REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CRIMINAL APPLN. NO. E433 OF 2021

MIKE MUREGA ONYANGA..APPLICANT

VERSUS

REPUBLIC..RESPONDENT

RULING

1. The applicant, *Mike Murega Onyanga*, approached this court through an undated Notice of Motion filed on 1st December 2021 seeking review of the sentence imposed on him by the Chief Magistrate's Court at Makadara in Criminal Case No. 1034 of 2021.

2. The trial court record shows that the applicant was charged and convicted of the offence of being in possession of narcotic drugs contrary to *Section 3 (1)* as read with *3 (2) (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994*.

The particulars were that on 28th April 2021 at Haile Sellasie Avenue in Nairobi County, the applicant was found in possession of narcotic drugs to wit 43 rolls of cannabis with a street value of KShs.2,150, which was not in medical preparation form.

3. Upon his arraignment in court, the applicant pleaded guilty to the charges and was convicted on his own plea of guilty. He was sentenced to serve eighteen months imprisonment.

4. In the affidavit sworn in support of the application, the applicant averred that the time he spent in remand custody was not factored into his sentence in accordance with the requirements of *Section 333 (2)* of the *Criminal Procedure Code*. He deposed that he had learnt a lesson while in prison that crime does not pay and that he was now a changed man. He claimed that he had attended spiritual classes in prison and prayed that his prison term be substituted with a non- custodial sentence.

5. At the hearing, both the applicant and the respondent chose to prosecute the application by way of oral submissions. In his submissions, the applicant implored me to revise his sentence so that the time he had spent in lawful custody would be computed as part of his sentence.

6. The application was opposed by the respondent. Learned prosecuting counsel *Mr. Kiragu* submitted that the applicant had not demonstrated that he had reformed and he had not advanced any reason why his sentence should be revised. He averred that the sentence imposed by the trial court was lenient and the applicant should be allowed to serve his entire prison term so that he could complete his rehabilitation.

7. I have considered the application and the oral submissions made by the parties. The application invokes the revisional jurisdiction of this court which is donated by *Section* ***362*** of the ***Criminal Procedure Code*** which provides thus:

> ***"…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."***

8. ***Section 364*** of the *Criminal Procedure Code* outlines the manner in which the revisional jurisdiction of the court should be exercised. It 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 –***
>
> ***(b) In the case of any other order other than an order of acquittal, alter or reverse the order. ……."***

9. As a general rule, sentencing is a matter that rests on the discretion of the trial court. This court therefore, while exercising revisional jurisdiction can only interfere with an order or sentence passed by the trial court if it was satisfied that there was an illegality, error, or impropriety in the impugned sentence or an irregularity in the proceedings that gave rise to the sentence.

10. In this case, the trial court's pre-sentence notes reveal that in sentencing the applicant, the learned trial magistrate only considered his plea in mitigation. There is no indication on the record that the learned trial magistrate took into account the time the applicant had spent in remand custody prior to the date of his sentence.

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

> ***"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."***

12. The ***Judiciary Sentencing Policy Guidelines*** *paragraph 7 further buttresses this legal position by providing that:*

> ***"The proviso 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 had been in custody during the 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 an offender, the court must take into account the period in which the offender was held in custody during the trial."***

13. The Court of Appeal in ***Ahamad Abolfathi Mohammed & Another V Republic, [2018] eKLR*** **while considering the objective of the aforesaid section pronounced itself as follows:**

> ***"By dint of section 333 (2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. 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. …. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."***

14. Given the foregoing, it is clear that the learned trial magistrate erred when sentencing the applicant without considering the period he had spent in lawful custody prior to the date he was sentenced. The record shows that the applicant was arrested on 28th April 2021 and was convicted and sentenced on 29th July 2021. He had been granted a cash bail of KShs.30,000 but there is no record showing that he had deposited the cash bail before he was convicted. This means that the applicant was in custody for a period of approximately three months prior to his conviction and sentence which period ought to have been factored into his sentence.

15. With regard to the applicant's prayer that his prison term be substituted with a noncustodial sentence solely on grounds that he had reformed, it is my view that such a prayer does not fall within the ambit of the court's revisional jurisdiction. I say so because, as stated earlier, sentencing is at the discretion of the trial court and this court would only be justified in interfering with the sentence if it was satisfied that it was illegal or that the trial court erred by considering extraneous factors or failed to consider relevant ones or that the sentence was manifestly harsh or excessive in the circumstances of the case.

16. *Section 3 (2) (a)* of the *Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994* which prescribes the penalty for the offence for which the applicant stands convicted provides that:

> ***"(2) A person guilty of an offence under subsection (1) shall be liable:***
>
> > ***(a) in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years; …"***

17. Considering the penalty provided by the law for the offence the applicant committed, I am satisfied that the sentence of 18 months imprisonment imposed by the trial court was not only lawful but was also very lenient. I find no legal basis for interfering with the same.

18. In view of the foregoing, it is my finding that the application partially succeeds to the extent that the period the applicant had spent in lawful custody should be computed as part of his sentence.

I therefore order that the sentence imposed by the trial court shall commence from the date of the applicant's arrest namely, 28th April 2021.

It is so ordered.

DATED, SIGNED and DELIVERED at **NAIROBI this 22nd day of April 2022.**

C. W. GITHUA

JUDGE

In the presence of:

The applicant

Ms Ntabo for the respondent

Ms Karwitha: Court Assistant