



REPUBLIC OF KENYA



**Ochieng v Republic (Criminal Revision E139 of 2023)
[2023] KEHC 20450 (KLR) (Crim) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20450 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E139 OF 2023
DR KAVEDZA, J
JULY 24, 2023**

BETWEEN

PAUL OTIENO OCHIENG APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for revision of the sentence of 3 years imprisonment imposed by Hon. R. A. Oganyo (C.M) on 30th August 2022 in Milimani Magistrates Court Criminal Case No. 1278 of 2016 Republic vs Paul Otieno & Grace Akoth Otieno)

RULING

1. The applicant was charged, convicted and sentenced to three (3) years imprisonment for the offence of Trafficking in Narcotic Drugs contrary to Section 4(a) of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#) No 4 of 1994.
2. The applicant has now filed an application dated February 1, 2023 seeking a revision of his sentence. He prays that the court takes into account the time he spent in pre-trial custody and revise his sentence.
3. The application is supported by an affidavit sworn by the applicant, Paul Otieno Ochieng. He avers that he is a first offender and pleads with the court for leniency. The application is not opposed by the State.



4. While the application is premised on the provisions of section 333 (2) of the *Criminal Procedure Code*, it invokes the revisionary jurisdiction of this court which is donated by section 362 of the *Criminal Procedure Code* which reads as follows:

“...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.

5. Further, section 333 (2) of the *Criminal Procedure Code* (Cap 75) Laws of Kenya provides that:

“(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.”

6. I have noted from the sentencing proceedings that the applicant was arrested on August 17, 2016 and upon arraignment, he applied for bail/bond and the same was granted. He did not however raise the cash bail and was therefore remanded in custody until August 30, 2022 when the case was concluded. He was subsequently sentenced to serve three (3) years imprisonment.

7. It is clear that the trial court did considered the period the applicant had spent in custody which from my computation is three (3) years.

8. In *Abmed Abolfatbi Mohamed v Republic* [2018] eKLR the Court of Appeal held as follows;

“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.”

9. The Judiciary Sentencing Policy Guidelines states as follows as regards the section:

“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. My reading of the ruling on sentencing reveals that the learned trial magistrate took into account the period the applicant had spent in pre-trial custody when passing the sentence against him.



Furthermore, I note that the trial court considered all relevant factors including the quantity and value of the drugs the applicant was found trafficking. Taking into account the maximum penalty prescribed by the act for the offence of trafficking in narcotic drugs contrary to section 4(a) of the Act which is fifty (50) years imprisonment and the devastating effects the drug menace has had on our society particularly the youth, I am satisfied that the sentence of three (3) years meted on the applicant was not illegal, harsh or excessive in the circumstances of the case.

11. I thus find that the sentence imposed on the applicant was lenient and will not allow the application. I therefore direct that the applicant serves the sentence to completion.
12. It is so ordered.

RULING DATED AND DELIVERED VIRTUALLY THIS 24TH DAY OF JULY 2023.

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D.KAVEDZA

JUDGE

In the presence of:

