



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oanda v Republic (Criminal Revision E017 of 2023)  
[2023] KEHC 19984 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19984 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CRIMINAL REVISION E017 OF 2023**

**WA OKWANY, J  
JULY 13, 2023**

**BETWEEN**

**CHARLES STIMA OANDA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being a Revision of the Sentence of Hon. C.W. Waswa, Resident Magistrate Nyamira dated 29th June 2022 in the original Nyamira Chief Magistrate's Court Criminal Case No. E158 of 2021)*

**RULING**

1. The Applicant herein was charged with the offence of assault causing actual bodily harm contrary to section 251 of the *Penal Code*. He was first arraigned in court on May 3, 2021 when he took plea and denied the charges. The matter proceeded for trial and at the end, the Applicant was on July 27, 2022 convicted and sentenced to pay a fine of Kshs 200,000/= or in default, to serve 4 years imprisonment.
2. The Applicant filed the instant application on May 23, 2023 seeking the revision of his sentence under Section 333 (2) of the *Criminal Procedure Code*. The Application is supported by the Applicant's affidavit and is premised on the following grounds: -
  1. THAT he was convicted and sentenced to 4 years imprisonment for the offence of assault contrary to section 251 of the Penal Code.
  2. That he did not appeal to the High Court.
  3. THAT the period spent in custody was not considered by the trial court.
  4. That he is now an old man of 74 years and prison life has really taken a toll on him because he has been diagnosed with arthritis, high blood pressure and diabetes.



5. THAT he is remorseful for the act he did.
  6. THAT he prays to the honourable Court to be lenient enough to pardon him and release him to society. He has made peace with the complainant and has sincerely learned his lesson the hard way.
  7. THAT he comes from a very humble background living a pauper's lifestyle hence he could not raise the fine of Kshs 200,000/= that was imposed on him.
  8. THAT he is a first-time offender which means he had never stepped foot in a court of law except in this case.
  9. THAT he has children and grandchildren who totally depended on him for support, guidance and counselling hence his absence has hindered that.
3. The Respondent did not oppose the Application which was canvassed by way of oral submissions. Counsel for the Respondent urged the court to consider the period that the Applicant had spent in remand custody while awaiting his trial. On his part, the Applicant submitted that the trial proceeded while he was in remand custody and that he has served a substantial part of his 4 years sentence. He stated that he is an old and sickly man with a sick wife. He further stated that his daughter died and left him with orphans who solely depended on him for their upkeep. He urged the Court to reduce his sentence or release him.
4. I have considered the Application and the submissions made by the parties.
5. The right to apply for a review of a decision by a subordinate court is provided for under Article 50 (2) (q) of the Constitution which states thus: -

The Constitution of Kenya, 2010

Article 50 - Fair hearing

  - (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. The High Court's Revisionary powers are contained under Sections 362 and 364 of the Criminal Procedure Code which stipulate as follows: -
  362. Power of High Court to call for records  
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. Powers of the High Court on Revision
    - (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 order, or which otherwise comes to its knowledge, the High Court may –
    - (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 had had an opportunity of being heard either personally or by an advocate in his own defense:

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.

7. The High Court is empowered to review the decision of a subordinate court in order to satisfy itself that the decision under review is correct, legal and proper.
8. A perusal of the court record reveals that the Applicant was arrested on April 30, 2021 and arraigned before the trial court on May 3, 2021. I note that even though the Applicant was granted bond of Kshs 50,000/=, he was unable to make bond and remained in custody during the entire trial until July 26, 2022 when he was sentenced to serve for 4 years imprisonment or pay a fine of Kshs 200,000.
9. From the above narration of the sequence of events that followed the Applicant's arrest, it is clear that the Applicant was in remand custody for a period of 1 year 3 months and has been in prison for close to 1 year.
10. It is now an established principle that courts are required to consider the time spent by an accused in pre-trial custody at the point of sentencing. This principle is stated under Section 333 of the Criminal Procedure Code as follows: -

- (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.

11. Similarly, the Judiciary Sentencing Policy Guidelines also address the issue of the period spent by an accused person in pre-trial custody. The Judiciary Sentencing Policy Guidelines at paragraph 7 states thus:-

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.
8. 11 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.

12. In the case of *Bethwel Wilson Kibor vs Republic [2009] eKLR*, the Court of Appeal held thus:-

' 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.'

13. Flowing from the above precedent and statutory provisions, it is evident that the trial court did not consider the period that the Applicant spent in pre-trial custody when passing its sentence. It is my finding that the sentence was therefore excessive. While this Court appreciates that sentencing is a preserve of the trial court, such sentences must be in tandem with the law and meet the interests of justice. I am persuaded by *S vs Nchunu & Another (AR 24/11) [2012] ZAKZPHC6*, where the Kwa Zulu Natal High Court stated: -

' It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be. The purpose behind a sentence was set out in *S Vs Scott-Crossley 2008 (1) SACR 223 (SCA)* at para 35:

'Plainly, any sentence imposed must have deterrent and retributive force. But off course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overriding ones. It is trite that it is in the interest of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.'

14. In the present case, it is evident that the Applicant regrets his actions as he has had time, while in custody, to reflect on the offence that he had committed. The Applicant submitted that he has since reformed, reconciled with the complainant and would like to be reunited with his family.
15. I have taken the Applicant's advanced age of 74 years and the fact that he has already served a substantial part of his sentence. I have also considered the period that that he spent in custody while awaiting trial. I find that there is merit in this Application and I therefore allow it.
16. Consequently, I review the Applicant's sentence and substitute it with the period that the Applicant spent in custody while awaiting trial and the prison term already served.
17. In the end, I direct that the Applicant be set at liberty forthwith unless he is otherwise lawfully held.
18. It is so ordered.

**Ruling dated, signed and delivered at Nyamira via Microsoft Teams this July 13, 2023.**

**W. A. OKWANY**

**JUDGE**

