



REPUBLIC OF KENYA



KENYA LAW
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**Kinyanjui & another v Republic (Criminal Revision E087 of 2023)
[2024] KEHC 16261 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16261 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL REVISION E087 OF 2023
MW MUIGAI, J
DECEMBER 19, 2024**

BETWEEN

STEPHEN MUIRURI KINYANJUI 1ST APPLICANT

JOHN WAMBUA MUNYAO 2ND APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Trial Court Proceedings

1. The applicants were charged with others not in the instant Application with stealing contrary to section 268 (1) as read with section 275 of the [Penal Code](#).
 - a. John Wambua- 1st Accused
 - b. Stanley WaMaina- 2nd Accused
 - c. Stephen Muiruri- 3rd Accused
 - d. Samuel Leisa- 4th Accused- Absent Warrant of arrest issued and remained in force
2. The particulars of the charge on diverse dates between the 7th & 19th day of June, 2023 at Urban Quarry, in Matungulu Sub County, jointly and with others not before Court stole assorted spare parts from a building stone cutting machine, commercial generator and spare parts storage all valued at Ksh 387,000/- the property of Francis Njane Kamau.
3. The Trial Court had the charges to the Accused persons in Kiswahili on 27/6/2023, they pleaded Not Guilty. On 8/8/2023, the Amended Charge was read to Accused persons and plea of Not Guilty was entered for all Accused persons.



4. On 21/9/2023 PW1 testified in Court and was cross -examined by Accused persons. On 6/10/2023 the typed proceedings without the original record show 1st & 2nd Accused changed plea on 6/10/2023 and also on 19/10/2023 the 1st & 3rd Accused changed plea to that of guilty. Facts were read and they pleaded guilty on their own plea of guilt. They were convicted and sentenced the 1st & 3rd Appellant to serve two pay fine of Ksh 100,000/- in default (2) years imprisonment in Count 1 & Ksh 50,000/- in default 6 months in Count 2. The hearing for 2nd & 4th Accused was to proceed on 28/2/2024.

Notice of Motion

5. The Applicants filed an undated Notice of Motion on 14th December 2023 seeking the following orders, that;
 - a. The court invokes the provisions of section 333(2) of the *Criminal Procedure Code* and review their sentence
6. He has filed a supporting affidavit that has not been commissioned nor dated in which he states that they are currently being held at Machakos Main G.K Prison serving an 18 month's imprisonment for the offence of stealing and that the Trial Magistrate erred by not considering the period they spent in remand custody as per Section 333(2) of the *Criminal Procedure Code*. That they have been in remand for 5 months period which they pray that the period in custody pre- conviction and sentence to be factored in.
7. That the Applicants were arrested on 23rd June 2023 and since then had been in prison where they stayed upto 29th November 2023 when the Trial Court convicted & sentenced them. The sentences were to run consecutively and sentence would start from 27/6/2023.

Respondent's Submissions

8. The Respondent filed the submissions dated 21st May 2024 in which counsel relied on Article 50 (2) of the *Constitution* and the case of *Benard Kimani Gacheru v Republic* [2002] eKLR, *Ahamad Abolfathi Mohammed & Another v Republic* and Section 333(2) of *Criminal Procedure Code*.
9. It was submitted that the Trial Court factored in the 159 days that the applicants were in prison thus the sentence imposed were appropriate in the circumstances and that the application be thus dismissed.

Determination

10. I have considered the application and written submissions filed on behalf of the respective parties.
11. Section 362 of the *Criminal Procedure Code* (CPC) is clear on the scope of revision in criminal trial as follows:-

“The High Court may call for and examine the record of any Criminal proceedings before any Subordinate Court for the purposes 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.”
12. Section 364 of the *CPC* provides that:-
 - “(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may –



(b) in the case of any other order other than an order of acquittal, alter or reverse the order.”

13. As was stated by the High Court of Malaysia in *Public Prosecutor v. Mubari bin Mohd Jani and Another* [1996] 4 LRC 728 at 734, 735:

“.....The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...”

14. Section 333(2) of the *Criminal Procedure Code* stipulates that the time spent in custody pre-trial conviction and sentence must be taken into account in computing the sentence to be served.

15. Section 333(2) of the *Criminal Procedure Code* provides that:

“(2) 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

The Court of Appeal in *Abamad Abolfathi Mohammed & Sayed Mansour Mousavi v Republic* [2018] KECA 743 eKLR held that:-

“..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. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person...”

16. According to the applicants they were arrested on 23rd June 2023 and since then had been in prison where they stayed up to 29th November 2023

17. The charge sheet shows that the date of arrest was on 23rd June, 2023 and the Applicant was arraigned in court on 26th June, 2023. The Applicants remained in custody until they were sentenced on 29th November, 2023.

Disposition

a. Pursuant to Section 333(2) of the *Criminal Procedure Code*, the 2 year imprisonment sentence will be computed to take into account the 5 months and 2 days and to run from 23rd June 2023 the date of the arrest which the Trial Court indeed took into account and thus this application lacks merit and is dismissed.

It is so ordered.



**RULING DELIVERED SIGNED DATED IN OPEN COURT ON 19/12/2024 IN MACAHKOS
HIGH COURT.**

(VIRTUAL/PHYSICAL CONFERENCE)

M.W. MUIGAI

JUDGE

