



REPUBLIC OF KENYA



KENYA LAW
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**Ondara v Republic (Criminal Revision E238 of 2022)
[2023] KEHC 27132 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27132 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL REVISION E238 OF 2022
TA ODERA, J
DECEMBER 20, 2023**

BETWEEN

RICHARD MOGENI ONDARA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant herein seeks a review of the sentence of the trial Court on the ground that the trial court did not consider the time spent in custody.
2. The prosecution did not object to the application

Determination

3. I have considered the application and the parties' Submissions.
4. It is now settled law that the matter of sentencing is squarely a matter of discretion of the trial court. The Sentencing Guidelines (2023) provide as much.
5. It then follows, that for a court to interfere with a court's exercise of discretion, the applicant must establish the following: -
 - a. The sentence was manifestly excessive in the circumstances of the case;
 - b. The Trial Court overlooked some material factor;
 - c. The Trial Court took into account some wrong material;
 - d. The Trial Court acted on a wrong principle.



6. In the case of *MM1 v Republic* [2022] eKLR, the Court referred to the case of *Mokela vs the State* (135/11) [2011] ZASCA 166 where the Supreme Court of South Africa held that:

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”

7. The Court also cited the Court of Appeal case of *Ogolla s/o Owuor vs. Republic* [1954] EACA 270, where it held that “The Court does not falter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

8. The Court further cited the case of *Shadrack Kipkoech Kogo vs R* Eldoret Criminal Appeal No 253 of 2003 where the Court of Appeal held that:

“Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka-vs-R* (1989 KLR 306))

9. The Applicant has sought that this Court considers the period he was in custody as the same was not considered by the Trial Court.

10. It is a fortified principle that Courts must consider the time an accused person spends in custody when meting out the sentence. This is captured in section 333(2) *Criminal Procedure Code* provides thus:

- (2) Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) 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.

11. . The *Sentencing Guidelines (2023)* provide thus:

2.3.18 Section 333(2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody. Failure to do so impacts the overall period of detention which may result in a punishment that is not proportionate to the seriousness of the offence committed. This also applies to those who are charged with offence that involve minimum sentences as well as where an accused person has spent time in custody because he or she could not meet the terms of bail or bond.

2.3.19 Upon determining the period of imprisonment to impose upon an offender, the court must then deduct the period spent in custody identifying the actual period to be served (see GATS at Part V). This period must be carefully calculated- and courts should make an enquiry particularly with unrepresented offenders- for example, there may be periods served where bail was interrupted and a short remand in custody was followed by a reissuance of bail e.g., where a surety is withdrawn, and a new surety is later found. This calculation must include time spent in police custody.

2.3.20 An offender convicted of a misdemeanour and who had been in custody throughout the trial for a period equal to or exceeding the maximum term of imprisonment provided for that offence, should be deemed to have served their sentence and be released immediately.”



12. See the case of *Bethwel Wilson Kibor v Republic* [2009] eKLR.
13. In the case of *Abamad Abolfathi Mohammed & Another v Republic* [2018] eKLR, the Court of Appeal held that the court is obliged to consider the period an accused person has spent in custody before they were sentenced. The Court held thus:

“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. 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.”
14. Looking at the Sentence meted out by the Trial Court, it is evident that the Trial Court did not consider the time spent in custody, contrary to Section 333(2) of the *Criminal Procedure Code*. According to the charge sheet, the Accused Person was arrested on 21.10.11 and he was convicted and sentenced on 20.6.12. He was in custody throughout the said proceedings.
15. The Applicant’s Application is successful. The Applicant shall therefore serve the sentence of 18 years which is to be computed from October 21, 2011 when he was arrested the till completion.

DATED, DELIVERED AND SIGNED AT KISII THIS 20TH DAY OF DECEMBER 2023.

TERESA ODERA

JUDGE

In the presence of:

Mr. Ochengo for the State

Accused Person/Applicant- Absent

Mwiti: Court Assistant

