



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CRIMINAL APPLICATION NO. E384 OF 2021

VINCENT CHERUIYOT NGENO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an application from the judgement of the Hon. Z. Abdul, SRM, dated 9/2/2021 in the Chief Magistrates' Court at Nairobi in Criminal Case No. 1826 of 2014, Republic v Vincent Cheruiyot Ngeno)

RULING ON REVISION

The applicant moved this court under certificate of urgency pursuant to section 362 and 364 of the Criminal Procedure Code and article 50 (2) of the 2010 Constitution of Kenya for an order directing that the period of five months during which he was in pre-trial remand custody be taken into account in sentencing him.

The application is based on the following grounds. He was arrested on 26th March 2015 and was charged with the offence of stealing contrary to section 268 as read with section 275 of the Penal Code (Cap 63) Laws of Kenya.

At the conclusion of his trial of he was convicted and sentenced to two years imprisonment

The period in which he was in pre-trial remand custody of five months was not taken into account when he was sentenced.

The applicant has further stated that he is married with three children; two of whom are school going. They are depended upon him. He has further stated that his ageing parents are also depended upon him.

Finally, he has stated that his continued incarceration is depriving his family of their basic needs.

I find it unnecessary to set out the applicant's averments in his affidavit; since the issue raised is one of law that does not evidence by way of an affidavit. I therefore decline to do so.

In his oral submissions in this court the applicant submitted that under section 333 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya, the period of five months should have been taken into account when he was being sentenced.

Ms Chege counsel for the respondent supported the sentence and pointed out that the sentence imposed was too lenient in view of the colossal sums of money the applicant had stolen. However, counsel conceded that the applicant was in pre-trial custody for five months.

I find that the applicant has applied for revision of his sentence of two years imprisonment.

Furthermore, I find that the pre-trial period of five months during which the applicant was in custody should have been taken into account during sentencing by the trial court in terms of section 333 (2) of the Criminal Procedure Code; whose provisions are couched in mandatory language.

It therefore follows that the trial court was mandatorily required to take that period into account in sentencing the applicant. The failure to do so was an error of law which entitles this court to interfere with the sentencing discretion of that court.

The contention by counsel for the respondent that the sentence was too lenient cannot in law stop the court from taking into account the period the applicant had been in custody.

I further find that the appellant was sentenced to two years imprisonment on 9th February 2021. It is clear therefore that he has also been in

post judgement custody for a period of one year and two months. Both the pre-trial custody period of five months and the post judgement custody of a period of one year and two months; totals one year and seven months.

Consequently, in terms of section 333 (2) of the Criminal Procedure Code, the applicant is now to serve five months in prison (being two years less one year and seven months), which period is to run from the date of this judgement.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF FEBRUARY 2022.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua - Court Assistant

The applicant

Mr Kiragu for the Respondent