



REPUBLIC OF KENYA



**Njogu v Republic (Criminal Revision E374 of 2021)
[2022] KEHC 15615 (KLR) (Crim) (22 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15615 (KLR)

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

CRIMINAL REVISION E374 OF 2021

JM BWONWONG'A, J

NOVEMBER 22, 2022

**BEING AN APPLICATION FOR REVISION OF THE SENTENCE
DELIVERED BY HON. S. JALANG'O (S.R.M) ON 5TH DECEMBER
2017 IN MAKADARA CHIEF MAGISTRATE'S COURT CRIMINAL
CASE NO. 1512 OF 2015 REPUBLIC VS FRANCIS NJOGU**

BETWEEN

FRANCIS NJOGU APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for revision of the sentence delivered by Hon. S. Jalang'o (S.R.M) on 5th December 2017 in Makadara Chief Magistrate's Court Criminal Case No. 1512 of 2015 Republic vs Francis Njogu)

RULING

1. The applicant was charged with the offence of rape contrary to section 3 (1) (a) (c) of the *Sexual Offences Act*, No. 3 of 2006. In the alternative, he was charged with the offence of committing an indecent act with an adult contrary to section 11 (a) of the *Sexual Offences Act*, No. 3 of 2006.
2. He pleaded not guilty and after a full trial, he was convicted for the offence of rape. He was sentenced to serve ten (10) years imprisonment.
3. He has now approached this court through his chamber summons seeking the revision of his sentence. The grounds raised in support of his application are set out on the face of the application, with the major grounds being the following. The trial court did not consider the period he was in pre-trial remand custody. The application is supported by an affidavit sworn by the applicant, in which he has



averred that the court should revise his sentence and consider the 2 years and 7 months, he spent in the pre-trial remand custody pursuant to the provisions of section 333 (2) of the *Criminal Procedure Code* (Cap 75) Laws of Kenya. He is very remorseful for the offence committed and he is a first offender.

The applicant's submissions

4. During the hearing of the application, the applicant made oral submissions. He submitted that he was arrested on May 9, 2015 and was sentenced on December 5, 2017. He told the court that the period of pre-trial custody was never taken into account by the trial court. He has urged the court to set him free.

The respondent's submissions

5. Mr. Kiragu learned prosecution counsel conceded that the trial court did not take into consideration the pre-trial remand period.

Issues for determination

6. I have considered the application, the averments thereto and the applicable law.
7. The issue that arises for determination is whether the applicant has made out a case for the grant of the orders sought.

Analysis and determination

8. While the application is premised on the provisions of section 333 (2) of the *Criminal Procedure Code*, it invokes the revisional jurisdiction of this court, which is donated by section 362 of the *Criminal Procedure Code*, which reads as follows:

“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.”

9. I note that the applicant substantively seeks the revision of his sentence of 10 years. The applicable law is found in section 333 (2) of the *Criminal Procedure Code* (Cap 75) Laws of Kenya provides that:

(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.”

10. I have perused the record of the proceedings of the trial court. The record shows that the applicant was arrested on May 9, 2015 and was charged in court on May 13, 2015. He was granted bail/bond but for one reason or another, he was unable fulfil the terms and conditions ordered by the court.
11. Consequently, he was in remand during his trial until his conviction on December 5, 2017. He therefore spent 2 years and 7 months in the remand custody.
12. When he was being sentenced, the trial magistrate indicated that he had considered the mitigation of the applicant and the applicable provisions of the law. He then proceeded to sentence the applicant to ten (10) years imprisonment. Thereafter his right to appeal was explained. From the record, it is



clear that the trial court did not consider the time the applicant was in remand. In *Abmed Abolfathi Mohamed v Republic* [2018] e-KLR the Court of Appeal held that:

“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. It must be remembered that the proviso to Section 333(2) of the *Criminal Procedure Code* was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellant’s sentence of imprisonment to run from the date of arrest on June 19, 2012.”

13. The *Judiciary Sentencing Policy Guidelines* state as follows as regards the application of section 333 (2):

“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 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.”

14. The trial court did not take into account the said period in sentencing the applicant, and thus it acted on wrong principles. The said period ought to have been taken into consideration.

15. In the premises, the application succeeds with the result that it is hereby allowed. The applicant is to serve the sentence of 10 years imprisonment less the 2 years and 7 months. The said sentence will start to run from the date of his conviction.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF NOVEMBER 2022.

J M BWONWONG’A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant

The applicant in person.

Mr. Mutuma for the Respondent

