



Ouma v Republic (Miscellaneous Criminal Application E012 of 2023) [2024] KEHC 8093 (KLR) (5 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8093 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CRIMINAL APPLICATION E012 OF 2023**

JRA WANANDA, J

JULY 5, 2024

BETWEEN

GABRIEL OUMA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant seeks sentence review. In the body of the Application, there is some reference to Section 333(2) of the *Criminal Procedure Code* which requires that the time spent by a convict in remand custody be taken into account in determining the sentence to be imposed.
2. The Applicant was charged in Eldoret Chief Magistrate’s Criminal Court Case No. 2350 of 2019, jointly with 2 others, for the offence of severing with intent to steal contrary to section 32A of the *Kenya Information Communications Act* 2012. The particulars of the offence were that on 31/07/2019 at Kidiwa Estate in Turbo sub-County within Uasin Gishu County, with intent to steal, they jointly severed a copper telecommunications cable measuring 20 meters valued at Kshs 7,0000/- the property of Telkom Kenya. The Applicant and his co-accused were all convicted on their own plea of guilty and were each sentenced to pay a fine of Kshs 5,000,000/- and in default, to serve 10 years imprisonment.
3. Aggrieved with the sentence, the Applicant and his co-accused all appealed. The respective Appeals were then consolidated and determined under Eldoret High Court Criminal Appeal No. 148 of 2019. Since the Applicant and his co-accused had been convicted on their own plea of guilty, the Appeal was only considered on the issue of the sentence By the Judgment delivered on 12/11/2021 by O. Sewe J, the Appeals were however all dismissed in entirety.
4. The Applicant has now brought the instant Application seeking for sentence review. As aforesaid, although the Application bears some passing reference to Section 333(2) aforesaid, there is no explanation whatsoever on how that Section is applicable to his circumstances. In the grounds to the



Application and in the Affidavit in support thereto, what he has raised is that he is a first offender, he is remorseful, repentant, that he has learnt to take responsibility for his own actions, and that he begs for mercy and other grounds of such nature.

5. The Applicant also filed written Submissions in which he reiterated the same matters as above and added that the period he has spent in prison has created a space of healing of the mind, that the act he committed was out of peer pressure, that the sentence was harsh and that the trial Court failed to consider the mitigating circumstances. He then prayed that the Court reduces the sentence or considers him for a non-custodial sentence.
6. The State did not file any response to the Application or Submissions.

Determination

7. The issue that arises for determination herein is whether this Court should review the sentence imposed by the trial Court.
8. Section 333(2) of the *Criminal Procedure Code* provides as follows:

“Subject to the provisions of Section 38 of the Penal Code, 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody.”
9. It can be noted right away that the grounds raised by the Applicant have nothing to do whatsoever with Section 333(2). In any case, the issue of legality or harshness of the sentence were the same matters that were considered and ruled upon in the Judgment of O. Sewe J delivered in Eldoret High Court Criminal Appeal No. 148 of 2019. For that reason, as regards the issues aforesaid, this Court is now functus officio. Re-opening or revisiting those same issues will be tantamount to this Court sitting on Appeal its own decision.
10. Nevertheless, regarding the time spent in custody, I note from the Charge Sheet that the Applicant and his co-accused were arrested on 31/07/2019. They were then arraigned on 1/08/2019 and the plea was taken on 2/08/2019. Although they all admitted the charges, for reasons that are not clear, plea of not guilty was entered for all of them and they were on the same date granted bond of Kshs 10,000/- or cash bail of Kshs 7,000/-. When the matter came back in Court 7 days later on 9/08/2019 for hearing, upon the Applicant’s and his co-accused’s request, the plea was taken again and they again admitted the charges. This time, a plea of guilty was entered and they were then convicted accordingly. They were then remanded in custody and the sentence was read out to them on 12/09/2019. The period from arrest to date of sentencing was therefore between 31/07/2019 and 12/09/2019, a period of about 1 month and 12 days. If the proviso to Section 333(2) were to be applied, then it is this 1 month and 12 days that would need to be “taken into account”.
11. Considering that the Applicant and his co-accused were granted bail or bond, he has not stated whether he posted the bond or paid the bail and whether he was then released from custody or whether, despite the grant of bond or bail, he still remained in custody. The record also does not give clear indication thereon. In the circumstances, the Applicant has failed to place sufficient material before the Court to make a determination in his favour under Section 333(2) of the *Criminal Procedure Act*.
12. In the circumstances, the Application fails and is dismissed.



DELIVERED, DATED AND SIGNED AT ELDORET THIS 5TH DAY OF JULY 2024

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WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

Mr. Onjoro for the State

Applicant (Present virtually from Eldoret Main Prison)

Court Assistant: Brian Kimathi

