



**Chiteri v Republic (Criminal Application 139 of 2016)  
[2025] KECA 1056 (KLR) (13 June 2025) (Ruling)**

Neutral citation: [2025] KECA 1056 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPLICATION 139 OF 2016  
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA  
JUNE 13, 2025**

**BETWEEN**

**JOSEPH CHITERI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an application for resentencing emanating from the judgment of (PO Kiage, M Ngugi & F Tuiyott, JJA) dated 11th day of March, 2022 in COA Criminal Appeal 139 of 2016)*

**RULING**

1. The application dated 22<sup>nd</sup> November 2024 is brought under Section 333(2) of the [Criminal Procedure Code](#). It seeks resentencing focusing particularly on the period spent in remand custody by the applicant, Joseph Chiteri, whilst awaiting the trial and determination of his criminal case. The application is supported by the affidavit sworn by the applicant, dated 22<sup>nd</sup> November 2024. In the affidavit, the applicant depones that he was initially arrested on 15<sup>th</sup> April 2008 for the offence of murder contrary to Section 203 as read with Section 204 of the [Penal Code](#). Subsequently, he was tried, convicted for the offence in the High Court and thereafter sentenced to death. On appeal this Court (Kiage, Ngugi & Tuiyott, JJA) upheld the conviction whereas the death sentence was interfered with and substituted with a 30-year imprisonment term.
2. The applicant emphasizes the need for the court to consider the provisions of Section 333(2) of the [Criminal Procedure Code](#), particularly regarding the time spent in remand custody prior to sentencing. He elaborates on his current circumstances, citing his advanced age of 60 years, his medical condition, being HIV-positive, and his remorse for the offence he committed which has caused significant hardships to his family, especially his children. In ultimate, the applicant seeks the court's consideration to factor in the remand custody period as stipulated under Section 333(2) of the [Criminal Procedure Code](#).



3. The respondent did not file a reply to the application.
4. When the application came up for interpartes hearing on 25<sup>th</sup> March, 2025, on our virtual platform, the applicant was present in person while Ms. Busienei, learned Assistant Director of Public Prosecutions appeared for the respondent. Both parties indicated that they wished to rely on their respective written submissions entirely.
5. The applicant reiterated the necessity for the consideration of the time spent in remand custody prior to sentencing by the applicant. He emphasized that the failure to account for this period has resulted in an excessive sentence, violating his constitutional rights under Article 50(2)(p) of the *Constitution*. He highlighted inconsistencies in the application of Section 333(2) by trial courts, referencing precedents such as Bethwel Wilson Kibor v Republic [2009] KECA 143 (KLR) and William Okungu Kittiny v Republic [2018] KECA 851 (KLR) to support his argument that substantive justice should prevail over procedural technicalities.
6. He underscored his remorse as a first-time offender and emphasized his successful rehabilitation while in custody, evidenced by certificates and recommendations from prison authorities. Now aged 60, he argued that his time in custody has served as a sufficient lesson, and he is socially re-adaptable. He concluded by seeking a reduction in his sentence based on the time served in remand custody since his arrest on 14<sup>th</sup> April 2008.
7. Ms. Busienei in response argued that the applicant was convicted for the offence of murder and initially sentenced to death, which was later substituted with a 30-year imprisonment term following his appeal to this Court. While the applicant seeks consideration for the period spent in remand in terms of Section 333(2) of the *Criminal Procedure Code*, counsel assert that the judgment or proceedings of the Court of Appeal have not been attached to the application to confirm whether or not the substituted sentence took into account the period.
8. Counsel submitted that the court must have considered the period when substituting the death sentence with a sentence of 30 years. Consequently, she urged for the dismissal of the application.
9. We acknowledge that Section 333(2) of the *Criminal Procedure Code* requires that the time an accused person spends in remand custody before sentencing should be taken into account when passing the final sentence. This provision serves to uphold the principles of fairness and equity in sentencing, ensuring that individuals are not subjected to undue hardship by the omission to consider pre-sentencing custody.
10. However, upon review of the procedural history, it is evident that this court, being functus officio, lacks jurisdiction to entertain the present application. The principle of functus officio, as articulated in appellate decisions such as Josephat Kenyuri v Republic [2019] eKLR and Ngare Gikonyo v Republic [2022] eKLR, underscores that once a court has rendered its decision on a matter, it cannot revisit or alter its judgment except under specific circumstances provided by law. In the current case, this Court differently constituted previously adjudicated the matter, substituting the death sentence with a 30-year imprisonment term. This decision constituted the final determination, and as such, this Court lacks authority to reconsider or amend it. In any event, the application is not seeking a review of the judgment of this court.
11. Furthermore, the applicability of Section 333(2) of the *Criminal Procedure Code* in the context of a second appeal, as demonstrated in appellate cases such as Bethwel Wilson Kibor v Republic and William Okungu Kittiny v Republic, suggests that the provisions of Section 333(2) must be addressed by the trial court during initial sentencing or by the appellate court during resentencing. It cannot form the basis for a subsequent application following a final appellate decision. In any case the proceedings



and judgment of this Court have not been annexed to the application to demonstrate by the applicant that the court did not consider the time spent in remand custody while resentencing the appellant. The applicant bore the brunt to avail such evidence. He did not. As it is the applicant is inviting this Court to act on speculation which is not the province of this Court or indeed any other court of law.

12. In light of the above findings, we come to the irresistible conclusion that the application is procedurally untenable and we decline to grant the orders sought. The application dated 22<sup>nd</sup> November 2024 is accordingly dismissed.

**DATED AND DELIVERED AT KISUMU THIS 13<sup>TH</sup> DAY OF JUNE, 2025.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

