



**Kimingich & another v Republic (Miscellaneous Criminal Application
E107 of 2024) [2025] KEHC 5330 (KLR) (29 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5330 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION E107 OF 2024**

RN NYAKUNDI, J

APRIL 29, 2025

**IN THE MATTER OF APPLICATION AND ENFORCEMENT OF SECTION
333(2) OF THE CRIMINAL PROCEDURE CODE IN RELATION TO
SENTENCES THAT HAVE NOT FACTORED THE TIME SPENT IN CUSTODY**

BETWEEN

SAMUEL KIMINGICH 1ST APPLICANT

ERICK NYONGESA WANJALA 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. From the record, this is a consolidated Criminal Appeal No. E121 of 2022 from which this Petition emanates seeking this court to exercise review jurisdiction against the Judgement of the Court dated 21st June 2024.
2. What is pending before me for determination is an undated Notice of Motion Applications in which the Applicants are seeking the following orders:
 - a. That the Petition is seeking enforcement of section 333(2) of the *Criminal Procedure Code* in relation to sentences that have not factored the time spent in custody.
3. The first Application is supported by the Annexed Affidavit sworn by Samuel Kimingich, the 1st Applicant herein where he avers as follows:
 - a. That I was arrested, convicted and sentenced to serve 50 years' imprisonment for the offence of Robbery with violence.



- b. That I did appeal the conviction and sentence and my appeal succeeded partially and my sentence was reduced to 8 years' imprisonment.
 - c. That I spent 1 year in remand custody.
 - d. That may this Honourable Court exercise section 333(2) of the CPC and allow my sentence to commence as mitigated and allow it to run from the date of arrest.
4. The second application is supported by the Annexed Affidavit sworn by Erick Nyongesa Wanjala, the 2nd Applicant herein where he avers as follows:
- a. That I was arrested, convicted and sentenced to serve 50 years' imprisonment for the offence of Robbery with violence.
 - b. That I did appeal the conviction and sentence and my appeal succeeded partially and my sentence was reduced to 8 years' imprisonment.
 - c. That I spent 1 year in remand custody.
 - d. That may this Honourable Court exercise section 333(2) of the CPC and allow my sentence to commence as mitigated and allow it to run from the date of arrest.

Analysis and Determination

5. I have read and considered the consolidated applications and the affidavit in support and the main issue for determination herein is whether this Application has merit.
6. Firstly, it is imperative to mention that the jurisdiction of a court of law is donated by *the constitution* and the statute was in Samuel Kamau Macharia vs KCB & 2 Others Civil Application No. 2 of 2011, where the court stated:

“A court’s jurisdiction flows from either *the constitution* or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
7. Article 165(6) of *the Constitution* empowers the High Court to exercise supervisory jurisdiction over subordinate courts. In that respect the High Court can call for any record of a subordinate court so as to satisfy itself as to the correctness or legality of any order or sentence issued by the subordinate court. However, the subordinate court has no power to call for the record of the High Court with a view to reviewing it. It is clear from the provision stated above that a person can only apply for review of an order or sentence in a criminal case to a higher court.
8. Under Article 165(6) & (7) as read with Article 50(6) a & b of *the Constitution* of Kenya 2010 together with the provisions of section 362 of the *Criminal Procedure Code*, the High Court has power to call for the record of a subordinate court to review any order or ruling or even judgement pronounced by that other court. The letter and spirit of this provisions are that while discharging this duty, it has inherent powers to revisit, scrutinize, to re-examine those orders made earlier and ceased with jurisdiction, the legal imperatives is that it can be able to make such other orders in furtherance of the interest of justice.
9. The duty of the court is therefore to identify errors of fact or law or mistake of any such impugned decisions and appropriately address them. The enabling provisions under section 362 of the *Criminal Procedure Code* is sometimes very scanty on the procedural protocols upon which the court can then proceed to review the impugned decision. However, there are more inspirational provisions which the



court can draw from given the anchor of Article 50(6) a & b of *the Constitution* which also entrenches review jurisdiction of the High Court on new compelling evidence within the scope of section 80 of the *Civil Procedure Act* and Order 45, rule 1 of the Civil Procedure Rules.

10. What are the key grounds envisaged in the law which apply across any grievance raised by a party following a decision of a competent court created under Article 50(1) of *the Constitution*?
 - a. Error on the face of the record or mistake
 - b. Discovery of new and important matter of evidence.
 - c. Any other sufficient reason or cause
11. It is trite law that superior courts within our jurisdiction have stated that it can recall or review its own orders and for the High Court those orders of the Magistrate Courts or inferior tribunals if it is satisfied that it is necessary for the sake of justice or the previous decisions suffers from an error apparent from the face of the record which means that an error which is based on clear ignorance or disregard of the provisions of the law. An error is not apparent on the face of the record if it is not self-evident and it requires an examination or argument to establish it. The High Court in exercising supervisory or review jurisdiction over the subordinate court or tribunals could only review judgements or rulings made by constitutional organs if the decision is manifestly wrong and is necessary to do it for an applicant to have a full effect of justice.
12. The court may also reconsider its own judgement or that of concurrent session Judge in order to prevent a miscarriage of justice. So cases on resentencing or review of sentences under section 333(2) of the *Criminal Procedure Code* are to me petitions which I can refer as curative petitions. In the case at bar, the facts speak for themselves that the Petitioners filed an Appeal as evidenced in the Judgement dated on 21st June 2024 in Criminal Appeal No. E121 of 2022 in which the Court pronounced itself as follows:
 62. In the end, I make the following orders:
 - i. The conviction is upheld.
 - ii. On sentence, I hereby set aside the respective sentences of 50 years' imprisonment imposed by the trial court on each of the Appellants and substitute the same with respective sentences of 8 years' imprisonment for each of the two Appellants.
13. On the question whether there is an arguable case on the issues raised by the Petitioners under section 333(2) of the *Criminal Procedure Code* on giving credit for pre-trial detention, there is prima facie evidence that the session Judge fashioned it within the custodial sentence of 42 years given as credit can be correctly taken as the basis of the legal proposition in the letter and spirit of the agitated code by the petitioners for us to review the sentence of 8 years' once more. Whether the learned Judge specifically omitted or declined to mention section 333(2) on the question of giving credit for pre-trial detention did not cause prejudice, injustice or miscarriage of justice as against the petitioners to warrant this court to invoke Article 50(6) a & b of *the Constitution*.
14. In the exercise of proper judicial discretion, time has come for the superior courts particularly the High Court which is vested with the powers of supervisory or review jurisdiction over subordinate courts to take a precautionary protocol under section 333(2) of the *Criminal Procedure Code* so as not to make any such orders at whim or at a request of an Applicant who are now exploiting this provisions of the law to defeat the scheme of sentencing in Kenya or destroying it altogether.



15. The fact is and I hope it will never be necessary to say so again that in the hierarchical system of a court which exist in this country to rethink and reset the legal tone on the entire framework of sentencing in Kenya. As of now, the legal landscape is very conflicting notwithstanding the proper settlement of criminal cases around the country at the various forums.
16. Indeed, in this rendition in reliance to the rule relating to the criminal cause of action, I will not hesitate to borrow from the locus classicus case of Henderson Vs Henderson [1843-60] ALL E.R Rep. 378 in which the court held as follows:
- “...where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court required the parties to that litigation to bring forward their whole case, and will not, (except under special circumstances), permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”
17. Nevertheless, my interpretation of the law is that the Applicant has not shown special circumstances which exist in the decision of this Court presided over by Wananda J, that in the deliverables of the Metrix of justice, non-application of the rule of section 333(2) occasioned injustice in the sentence imposed from the original period of 50 years’ to a revised sentence of 8 years’ on the same set of facts. The Notice of Motion is declined.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 29TH APRIL 2025

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R. NYAKUNDI

JUDGE

