



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS CRIMINAL DIVISION

MISC. APPLICATION REVISION NO. E040 OF 2021

BENSON LUDECHI.....APPLICANT

REPUBLIC.....RESPONDENT

RULING

1. The Applicant moved the court vide a Chamber Summons application filed on; 17th February 2021, supported by his own affidavit, basically seeking that, the two (2) years and eleven (11) months he spent in custody, be considered as part of the custodial sentence meted on him.
2. He avers that, he was convicted vide, Criminal Case No. 3295 of 2017, at the Chief Magistrate's Court at and Sentenced to serve, two (2) years imprisonment, for the offence of; stealing a motor vehicle. He seeks that, the subject sentence runs from the date of his arrest.
3. Upon considering the application, the court ordered that, the same be served for inter-parties hearing. However, the Respondent did not file any formal response, save to address the court orally and argue that, the section under which the Applicant was charged carries a custodial sentence of seven (7) years. That, the Applicant was sentenced to; twenty-four (24) months after the court considered the period he was in custody. Therefore, the application should be dismissed.
4. I have considered the application and the opposition raised thereto and I find that, the applicant was charged as aforesaid, in the Chief Magistrates Court at Kibera vide Criminal Case No. 3295 of 2017, in count one, with the offence of; stealing a motor vehicle contrary to; section 278(A) of the Penal Code, and an alternative count of; handling suspected stolen goods contrary to; section 322(1) of the Penal Code. The particulars of each count are as per the charge sheet.
5. He pleaded not guilty to both counts and the case was fully heard on, 13th August 2020, the trial court delivered its Judgment and convicted him on the main count of; stealing a motor vehicle. He was treated as a first offender. After offering his mitigation, the court sentenced him to, serve two (2) years imprisonment.
6. In pronouncing the sentence, the trial court stated as follows: -

“I have carefully considered the nature of the offence, the circumstances under which the offence was committed. I have also considered the mitigation advanced by the accused and the fact that, the motor vehicle was recovered. The accused has been in custody since September, 2017. In the circumstances, I hereby sentence the accused to twenty-four months (Two years) imprisonment”

7. It suffices to note that, the relevant provisions of the law applicable herein is, section 333(2) of the Criminal Procedure Code (Cap.75) Laws of Kenya, which states as follows;

“(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”.

8. The subject provisions are echoed under; clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines and in the cases of; *Ahamad Abolfathi Mohammed & Another vs. Republic (2018) eKLR* and *Bethwel Wilson Kibor vs. Republic (2009) eKLR*.

9. Further, pursuant to the provisions of; Article 165 (6) and (7) of the Constitution of Kenya, 2010 and section 362 and 364 of the Criminal Procedure Code (Cap 75), Laws of Kenya, the Appellate court will only interfere with the lower courts finding on sentence if; there is an apparent illegality, impropriety in the sentence meted out.

10. Finally, in the case of; Bukenya v Uganda (Criminal Appeal No. 17 of 2010) (2012), UGSC 3 (29 January 2013) the court stated that;

“Taking the remand period into account is clearly a mandatory requirement. As observed above, this Court has on many occasions construed this clause to mean in effect that, the period which an accused person spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this Court in which we have emphasized the need to apply clause (8). It does not mean that, taking the remand period into account should be done mathematically such as subtracting that period from the sentence the Court would give. But it must be considered and that consideration must be noted in the judgments”.

11. Having considered the sentiments of the trial court before pronouncing the sentence, it is clear that, the period the Applicant was in custody was considered. Indeed, the charge sheet under which the Applicant was sentenced on, states that, he was arrested on; 21st September, 2017. He was arraigned in court on; 3rd October, 2017. The trial court considered the custody period from; September, 2017.

12. In the given circumstances, the application lacks merit in that, there are no good reasons to interfere with the sentence. Consequently, the application is dismissed accordingly.

13. It is so ordered.

Dated, delivered and signed on this 6th day of August, 2021, virtually and during vacation as the Vacation Duty Court.

GRACE L. NZIOKA

JUDGE

In the presence of;

Applicant in person

Ms Akunja for the Respondent

Edwin Ombuna Court Assistant.