



**Ombewa v Republic (Criminal Revision E892 of 2023)
[2024] KEHC 13459 (KLR) (Crim) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13459 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E892 OF 2023
LN MUTENDE, J
OCTOBER 29, 2024**

BETWEEN

DAN OCHIENG OMBEWA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Dan Ochieng Ombewa, the Applicant, was arraigned before Milimani Chief Magistrate’s Court in Milimani Criminal Case No. 850 of 2015, for the offence of Conspiracy to Commit a Felony Contrary to Section 393 of the *Penal Code*; Two (2) Counts of Stealing Contrary to Section 268 as read with Section 275 of the *Penal Code*, with alternative Counts of Handling Stolen Property/ Goods contrary to Section 322(2) of the *Penal Code*. He was convicted under Section 215 of the *Criminal Procedure Code* for all the Counts and sentenced to serve Four (4) years imprisonment for the offence of Conspiracy; and, further sentenced to serve Three (3) and Two (2) years imprisonment, respectively, on the charges of Stealing. The sentences were ordered to run concurrently.
2. Dissatisfied with the question of sentence, the applicant seeks revision so that the period spent in remand custody can be considered. He also prays for a non-custodial sentence or to be considered to serve a non-custodial Sentence under the Community Service Orders. His case is that he spent 18 months in remand custody before he was released on bond. That he is remorseful and rehabilitated as per evidence of attached records from prison where he undertook biblical studies, and, he has also been a teacher at the Prison Academy.
3. The application is not opposed by the prosecution who urge that if the period spent in custody was not considered, it should be.



4. I have considered arguments raised and also perused the lower court record. An application for revision is brought under the provisions of Section 362 of the [Criminal Procedure Code](#) (CPC) as read with Section 364. The court is enjoined to rectify errors, omissions, irregularities or procedural improprieties occasioned by the subordinate court which are apparent on record.

5. Section 362 of the [CPC](#) specifically provides as follows:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

6. The applicant seeks to have the sentencing discretion of the trial court reconsidered. The law is that the court can only interfere with sentencing discretion under strict circumstances. In [Abmad Abolfathi Mohammed & Another v Republic](#) [2018] eKLR, Criminal Appeal No. 135 of 2016, the Court of Appeal stated that:

“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In [Bernard Kimani Gacheru v Republic](#), Cr App No.188 of 2000 this Court stated thus:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist.”

7. The revision court has limited powers compared to the appellate court. Section 333 of the [Criminal Procedure Code](#) provides that the period served in custody shall be considered in the final sentence, it is required that any period spent in remand should be deducted from the sentence and that the court should give clear directions to that effect.

Section 333(2) of the [CPC](#) states that:

“Subject to the provision of Section 38 of the [Penal Code](#) every sentence shall be deemed to commence from and to include the whole of the day of, to date on which it was pronounced, except where otherwise provided in this [Code](#).”

Provided that where the person sentenced under Subsection (1) from prior to such sentence, been held in custody, the sentence shall take account of the period spend in custody.”



8. The applicant was arrested on 6/5/2017, he was later released on cash bail and the release order was signed on 14/5/2015. His bond was not cancelled during the trial. Being in custody was because of other cases that he faced. The sentence in the circumstances runs from the date it was pronounced.
9. He has also prayed for leniency. Section 393 of the *Penal Code* provides that:

Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment.
10. The four (4) year jail term on Count 1 was reasonable considering the circumstances of the offence and the amount of money stolen, namely, Ksh. 17,818,463.57- and Ksh. 2,122,417.70- respectively.
11. Section 275 of the *Penal Code* provides that:

Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.
12. The sentence imposed put alongside the amount of money stolen, it was so lenient.
13. Community Service Orders as a sentencing option is recommended for misdemeanors and where the court exercising discretion opts to sentence the offender to a sentence below 3 years. The accused was charged with felonies, he was also heard on his mitigation and the circumstances of the offence having been considered, the court was of the view that a deterrent sentence was most appropriate. The applicant has so far served two (2) years imprisonment, he is also in the process of full rehabilitation which should not be unsettled by this court.
14. The upshot of the above is that the application for revision is unmeritorious, accordingly, it is dismissed.
15. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 29TH DAY OF OCTOBER, 2024.

L. N. MUTENDE

JUDGE

