



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL REVISION NO. E059 OF 2021**

**KELVIN BAYO.....APPLICANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**RULING**

1. In his undated chamber summons application filed on 22<sup>nd</sup> February 2021, the applicant, *Kelvin Bayo* moved this court seeking review of his sentence imposed by the lower court in Kibera Chief Magistrate's Court Criminal Case No. 185 of 2016.
2. In his supporting affidavit, the applicant averred that he was convicted of the offence of handling stolen goods and was sentenced to serve 10 years imprisonment. He invited the court to find that the trial court violated his rights enshrined in *Article 50 (2) (g) and (h) and Article 25 (c)* of the Constitution which are clearly not applicable to the prayers sought in the application.
3. At the hearing, both the applicant and the respondent chose to prosecute the application by way of oral submissions. In his submissions, the applicant beseeched this court to order that the sentence meted out on him by the trial court should take effect from the date of his arrest not the date it was pronounced. He also requested me to substitute the sentence with a non custodial sentence noting that he was a first offender.
4. The respondent through learned prosecuting counsel *Ms Kimani* opposed the application. She submitted that in passing sentence, the learned trial magistrate considered the plea in mitigation advanced by the applicant including the fact that he was a first offender; that the period he spent in custody during the trial was also considered.
5. In addition, counsel urged me to find that the sentence imposed on the applicant was commensurate with the offence he had committed; that the sentence was lawful as the law prescribed a punishment of not more than 14 years imprisonment for the offence; that there was no basis for substitution of the sentence with a non custodial sentence and the application ought to be dismissed.
6. I have considered the application and the oral submissions made by both parties. From the applicant's submissions, it is apparent that the application is anchored on the claim that in passing sentence, the learned trial magistrate contravened *Section 333 (2)* of the *Criminal Procedure Code*; that the sentence was harsh and should be substituted with a non custodial sentence since the applicant was a first offender.
7. *Section 333 (2)* of the *Criminal Procedure Code* principally provides that the time an offender had spent in lawful custody during the trial should be discounted from the sentence imposed by the trial court. The section 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.”***

8. The *Judiciary Sentencing Policy Guidelines* at *paragraph 7:10* besides interpreting the provision also gives some insight into the mischief the provision was meant to cure. It states 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 paragraph 7:11 the guidelines proceed to state that:

***“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.”***

9. In this case, it is clear from the record of the trial court that the applicant was in custody throughout his trial. When passing sentence, the trial court stated as follows:

***“I have considered the fact that the accused has been in custody for two years now. I have also considered the fact that the accused is a first offender. I heard his mitigation and I can attest that the accused is not remorseful. He has continued throughout trial to display contempt in proceedings. However having been guided by the provisions of the law I find that:***

***The accused will serve 10 years in jail.”***

10. Granted that the learned trial magistrate considered the period the applicant had been in custody during the trial, she did not specifically direct that the sentence handed down on the applicant would be computed from the date of his arrest which was 13<sup>th</sup> January 2016 considering that the applicant was in custody for the entire period of his trial.

11. From the trial court’s presentence notes, there is no doubt that the sentence was meant to take effect from the date it was pronounced which goes against the text and spirit of the proviso to *Section 333 (2) of the Criminal Procedure Code*. It is thus evident that the learned trial magistrate erred in law when passing sentence against the applicant. She committed an error which this court is obligated to correct in the exercise of its revisional jurisdiction under *Section 362* as read with *section 364* of the *Criminal Procedure Code*.

12. With regard to the applicant’s prayer that since he was a first offender his sentence should be substituted with a non custodial sentence, it is pertinent to note that sentencing is at the discretion of the trial court which needless to state must be exercised judiciously.

In this case, before passing sentence, the trial court considered that the applicant was a first offender and his attitude towards the offence. In the exercise of her discretion, the learned trial magistrate found a sentence of 10 years imprisonment appropriate for the offence the applicant had committed.

13. In its revisional jurisdiction, this court is only mandated to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order made by the trial court or to correct any irregularity in the proceedings leading to the making of the impugned order or sentence

The court cannot interfere with the trial court’s discretion in sentencing merely because the convict is of the view that the sentence was harsh or excessive. The court can only use its power of revision in reviewing a sentence if it was satisfied that there was blatant abuse of discretion by the trial court when passing sentence or that the sentence was illegal for one reason or the other. The court can also review the sentence if it was satisfied that there was a patent defect in the proceedings giving rise to the sentence like the one alluded to earlier with regard to contravention of *Section 333 (2) of the Criminal Procedure Code*.

14. Other than the trial court’s failure to discount the period spent in lawful custody from the sentence imposed on the applicant, the sentence was otherwise lawful since the penalty prescribed by the law for the offence of handling stolen property is a maximum of 14 years imprisonment.

Flowing from the foregoing and given that the applicant chose to file an application for revision as opposed to an appeal against sentence, I find no legal basis to grant the applicant’s prayer of substitution of his sentence with a non custodial sentence.

15. Bearing in mind that the applicant was in lawful custody throughout his trial, the upshot of this ruling is that the application partially succeeds in so far as the date of commencement of the applicant’s sentence is concerned. The sentence shall take effect from the date of his arrest on 13<sup>th</sup> January 2016.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2021.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr Chebii for the state

Applicant present

Ms Karwitha: Court Assistant