



**Marita v Republic (Criminal Revision E068 of 2022)
[2023] KEHC 745 (KLR) (Crim) (7 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 745 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E068 OF 2022
JM BWONWONG'A, J
FEBRUARY 7, 2023**

BETWEEN

HEZRON ONSONGO MARITA APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for revision of the sentence imposed by Hon E. Kimilu, SPM, on 19th October 2021 in Milimani Chief Magistrate's Court Traffic case no. 17249 of 2019 Republic vs Hezron Onsongo Marita & another)

RULING

1. The applicant was convicted and sentenced to serve a cumulative term of three (3) years imprisonment for the three counts committed under the [Traffic Act](#) (Cap 403) Laws of Kenya. In count II the appellant was convicted of causing death through dangerous driving contrary to section 46 of the [Traffic Act](#) and was sentenced to serve 3 years imprisonment. In count III, the appellant was convicted of failing to stop after an accident contrary to section 73 (1) as read with section 75 of the [Traffic Act](#) and was sentenced to three months imprisonment. In count IV the applicant was convicted for failing to report an accident contrary to section 73 (3) as read with section 75 of the [Traffic Act](#) and was sentenced to 3 months imprisonment.
2. He has now filed the present application seeking the revision of his sentence.
3. The grounds raised in his application and the sworn affidavit in support of the application are as follows. That the trial court failed to consider the time he spent in pre-trial custody, he is remorseful for the offence and he has reformed. Further, he is the sole breadwinner of his family of one wife and 3 children. He has respiratory problems and is unable to get adequate medical attention due to



the congestion of the prison. He has urged the court to consider his application and place him on probation.

The oral submissions

4. During the hearing of the application, the applicant orally submitted that the trial court failed to consider the provisions of section 333 (2) of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya, in sentencing him.
5. Ms Ntabo learned prosecution counsel submitted that the time the applicant spent in the pre-trial custody was not considered by the trial court during sentencing.

Issues for determination

6. After considering the application, the oral submissions and the applicable law, I find the following to be the issues for determination.
 1. Whether the applicant has made out a case for the grant of the orders sought.
 2. Whether the orders ought to be revised.

Analysis and determination

7. The instant application is premised on sections 362 and 364 of the [Criminal Procedure Code](#). Section 362 gives the High Court the jurisdiction to call for and examine the record of any criminal proceeding 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. Section 364 on the other hand, provides for the powers of the High Court in revision.
8. However, the prayer sought by the applicant is basically that the time she spent in custody be considered and subtracted from the sentence meted against him. Section 333 (2) of the [Criminal Procedure Code](#) provides that: -

"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."

9. The jurisdiction of the court under section 333 (2) of the [Criminal Procedure Code](#) and the proviso thereto were explained by the Court of Appeal in the case of [Abamad Abolfathi Mohammed & another v Republic](#) [2018] eKLR. The said court while applying the foregoing provisions held that by dint of section 333 (2) of the [Criminal Procedure Code](#), the courts during sentencing ought to take into account the period that the accused have spent in pre-trial remand custody, before they are sentenced. The Judiciary [Sentencing Policy Guidelines](#) further buttresses this legal position for it provides that: -

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.”

10. However, I have perused the trial court record and I note that upon being convicted and upon the applicant having put forward his mitigation, the trial court considered the mitigation and sentenced him. The court then explained to the applicant his right of appeal.

From the record, the applicant was arrested on September 17, 2019 and was arraigned in court for plea taking on October 11, 2019. He was released on cash bail on June 16, 2020. It is clear from the above that indeed the court did not consider the period the applicant had spent in custody which was nine (9) months.

11. In the premises, I allow the application and order that the sentence of 3 years imprisonment imposed on the applicant be reduced by 9 months.

12. The sentence will commence from the date of conviction, being October 19, 2021.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 7TH DAY OF FEBRUARY 2023.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant

The applicant in person

Ms Akunja for the respondent

