



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL REVISION NO. E020 OF 2021

DANIEL KAMAU KIBAKI APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. In his undated Notice of Motion filed on 26th January 2021, the applicant, *David Kamau Kibaki*, approached this court seeking revision of his sentence meted out by the trial court in Milimani Criminal Case No. 2142 of 2018.
2. A perusal of the lower court's record reveals that the applicant was charged together with three others with the offence of preparation to commit a felony contrary to *section 308 (1)* of the *Penal Code* particulars being that on 10th November 2018 along Kilome Road, the applicant and his co-accused were found armed with dangerous weapons namely knives and a sword in circumstances which indicated that they were so armed with the intention of committing a felony.
3. The court record further shows that on 5th July, 2019, the applicant pleaded guilty to the charges and was convicted on his own plea of guilty. He was sentenced to serve seven years imprisonment.
4. The applicant has now moved this court seeking a reduction or substitution of his sentence with a non custodial sentence on grounds *inter alia* that: he is a first offender; he is remorseful for the offence he committed and that he is now fully rehabilitated and ready to rejoin society. In addition, he prayed that the sentence be reduced by the time he had spent in custody during the trial.
5. During the hearing, the applicant appeared in person while the respondent was represented by learned prosecuting counsel *Mr. Kiragu*. Both parties made brief oral submissions in support and in opposition to the application.
6. In his submissions, the applicant appears to have abandoned his prayer for substitution of his custodial with a non custodial sentence and only beseeched this court to reduce his sentence by the period he had spent in custody arguing that in sentencing him, the learned trial magistrate erred by failing to consider the period he was in lawful custody during the trial.
7. In opposing the application, *Mr. Kiragu* urged the court to dismiss the application on grounds that the appellant was properly sentenced as *section 308* of the *Penal Code* prescribes a minimum mandatory sentence of 7 years imprisonment.
8. I have considered the application and the oral rival submissions made by both parties. I find that the applicant's main prayer is for review of his sentence to factor in the period he had spent in lawful custody during the trial which in his view was not taken into account by the trial court. The application is therefore anchored on *section 333 (2)* of the *Criminal Procedure Code* which states as follows:

“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.
9. A reading of the proviso to *section 333 (2)* above clearly shows that it applies to all sentences passed by a trial court if the convict had been in custody during the trial whether or not the offence for which the convict was convicted attracted a minimum mandatory sentence.
10. *Mr. Kiragu's* submissions that the application was unmerited purely because *Section 308* of the *Penal Code* which creates the offence for which the applicant was convicted prescribes a minimum sentence of 7 years is incorrect and cannot be sustained.

11. The court record shows that when sentencing the applicant, the learned trial magistrate stated as follows:

“The first accused is hereby sentenced to seven (7) years imprisonment. Right of appeal 14 days explained.”

12. From the foregoing, it is clear that the learned trial magistrate did not take into account the period the applicant had spent in custody prior to the date he was sentenced as he was required to do by *section 333 (2) of the Criminal Procedure Code*.

The learned trial magistrate therefore erred by failing to comply with mandatory statutory provisions when sentencing the applicant. He ought to have directed that the applicant’s sentence will take effect from the date he was arrested since he had been in custody throughout the trial which translated to a period of about eight months.

13. In view of the foregoing, it is my finding that the application is merited and it is hereby allowed on terms that the sentence imposed on the applicant by the trial court shall be computed from the date of his arrest, which is, 10th November 2018.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH 2022.

C. W. GITHUA

JUDGE

In the presence of:

Applicant present

Mr. Kiragu for the respondent

Ms Karwitha: Court Assistant