



**Cheboi v Republic (Miscellaneous Criminal Application
E071 of 2022) [2025] KEHC 5118 (KLR) (29 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5118 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION E071 OF 2022
RN NYAKUNDI, J
APRIL 29, 2025**

BETWEEN

ABRAHAM KIPKOSGEI CHEBOI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. What is pending before me for determination is an undated Chamber Summons Application where the Applicant is seeking the following orders:
 - a. That the Honourable Court be pleased to award the Applicant a lenient definite sentence under Article 50(2)(p)(q) of the *Constitution* of Kenya 2010.
 - b. That the Honourable Court be pleased to invoke the provisions of section 333(2) i.e. the period spent in the remand custody of one (1) year be factored in the sentence awarded.
2. The Application is based on the grounds on the face of it among others:
 - a. That the Applicant herein is seeking for the computation of the years spent in remand custody in Criminal Case No 4975 of 2012 at Eldoret in which he was sentenced to twenty (20) years imprisonment.
 - b. That the Applicant appealed to the High Court at Eldoret and the same was dismissed in its entirety.
 - c. That the Applicant also appealed to the Court of Appeal at Eldoret but he has never received any response from the Court hence his application for sentence review only.



- d. That the Court of Appeal in *Bernard Mulwa Musyoka v R*, Criminal Appeal No 25 of 2016 affirmed that the Supreme Court did not prohibit courts below it from ordering sentence re-hearing in any matter pending before those courts.
3. The Application is supported by the annexed supporting affidavit sworn by Abraham Kipkosgei Cheboi, the Petitioner herein which averments echo the grounds of the petition.

Analysis and Determination.

4. On perusal of the application, the main issue for determination herein is whether the applicant is entitled to review of sentence under Section 333(2) of the *Criminal Procedure Code*.
5. 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.”
6. It is clear from the above provision that the law requires courts to take into account the period the convict spent in custody.
7. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in *Abamad Abolfathi Mohammed & another v 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.

8. The same court in *Bethwel Wilson Kibor v Republic* [2009] eKLR expressed itself as follows: -
- “By provision 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.”
9. According to The *Judiciary Sentencing Policy Guidelines*:
- “The provision 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.”

10. 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.

11. The applicant was arrested on 19th November 2012 and convicted on 2nd October 2013. Notably, the Applicant/Petitioner has not contested the sentence, he only seeks to have the duration he spent in custody be taken into account which is his legal entitlement in my considered view. In a nutshell, I take note that the learned trial Magistrate did not take into consideration the provisions of section 333(2) of the *Criminal Procedure Code* while sentencing the Applicant herein.

12. From the foregoing, the application succeeds to the extent that the committal warrant to prison be amended with a commencement being the date of arrest 19th November 2012. It is so ordered.

DATED AND SIGNED AT ELDORET THIS 29TH APRIL, 2025

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R. NYAKUNDI

JUDGE

