



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ndonga v Republic (Criminal Appeal 139 of 2019)
[2022] KEHC 15616 (KLR) (Crim) (23 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15616 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL 139 OF 2019

JM BWONWONG'A, J

NOVEMBER 23, 2022

BETWEEN

ARNOLD MUNGAI NDONGA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the sentence delivered by Hon. L.O Onyina,
C.M, on 18th June 2019 in JKLA Chief Magistrate's Court in
Criminal Case No. 158 of 2016 Republic v Arnold Mungai Ndonga)*

JUDGMENT

1. The appellant being charged and convicted with two counts for the offence of trafficking in narcotic drugs contrary to section 4 (a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No 4 of 1994. In count 1, he was sentenced to a fine of Kshs 1 million in default to serve one-year imprisonment and in addition to serve 7 years imprisonment. In count 2 he was sentenced to a fine of Kshs 10,000, in default to serve 3 months imprisonment and in addition to serve 3 years imprisonment. The sentences in default of the payment of the fines were to run consecutively, while the sentences of imprisonment were to run concurrently.
2. Being dissatisfied with the decision of the trial court, the appellant launched an appeal against his conviction and sentence. However, when his appeal came up for hearing on September 27, 2022, he abandoned his appeal on conviction and pursued his appeal against the sentence. The grounds raised were that he has already served a third of his sentence. He urged the court to reduce his sentence under the provisions of section 333 (2) of the *Criminal Procedure Code* (cap 75), Laws of Kenya.
3. The respondent did not oppose the appeal.



Issues for determination

4. Having considered the appeal and the applicable law, the issue for determination is whether I should interfere with the sentence that was imposed.

Analysis and determination

5. Section 333 (2) of the *Criminal Procedure Code* (cap 75) Laws of Kenya provides: -

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 account of the period spent in custody.”

6. It is clear from the above proviso that the law requires courts while sentencing to take into account the period the accused spent in pre-trial custody. The *Judiciary Sentencing Policy Guidelines* state that: -

7.10. 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.

7.11. 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.

7.12. An offender convicted of a misdemeanour and had been in custody through-out the trial for a period equal to or exceeding the maximum term of imprisonment provided for that offence, should be discharged absolutely, under section 35 (1) of the *Penal Code*.”

7. The requirement to comply with section 333 (2) *Criminal Procedure Code*, is mandatory in the computation of the sentence to be served by the appellant. The requirement is also amplified by the *Judiciary Sentencing Policy* and thus an integral part of the sentencing process to avoid excessive punishment that is not proportional to the offence committed and sentence lawfully prescribed and contrary to article 29 (a) and article 50 of *Constitution* of Kenya, 2010.

8. The Court of Appeal has also pronounced itself on these provisions in the case of *Bethwel Wilson Kibor v Republic [2009] eKLR*, where the court stated as follows:

By proviso to section 333(2) of *Criminal Procedure Code*, where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J who sentenced the appellant did not specifically state that he had taken into account the 9 years' period that the appellant had been in custody. The appellant told us that as at September 22, 2009, he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”

9. In the instant appeal, as per the original record, the appellant was charged with two counts of trafficking in narcotic drugs. He was arrested on December 10, 2016 and was charged in court on December 13, 2016 for plea taking. On December 21, 2022, the trial court granted the appellant a bond of Kshs 1



million with one surety of a similar amount. The appellant remained in custody during the entirety of that trial period, which concluded when he was sentenced on June 8, 2019.

10. During sentencing the learned trial magistrate stated:

I have perused the pre-sentence report and taken into consideration the mitigation, the sentence provided for and the nature of the offences committed, alongside the value of the substances in question. I have also taken into account the personal circumstances of the convict, including his youthful age.”

11. The trial court then proceeded to sentence the appellant to 7 years imprisonment plus a fine of Kshs 1 million in default to serve a further 1-year imprisonment for count one- and 3-years imprisonment plus a fine of Kshs 10,000 and in default a further 3 months imprisonment. The court noted that the terms of imprisonment should run concurrently while the sentence in default of the fine were to run consecutively.

12. In compliance with section 333 (2) *Criminal Procedure Code*, computation of the sentence ought to include the period the appellant was in custody during the hearing and determination of the case before the sentence was meted out. The appellant was placed in custody on December 10, 2016 and sentenced on June 18, 2019. It is clear that indeed the trial court did not consider the period the applicant had spent in custody which was 2 years and 6 months and 1 week during his trial.

13. In compliance with section 333 (2) *Criminal Procedure Code*, and taking into account the period he has been in custody during the pendency of the trial; I find that this appeal succeeds with the result that the appellant will serve his prison sentence which should be less by 2 years 6 months and 7 days and should run from the date of conviction.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD OF NOVEMBER 2022.

J M BWONWONG'A

JUDGE

In the presence of-

Mr Kinyua: Court Assistant

The appellant in person

Mr Mutuma for the respondent

