



REPUBLIC OF KENYA



KENYA LAW
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**Kiseli v Republic (Criminal Revision E034 of 2023)
[2023] KEHC 20990 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20990 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL REVISION E034 OF 2023**

**FR OLEL, J
JULY 31, 2023**

BETWEEN

ALPHONCE MUTUKU KISELI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

A. Introduction

1. The applicant was charged with the offence of breaking into a building and committing a felony contrary to section 306(a) of the *Penal Code* & the offence of handling stolen goods contrary to section 322 (1),(2) at Wamunyu PMCR No E010 OF 2022 and was sentenced to pay a fine of Kshs 100,000/= or in default to serve two (2) years imprisonment. The applicant filed this application on 20th June 2023 and specifically sought that the time spent in remand from January 14, 2022 to August 28, 2020 when he was sentenced, be factored in the sentence in line with section 333(2) of the *Criminal Procedure Act*.
2. The applicant chose to rely on the affidavit supporting his application and oral submissions made in court where he restated what was in his affidavit.
3. The respondent, through Prosecution counsel Mr. Mang'are did not oppose this application and stated that the court could use its discretion to make a determination after considering the proceedings in the primary file.

B. Analysis of Law

4. I have considered the application as well as the response by the Prosecution counsel.



5. The powers of the High court in revision are contained in section 362 through to 366 of the *Criminal Procedure Code* (cap.75). Section 362 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. What the High Court can do under its revision jurisdiction is stated under section 364 of the *Criminal Procedure Code* cap 5, which states as follows: -

“(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 –

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;

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

(2) No order under this section shall be made to the prejudice of an accused person unless he had had an opportunity of being heard either personally or through an advocate in his own defence. Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a Subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”

7. The applicant’s grievance that the period in remand ought to have been considered has merit and from the proceedings before the trial court it is clear that the applicant was in remand for seven (7) months before he changed his plea and was sentenced to serve 2 years imprisonment.

8. Section 333(2) of the *Criminal Procedure Code* provides that;

“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 into account of the period spent in custody”

9. The provisions of Judiciary sentencing policy Guidelines also state that;

“The provision’s 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 has been in custody during 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 the offender, the court must take into account the period in which the offender was held in custody during the trial.”

10. The applicant has a legitimate expectation that during trial he is subject to equal treatment before law and is accorded a fair hearing, which includes his right to have all relevant provisions of the law to be applied in favorably where the circumstances allow. See *Abmad Abolfathi Mohammed & another v Republic* (2018) eKLR & *Bethwel Wilson Kibor v Republic* (2009) eKLR.

11. The court had unlimited jurisdiction to determine, whether the applicants right was breached under article 165(3)(b) of the *Constitution* 2010. I find that this is an application where the courts discretion can be exercised in favour of the applicant and direct that the seven (7) months spent in custody be included in the sentence melted out vide the judgment dated August 22, 2022.

12. It is hereby so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 31ST DAY OF JULY, 2023.

FRANCIS RAYOLA OLEL

JUDGE

