



**Onchonga v Republic (Criminal Revision E106 of 2023)
[2024] KEHC 3209 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3209 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL REVISION E106 OF 2023
WA OKWANY, J
MARCH 7, 2024**

BETWEEN

VINCENT ORINA ONCHONGA APPLICANT

AND

REPUBLIC RESPONDENT

*(From the original Conviction and Sentence in the Chief Magistrate's
Court at Nyamira, Criminal Case No. CMCCR No. E791 of 2022
by Hon. C. Waswa, Senior Resident Magistrate on 26th April 2023)*

RULING

1. The Applicant herein was convicted and sentenced to serve 2 years' imprisonment for the offence of stealing a motorcycle contrary to Section 278A of the Penal Code. He filed the instant 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 while awaiting from his prison term. The Applicant averred that he had undergone several rehabilitation and reform programs and that he would wish to be reintegrated back to the society.
2. At the hearing of the Application, Mr, Chirchir, Learned Prosecution Counsel informed the court that the Applicant took plea before the trial court in July 2022 and was released on bond in January 2023 which meant that he had been in custody for about 6 months. He submitted that the Application could be considered in light of the provisions Section 333(2) of the CPC. The Applicant, on the other hand, stated that he stayed in remand custody for 10 months.
3. The Constitution of Kenya outlines the rights of an accused person under Article 50 as follows: -
 - (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.



4. Article 165 of the Constitution vests the powers of review on the High Court 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.

5. Sections 362 and 364 of the Criminal Procedure Code give effect to Article 165 of the Constitution and provide for the manner in which the High Court shall exercise revisionary 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.

6. The main issue for determination is whether the Applicant has made out a case for the revision of his sentence and whether the sentence meted by the trial court was appropriate, legal and correct.

7. It is trite that sentencing is at the discretion of the trial court and that a court of superior jurisdiction may only interfere with the exercise of such discretion if it is demonstrated that the sentence meted



was manifestly harsh or grossly inadequate or where the trial court overlooked some material factor or acted on wrong principles.

8. In *R v Mohamedali Jamal* (1948) 15 EACA 126, the Court of Appeal for Eastern Africa stated: -

“It is well established that an appellate Court should not interfere with the discretion exercised by a trial Judge or Magistrate except in such cases where it appears that in assessing sentence the Judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive.”

9. Section 333 (2) of the *Criminal Procedure Code* 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.

10. In *Ahmed Abolfathi Mohammed & Another v Republic* (2018) eKLR the Court of Appeal held thus: -

“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. I have considered the sentence meted by the trial court. Section 275 of the *Penal Code* provides that the offence of stealing attracts sentence of 3 years’ the punishment. A perusal of the trial record reveals that the said court considered the Applicant’s mitigation and the period that he had spent in custody before sentencing him to pay a fine of Kshs. 50,000/= and in default, to serve two years’ imprisonment.

“Having considered the nature of the offence and the mitigation by the accused, the accused is sentenced to pay a fine of Kshs. 50,000, in default to serve two (2) years imprisonment. This court has considered the time the accused spent in custody.”



12. I therefore find that the sentence passed by the trial court was not only correct but also legal and appropriate. In the circumstances of this case, I find no reason to interfere with the sentence. Consequently, I dismiss the instant application for lack of merit.

13. It is so ordered.

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

W. A. OKWANY

JUDGE

