



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

MISCELLANEOUS CRIMINAL APPLICATION NO. E091 OF 2021

SAMUEL NJUGUNA IRUNGU.....APPLICANT

VS

REPUBLIC.....RESPONDENT

RULING

Background

1. The Applicant herein, was charged with attempted Stock theft contrary to **Section 278** as read with **Section 389** of the **Penal Code**. The particulars were that on the 29th day of December, 2018 at Ruanyambo Location in Kinangop sub-County within Nyandarua County jointly with others not before court attempted to steal twenty-five sheep valued at KShs. 175,000 the property of Simon Githaiga Njoroge.
2. The Applicant pleaded not guilty and after trial was convicted for the offence of Attempted Stock Theft Contrary to **Section 389** of the **Penal Code** and sentenced to two-years' imprisonment.
3. The Applicant lodged a Notice of Motion with a Supporting Affidavit on 13/04/2021 praying that the court considers the time he spent in remand to constitute part of his sentence and/or substitute the sentence with a non-custodial one.
4. In mitigation, the Applicant herein supplied six grounds for the court's consideration in reviewing his sentence namely:
 - i. That he is remorseful for the offence.
 - ii. That he has spent (1) one year (5) months in remand custody which should be considered.
 - iii. That he has learnt to be a law abiding citizen.
 - iv. That he is from a poor family background.
 - v. That he has done Biblical courses and acquired certificate as part of his rehabilitation.
 - vi. That he would use the skills to cater for himself and build the Nation.
5. The application was canvassed orally before me on 29th November, 2021. The Applicant was in person whilst the Respondent was represented by learned State Counsel, Miss Maingi.
6. The Applicant urged the court to consider the period he was in remand prior to sentencing. He also informed the court that he attained several life-support skills in prison which would enable him do better work after released from prison.
7. Miss Maingi on the other hand did not oppose the application, stating that the period the Applicant spent in remand ought to have been considered.

Determination

8. I have considered the application, the submissions and the applicable law. The only issue for determination is whether the application is merited.

9. In this application, the Applicant does not deny committing the offence. All he urges the court is to be lenient to him and further consider the period he spent in the remand custody prior to the sentencing. He was charged with attempted stock theft contrary to **Section 278** as read with **Section 389** of the **Penal Code**. **Section 278** provides for the offence of stealing stock whilst **Section 389** provides for punishment for attempt to commit a felony or a misdemeanor where no other punishment is provided. In such a case, the person is liable to imprisonment to one half of such punishment as may be provided for the offence attempted, but if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.

10. Under **Section 278**, theft of stock is punishable by a term not exceeding 14 years imprisonment. Hence, for attempted theft of stock, the punishment should not exceed seven years imprisonment. The Applicant was sentenced to two years imprisonment on 3rd March, 20121. It is clear from the record that he was in remand custody throughout the trial. He was arrested on 03/09/2019 and sentenced on 03/03/2021 meaning that he was in remand for 1 year and 6 months excluding date of the sentence. From 03/03/2021 to 09/12/2021 is nine months and six days meaning therefore that he has been in custody for an extra three months.

11. It is further clear from the record that the learned trial magistrate failed to consider the period the Applicant was in remand custody prior to sentencing contrary to the mandatory provisions of **Section 333 (2) of the Criminal Procedure Code** which provides that: -

“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 (emphasis mine).

12. This duty is also contained under **clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines** where it is provided 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 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.”

13. The Court of Appeal in the case of **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR (Nairobi Criminal Appeal 135 of 2016)** directed that the trial court should have directed the Appellants’ sentence of imprisonment to run from the **date of their arrest** which makes it mandatory that the period which an accused has been held in custody prior to being sentenced be taken into account in meting out the sentence where it is not hindered by other provisions of the law.

14. The above analysis implies that the Applicant has served in excess of his jail term. He ought to leave the prison forthwith. In the in end, I find the application merited. The sentence is hereby revised with an order that taking into account the period the Applicant was in remand, he has served in excess of the sentence imposed. I order that he be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 16TH DECEMBER, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Applicant in person.*
2. *Miss Maingi for the Respondent.*