



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS CRIMINAL DIVISION

CRIMINAL REVISION NUMBER E091 OF 2021

EPHANTUS NJIHIA KIMANI.....APPLICANT

VERUS

REPUBLIC.....RESPONDENT

RULING

1. The subject of the ruling is a notice of motion application filed on 22nd March 2021, supported by an affidavit of the applicant. Basically, he is seeking that, the Honorable court takes into account the time he spent in custody during trial pursuant to the provisions of; Section 333(2) of the Criminal Procedure Code and revise the sentence meted upon him accordingly.

2. He avers that, he was arrested on 4th December 2018 and charged at the Chief Magistrate's Court at Makadara vide criminal case number 3197 of 18, with the charge of stealing a motorcycle contrary to; Section 278(A) of the Penal Code. He pleaded not guilty and the case proceeded to a full hearing. At the conclusion of the trial, he was found guilty on 12th March 2021 and sentenced to serve two (2) years imprisonment.

3. The application was canvassed orally on 22nd June 2021, with the applicant, reiterating the averments in the affidavit in support of the application, save to add that, he is remorseful and will not repeat the offence

4. However, the Respondent in oral by the learned State Counsel, Mr Kiragu confirmed that, the applicant was convicted and sentenced to two (2) years imprisonment for the offence stated herein. However, the subject offence carries seven (7) years imprisonment. That, indeed the trial court took into account the period he was in custody, save for failure to state when the sentence commences. Further, the stolen motor cycle was not recovered.

5. I have considered the application and in particular, the record of the trial court and I find that, the applicant was arrested on 5th December 2018. He was arraigned in court on 6th December 2018. He was granted bond terms of cash bail of Kshs 50,000, but did not secure the same. He remained in custody throughout the trial, to judgment and sentence on 12th March, 2021. Thereof he was in custody for a period of; two (2) years and three (3) months.

6. At the time of pronouncing the sentence the learned trial court stated as follows;

“I have considered the punishment provided by the law.

Mitigation by the accused, and time spent in remand the accused to be imprisoned for a period of 2 years. 14 R/A”

7. From the above sentiments, the period the accused spent in custody is stated to have considered. If that is so, then the accumulative period the accused would be incarcerated will be four (4) years and three (3) months. The question that arises is whether; this period is justifiable and/or just, in view of the fact that, the applicant was a first offender and/or the value of the subject matter is; Kshs 110,000 and that, the complainant has civil recourse for recovery of his motor cycle.

8. Furthermore, it does appear the applicant was apparently known to the complainant who seem to have willingly given him the subject motor cycle. I think a pre-sentence report would have been helpful to get the complainant's views.

9. Be that as it were, the provisions of Section 333 (2) of the Criminal Procedure Code which the applicant relies on states that; -

“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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody”.

10. Pursuant thereto the Court of Appeal stated in the case of; Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR, that: -

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. 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. 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 appellants’ sentence of imprisonment to run from the date of their arrest on 19th June 2012.”

11. From the aforesaid, if the period of two years imposed is upheld that would incarcerate the applicant for four (4) years and three (3) months which period in my considered opinion would be over a half of the period provided for under the law and rather harsh for a first offender, who should be accorded an opportunity for rehabilitation.

12. Therefore, pursuant to the provisions of; Article 165 (6) and (7) of the Constitution of Kenya, being the supervisory jurisdiction of this court, sub-article (7) of the Constitution of Kenya, states; -

“For the purpose of clause (6), the High Court may call for the record of any proceedings before any court or person, body of authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice. “

13. Similarly, the provisions of; section 362 to 364 of the Criminal Procedure states inter alia that;

“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.”

14. In accordance with the aforesaid provisions and in the interest of justice, I set aside the sentence imposed by the trial court of two (2) years’ imprisonment and substitute it with a custodial sentence of; one (1) year imprisonment, with effect from the date of sentence in the trial court.

It is so ordered.

DATED, DELIVERED VIRTUALLY, AND SIGNED ON THIS 30TH DAY OF JUNE, 2021.

GRACE L. NZIOKA

JUDGE

In the presence of;

Applicant in person.

Ms Kibathi for the Respondent.

Edwin Ombuna, the Court Assistant.