



REPUBLIC OF KENYA



**KENYA LAW**  
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**Koech v Republic (Criminal Appeal E096 of 2023)  
[2025] KECA 1333 (KLR) (18 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1333 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CRIMINAL APPEAL E096 OF 2023  
SG KAIRU, AK MURGOR & KI LAIBUTA, JJA  
JULY 18, 2025**

**BETWEEN**

**NICHOLAS KOECH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the Judgment of the High Court of Kenya at Malindi (S. M. Githinji, J.) dated 9th October 2023 in HC. CR. Revision No. E090 of 2023)*

**JUDGMENT**

1. The appellant, Nicholas Koech, has in this appeal challenged the decision given by the High Court at Malindi (S. M. Githinji, J.) on 3<sup>rd</sup> October 2023. In that decision, the High Court dismissed the appellant's revision application to review the sentence meted out to him by the magistrate's court upon conviction and sentencing for the offence of attempted murder. The appellant did not however appeal the conviction or sentence of the trial court opting rather to apply for revision.
2. In his application before the High Court, the appellant contended that the time he spent in remand custody was not considered when he was sentenced to seven (7) years imprisonment. The record of appeal before us is rather scanty in details as it does not contain the record of proceedings and the judgment of the trial court. What emerges, however, is that the appellant was charged, tried and convicted for the offence of attempted murder contrary to Section 220 of the *Penal Code*. He was convicted and sentenced to seven (7) years imprisonment after which he made the application for revision to the High Court.
3. The learned judge of the High Court appears to have considered the appellant's revision application under Section 365 of the *Criminal Procedure Code* which provides that no party has a right to be heard either personally or by an advocate before the High Court when exercising its powers of revision. The



record however shows that the appellant and counsel for the respondent were present when on 3<sup>rd</sup> October 2023 the learned judge issued directions as follows:

“The offence of attempted murder carries a maximum of life imprisonment. The applicant herein was sentenced to 7 years’ imprisonment. He argues that the period spent in remand was not weighed. He however does not reveal what was weighed that he never got the maximum sentence for the felony. The period must have counted even if the trial court may not have expressed so in writing. The application lacks merit and is hereby dismissed.”

4. It is against that direction that the appellant instituted this appeal. We heard the appeal on 24<sup>th</sup> February 2025. The appellant appeared virtually from Manyani Prison and was represented by learned counsel Mr. Eric Kuria. The respondent was represented by learned counsel Ms. Nyawinda.
5. In support of the appeal, Mr. Kuria urged that the appellant was in remand custody for 2 years, 7 months and 7 days, which period ought to have been considered when sentencing the appellant; that the learned judge erred in failing to heed Section 333(2) of the *Criminal Procedure Code*. He added that the appellant ought to have been granted remission by the Prison Authorities.
6. Counsel clarified to the Court that there was no appeal to the High Court against the sentence meted on him by the trial court.
7. In opposing the appeal, Miss. Nyawinda pointed out that there is no evidence of the time that the appellant spent in custody; that the learned judge noted that the appellant’s sentence was lenient, considering that attempted murder attracts life imprisonment; and that there is no basis for interfering with the decision by the learned judge.
8. We have considered the appeal. The appellant is correct that in sentencing, the trial court was obliged to consider the period spent in remand custody. Section 333(2) of the *Criminal Procedure Code* states that the period that the accused has been in custody should be taken into account whilst computing the sentence. Indeed, in the case of *Abamad Abolfathi Mohammed & Another v Republic* [2018] KECA 743 (KLR) the Court stated as follows:

“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.”
9. Apart from the dearth of material in the record of appeal before us, counsel for the appellant conceded that the appellant did not appeal the judgment or the sentence of the trial court opting instead to apply for revision. Quite apart from the fact that the appellant did not demonstrate before the High Court that the trial court did not, in sentencing, take into account time spent in remand custody, it has not been shown that the High Court wrongly exercised its discretion in declining to exercise its revisional jurisdiction in favour of the appellant. We have no basis therefore to interfere with the decision of the learned judge.
10. Moreover, the appellant not having appealed the sentence by the trial court, his application before the High Court would appear to have been caught up by Section 364(5) of the *Criminal Procedure Code* which provides that when an appeal lies from a finding, sentence or order, and no appeal is brought, no proceedings by way of revision shall be entertained at the insistence of the party who could have appealed.



11. The appeal fails and is accordingly dismissed.

**DATED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF JULY, 2025**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA, Carb, FCIArb.**

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**JUDGE OF APPEAL**

I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

