sentence. This court is duty bound to correct the said mistake in this ruling.

13. The applicant was arrested on 27th June 2024 and upon taking plea on 1st July 2024, the trial court granted him orders of release on cash bail of Kshs. 40,000/-. The applicant later changed his plea to one of guilty on 29th July 2024. There is no evidence in the original court record that the applicant was ever released on bail during the trial. The court sentenced and convicted the applicant on two counts of stealing on 16th August 2024. As such, the applicant spent one and a half 1½ months in custody. By virtue of **Section 333(2) of the Criminal Procedure Code**, this duration ought to have been considered during sentencing. It is not in doubt that the trial magistrate failed to take this period into consideration during sentencing which was an omission that this court ought to rectify.

14. I find this application merited and allow it in the following terms: -

a) That the applicant shall serve sentence thus: -

Count 1 - To serve three (3) years imprisonment to commence from 27th June 2024.

Count II - To serve two (2) years imprisonment to run from 27th June 2024. Sentences to run concurrently.

15. It is hereby so ordered.

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

**F. MUCHEMI
JUDGE**