



**Nyandieka v Republic (Criminal Revision E009 of 2024)  
[2024] KEHC 9510 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9510 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CRIMINAL REVISION E009 OF 2024  
WA OKWANY, J  
JULY 25, 2024**

**BETWEEN**

**EDWARD NYANDIEKA ALIAS ARUSA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant was convicted for the offence of grievous harm contrary to Section 234 of the [Penal Code](#). He was, upon conviction, sentenced to pay the victim Kshs 300,000/= in compensation or, in default, serve 5 years' imprisonment.
2. The Applicant filed the present Application on 8<sup>th</sup> February 2024 seeking a revision of the sentence. He urged this court to consider the time he spent in remand custody, while awaiting his trial, when computing the final sentence.
3. The Application is supported by the Applicant's Affidavit in which he states that he was now reformed and is ready to be reintegrated back to the society and that the Court should consider the time he spent in remand custody.
4. The Respondent did not oppose the Application and submitted that this is an application that the court could consider granting under Section 333(2) of the [Criminal Procedure Code](#).
5. Article 165 of the [Constitution](#) grants the High Court supervisory powers over subordinate courts as follows: -
  - (6) 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) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
6. Article 50 of the [Constitution](#) provides for the rights of an accused person to revision of sentence as follows:-
- (2) Every accused person has the right to a fair trial, which includes the right—
- (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.
7. Sections 362 and 364 of the [Criminal Procedure Code](#), provide for the High Court’s powers on revision as follows: -
362. 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.
- (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 defence:
- 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.
8. The crux of the Application is that the period that the Applicant spent in remand custody while awaiting his trial be included in his final sentence. I have perused the proceedings of the trial court during sentencing and I note that the said court only considered the Pre-Sentence Report, the nature of the offence and the circumstances of the victim when passing its sentence. The time that the Applicant spent in remand custody was not considered.
9. Section 333 (2) of the [Criminal Procedure Code](#) stipulates that the court must consider the period spent in custody during the pendency of the trial when sentencing a convicted person,. The [Judiciary Sentencing Policy Guidelines 2016](#) also provide thus:-
- 7.10. 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.

- 7.11. 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.
10. The above principles were restated by the Court of Appeal in the case of Bethwel *Wilson Kibor v Republic* [2009] eKLR as 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.”
11. It is my finding that the trial court erred in failing to consider the time the Applicant spent in pre-trial custody. I therefore find that the instant application is merited.
12. Consequently, I allow the Application and direct that the Applicant’s sentence shall commence from the date of his arrest being 22<sup>nd</sup> September 2021.
13. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 25<sup>TH</sup> DAY OF JULY 2024.**

**W.A. OKWANY**

**JUDGE**

