



REPUBLIC OF KENYA



**Omanwa v Republic (Criminal Revision E105 of 2023)  
[2024] KEHC 2851 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2851 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CRIMINAL REVISION E105 OF 2023  
WA OKWANY, J  
MARCH 7, 2024**

**BETWEEN**

**JOB MOMANYI ALIAS NYASANI OMANWA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original Conviction and Sentence in the Chief Magistrate's  
Court at Nyamira, Criminal Case No. 840 of 2019 by Hon.  
M. Nyigei, Principal Magistrate on 22nd September 2022)*

**RULING**

1. The Applicant was convicted for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to serve 5 years imprisonment. He filed this application under Section 333(2) of the Criminal Procedure Code (CPC) seeking orders for the computation and reduction of the time that he had spent in remand custody from his 5 years sentence term.
2. Mr. Chirchir, Learned Prosecution Counsel submitted that the Applicant spent 8 days in remand which, according to him, may not make any impact on the sentence period even if Section 333(3) of the CPC was to be applied.
3. In a rejoinder, the Applicant stated that even though he was granted bond, he was re-arrested on 22<sup>nd</sup> July 2022 and sentenced on 4<sup>th</sup> October 2023.
4. The main issue for determination is whether Section 333(2) is applicable in this case.
5. Article 50 of the Constitution stipulates as follows on the rights of an accused person: -
  - (2) Every accused person has the right to a fair trial, which included the right-
    - (q) if convicted, to appeal to, or to apply for review by a higher court as prescribed by law.



6. Article 165 grants the High Court the powers to review orders made by the subordinate courts as follows: -

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial, or quasi-judicial function, but not over a superior court.

7. Sections 362 and 364 of the *Criminal Procedure Code* further give effect to Article 165 and outline the manner in which the High Court shall exercise those powers as follows: -

362. Power of the High Court to Call for Records

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.

364. Powers of the High Court on Revision

1. In the case of a proceeding in a subordinate court, the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may –

- (a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
- (b) In the case of any other order other than an order of acquittal, alter or reverse the order.

2. No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defense:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

- 3. Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed that might have been inflicted by the court which imposed the sentence.
- 4. Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- 5. When an appeal lies from a finding a sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

8. The above legal framework empowers this Court to determine whether the sentence meted by the trial court was appropriate, legal and correct.



9. It is trite that sentencing is at the discretion of the trial court and that a court of superior jurisdiction will only interfere with the exercise of such discretion where the sentence is manifestly excessive or grossly inadequate or where the trial court overlooked some material factor or acted on wrong principles
10. In *Wagude v R* (1983) KLR 569 the learned Appellate Judges (Kneller, Hancox JJA. & Chesoni, Ag.JA.) stated thus: -
- “The Court may interfere with the sentence only if it shown that it was manifestly excessive. In this instance two years’ Imprisonment for stealing by a person employed in the public service was not manifestly excessive.”
11. The Applicant’s prayer is premised under section 333 (2) of the *Criminal Procedure Code* which states as follows: -
333. Warrant in case of sentence of imprisonment
- (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.
12. In *Bethwel Wilson Kibor. Republic* [2009] eKLR it was held follows:-
- “By proviso to section 333(2) of *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”
13. Section 296 (2) of the *Penal Code* provides for the death punishment for the offence of robbery with violence. Recent court decisions from the Supreme however declared the mandatory nature of death sentences unconstitutional. In this regard, courts are now at liberty to apply discretion and mete out a more lenient sentences depending on the circumstances of each case and the convict’s mitigation. I note that it was on this basis that the trial court sentenced the Applicant to 5 years’ imprisonment.
14. I have carefully perused the proceedings in the trial record and I note the Applicant was arrested on 11<sup>th</sup> June 2019 according to the Charge Sheet and presented before the court for plea taking on 12<sup>th</sup> June 2019. The Applicant was released on bond on 20<sup>th</sup> June 2019 but was subsequently re-arrested and arraigned before the trial court on 12<sup>th</sup> April 2021 (1 year and 10 months later) when he breached the bond terms. His bond was subsequently cancelled and this means that he stayed in custody for the remainder of the trial period. He was then sentenced on 10<sup>th</sup> October 2022.
15. From the above facts, it is clear that the Applicant was in custody for 8 days before being released on bond and for a further period of 1 year and 6 months after his re-arrest until the date of sentence. I find that the trial court should have considered the period that the Applicant spent in custody while



awaiting his trial during sentencing. A perusal of the trial record however reveals that the trial magistrate did not comply with the provisions of Section 333(2) of the CPC.

16. I therefore find that the instant application is merited and I therefore allow it. I direct that the period of that the Applicant spent in custody while awaiting his trial be computed and deducted from his 5 years sentence period.
17. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIDE MICROSOFT TEAMS THIS 7<sup>TH</sup> DAY OF MARCH 2024.**

**W. A. OKWANY**

**JUDGE**

