



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Salim v Republic (Criminal Revision E012 of 2023)
[2024] KEHC 9042 (KLR) (25 July 2024) (Revision)**

Neutral citation: [2024] KEHC 9042 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KWALE
CRIMINAL REVISION E012 OF 2023**

**OA SEWE, J
JULY 25, 2024**

BETWEEN

HAMISI ADAM SALIM APPLICANT

AND

REPUBLIC RESPONDENT

*(From the sentence passed in Criminal Case No. E223 of 2021 in the
Magistrate's Court at Kwale by Hon.Lewa, SRM on 29th August 2022)*

REVISION

1. The application for revision was filed herein on 13th December 2023 by the applicant, Hamisi Adam Salim. He prays that the Court be pleased to review the sentence imposed on him by the subordinate court on 29th August 2022. In support of the application, the applicant relied on his Supporting Affidavit annexed to the application in which he averred that he was charged before the lower court with six counts and sentenced to 18 months' imprisonment for Counts 1 to 4. In Counts 5 and 6 he was sentenced to pay a fine of Kshs. 100,000/= in default to serve one year's imprisonment. The terms were to run consecutively and therefore he was to ultimately serve 8 years' imprisonment.
2. The applicant averred that he is a reformed father of three children who are in primary school and who depend on him for their upkeep. He also stated that he had attained technical skills what will come in handy as a sole bread winner, should he be released. He relied on Articles 2, 50(2)(q) and 259 of the Constitution in urging the Court to convert his sentence into a non-custodial one.
3. The application was urged orally on 30th May 2024. He essentially relied on his affidavit and pointed out that he was in custody before his imprisonment. He therefore prayed that the time spent by him in custody be taken into consideration.
4. The application was opposed by the respondent. Counsel for the respondent confirmed that the applicant was sentenced to 18 months' imprisonment on two counts, which were to run concurrently.



In her view, the sentences meted on the applicant were lenient considering the circumstances in which the offences took place. She also submitted that the lower court took into consideration that the applicant was not remorseful. On that account she urged the Court to not interfere with the sentences imposed by the lower court.

5. Article 50(2)(q) of the Constitution pursuant to which the applicant approached the Court stipulates that:

(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.

6. In the same vein, Section 362 of the Criminal Procedure Code, recognizes that:

"The High court may call for and examine the records 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."

7. In that regard, Section and 364(1)(b) of the Criminal Procedure Code stipulates that:

"In the case of a proceeding in 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 ... in the case of any other order other than an order of acquittal alter or reverse the order."

8. Accordingly, the Court called for the record of the lower court, namely, Kwale Criminal Case No. E223 of 2021: Rashid Juma Mwandanda. The record of the lower court confirms that the applicant was indeed charged with four counts of the offence of conspiracy to commit a felony contrary to Section 393 of the Penal Code. The particulars alleged that the applicant, jointly with others conspired to commit a felony by personating police officers and purporting to arrest and detain the complainants. They were also charged with one count of being in possession of public stores contrary to Section 324(2) as read with Section 36 of the Penal Code; as well as a sixth count of personating a public officer contrary to Section 105(b) of the Penal Code.

9. The record further shows that the applicant denied those allegations but later changed plea and was accordingly sentenced as aforementioned. The record further shows that although an order was made for his release on bond, he remained in custody for the entire duration pending his conviction and sentence on 29th August 2022.

10. It is trite law that sentence review, even on appeal, ought not to be easily done; and that certain factors must be present to warrant such interference. Some of these factors were discussed in the case of *Ogalo s/o Owuora v Republic* [1954] 21 EACA 270, exist as follows:

"...The court does not alter a sentence on the mere ground than if the member of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in *James v Republic* [1950] 18 EACA 147, it is evident that the judge has acted upon some wrong principle or overlooked some material factor. To this we would also add a third criterion namely that the sentence is manifestly excessive in view of the circumstances of the case."



11. Similarly, in *Bernard Kimani Gacheru v Republic* [2002] eKLR, the Court of Appeal restated that:

"It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."
12. The *Judiciary Sentencing Policy Guidelines*, suggests a three-step approach to sentencing is recommended. Firstly, the sentencing court is to determine the sentencing options provided by the specific statute creating the offence. Secondly, the court has to determine whether a non-custodial or a custodial order would be the most appropriate in the circumstances. Thirdly, if custodial sentence is the most appropriate option, it is recommended that the court determines the duration of the custodial sentence taking into account the mitigating and aggravating circumstances, examples of which are set out in the Guidelines. In addition, the Policy Guidelines also acknowledge that one of the cardinal principles underpinning the sentencing process is the principle of proportionality. There is no doubt that the sentence passed was lawful.
13. I have gone further and perused the record to ascertain whether there was compliance with Section 333(2) of the *Criminal Procedure Code*. That provision states:
 - (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."
14. Similarly, in the revised *Judiciary Sentencing Guidelines*, it is stated, under Clauses 2.3.18 and 2.3.19, that:
 2. 3.18 Section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody. Failure to do so impacts the overall period of detention which may result in a punishment that is not proportionate to the seriousness of the offence committed. This also applies to those who are charged with offences that involve minimum sentences as well as where an accused person has spent time in custody because he or she could not meet the terms of bail or bond.
 2. 3.19 Upon determining the period of imprisonment to impose upon an offender, the court must then deduct the period spent in custody in identifying the actual period to be served (see GATS at Part V). This period must be carefully calculated – and courts should make an enquiry particularly with unrepresented offenders – for example, there may be periods served where bail was interrupted and a short remand in custody was followed by a reissuance of bail e.g., where a surety is withdrawn, and a new surety is later found. This calculation must include time spent in police custody.



15. Thus, in *Abamad Abolfathi Mohammed & Another v Republic* [2018] eKLR the Court of Appeal held:

...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.

16. The record of the lower court shows that the applicant was arrested on 17th July 2021 and that he remained in custody for the entire period preceding his conviction and sentence.

17. There being no indication in the sentencing notes of the trial court that the applicant's pre-sentence detention period was taken into account, I am satisfied that the application is meritorious. In this regard, I am persuaded by the position taken by Hon. Odunga, J. (as he then was) in *Jona & 87 others v Kenya Prison Service & 2 others* (Petition 15 of 2020) [2021] KEHC 457 (KLR) (18 January 2021) that:

"A holistic consideration of the above provisions clearly show that this court has the power to redress a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights and one such violation is the denial or threat of denial of freedom without a just cause such as where the sentence that a person risks serving is in excess of the lawfully prescribed one by failing to comply with section 333(2) of the *Criminal Procedure Code*."

18. The applicant's pre-sentence detention from date of arrest on 17th July 2021 and the date of sentence on 29th August 2022 be taken into account in reckoning his jail term.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF JULY 2024

OLGA SEWE

JUDGE

