



**Migwi v Republic (Criminal Revision E408 of 2021)
[2023] KEHC 17613 (KLR) (Crim) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17613 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E408 OF 2021
DO CHEPKWONY, J
MAY 18, 2023**

BETWEEN

JOEL WAIHARO MIGWI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Vide an undated Notice of Motion application, the Applicant, Joel Waiharo Migwi seeks that court reviews the sentence that was meted against him on November 9, 2021 in Makadara Chief Magistrates Criminal Case No 459 of 2020 pursuant to the provisions of Section 333, 362 and 364 of the [Criminal Procedure Code](#).
2. The application is premised on the grounds set out in the undated Supporting Affidavit of the Applicant in which he has deponed that he is a family man, being a husband and a father of three (3) school going children for whose he is their sole breadwinner. The Applicant also avers that he was charged and arraigned at Makadara Law Courts on January 29, 2020, having been charged with the offence of Obtaining by False Pretence contrary to Section 313 of the [Penal code](#) vide Criminal Case No 459 of 2020. According to the Applicant, upon going through the trial process, he was found guilty, convicted and sentenced to serve three (3) years imprisonment without an option of a fine. He depones that he is now a changed man having learnt a lot while in prison and as a consequence of the crime. He further avers that he suffers from chest problem and a prolonged stay in prison as likely to lead to an irreversible deterioration of his health due to the uncondusive conditions, congestion and risks of infection with Covid-19. He also seeks that the period he spent in custody during his trial to be considered for deduction from his sentence.
3. The application was canvassed through oral submissions. In his submissions, the Applicant submitted that he was in remand for a period of ten (10) months during trial and that since his sentence he has



learnt a lot through the trainings he has undergone while in prison. He therefore prayed for a second chance and submitted that he has reformed, he lost his mother while in prison, his father is old and that his daughter is about to join High School.

4. In rejoinder, the Applicant submitted that the reason he has not refunded the complainant was because he has never met or seen him since his arrest. He only admitted to the offence because he had been in custody for a long time.

Analysis and Determination

5. I have considered the application and the submissions made by both parties in support and in opposition thereof. I have also read the trial Court's record of proceedings and the Judgment of Hon Mwangi, in Makadara Criminal Application No 459 of 2020.
6. In seeking revision of the sentence that was meted against him, the Applicant has invoked this court revisional jurisdiction as provided under Section 362 as read with Section 364 of the *Criminal Procedure Code*. Section 362 which states 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.
- (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 than 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, 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.”
7. Apart from citing his social and economic circumstances, the Applicant claims that the trial Magistrate failed to take into consideration the period he had spent in custody during trial contrary to the provisions of Section 333(2) of the Criminal Procedure Code. Section 333 (2) of the Criminal Procedure Code which the learned trial Magistrate allegedly violated when sentencing the applicant is in the following terms:-

“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.”
8. The Court of Appeal in the case of Bethwel Wilson Kibor v Republic [2009]eKLR. expressed itself 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 September 22, 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.”
9. According to The Judiciary Sentencing Policy Guidelines at Paragraph 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”.
10. According to Section 137 I (2)(a) of the Criminal Procedure Code: -
 - (2) In passing a sentence, the court shall take into account
 - (a) the period during which the accused person has been in custody;



11. It is therefore clear that the foregoing provisions imposes an obligation on the trial court to take into account the period an accused has spent in remand in the determination of an appropriate sentence. Failure to comply with the said provision, renders the subsequent sentence a contravention of the law.
12. In the present case, I have read through the trial court's record and it shows that before passing sentence, the learned trial Magistrate stated as follows:-

“Mitigation by the accused is noted. Time spent in remand has been considered. The accused to serve three years imprisonment. R/A 14 days”
13. From the above statement, it is clear that the learned trial Magistrate considered the period the Applicant had been in custody during the trial. However, he did not specifically direct that the sentence handed down on the Applicant would be computed from the date of his arrest which was on January 27, 2020 considering that the Applicant was in custody during the entire period of his trial.
14. From the presentence notes, it is my considered view that the sentence was meant to take effect from the date it was pronounced which goes against the text and spirit of the proviso (2) to Section 333 of the Criminal Procedure Code. It is thus evident that the learned trial magistrate erred in law when passing sentence against the Applicant. He committed an error which this court is obligated to correct in exercise of its revisional jurisdiction under Section 362 as read with Section 364 of the Criminal Procedure Code.
15. For the foregoing reason, having established that the Applicant was in lawful custody throughout his trial hence his sentence ought to take effect from the date of his arrest which was on January 27, 2020. The upshot is, that the application partially succeeds in so far as the date of commencement of the Applicant's sentence is concerned.
16. It is hereby ordered that the Applicant's sentence of three (3) years to be computed from January 27, 2020.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIMABU THIS 18TH DAY OF MAY, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Kirago counsel for State

Appellant present

Court Assistant – Gitonga/Mwenda

