



REPUBLIC OF KENYA



KENYA LAW
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**Otoigo v Republic (Criminal Revision E014 of 2023)
[2023] KEHC 20232 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20232 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL REVISION E014 OF 2023
WA OKWANY, J
JULY 13, 2023**

BETWEEN

WILFRED MATUKO OTOIGO APPLICANT

AND

REPUBLIC RESPONDENT

*(Being a Revision on the Conviction and Sentence of Hon. B.M. Kintai,
Principal Magistrate Keroka dated and delivered on 9th October 2019 in the
original Keroka Principal Magistrate's Court Criminal Case No. 881 of 2018)*

RULING

1. The Applicant herein initiated an Application on April 12, 2023 under Article 25 (2) and 50 (2) (p) of the Constitution seeking orders for the revision of the sentence passed on him before the lower court on the following grounds: -
 1. THAT he was convicted and sentenced to 8 years imprisonment for the offence of attempted murder under section 203 as read with section 204 of the Penal Code.
 2. That he did not appeal to the High Court.
 3. THAT he obeyed this Honourable Court to resume his sentence from the conviction date of October 9, 2019 (sic)
 4. THAT the period spent in custody was not considered by the trial court i.e 1 year and 1 month.
 5. THAT he now prays that the honourable Court be kind to consider and include the period spent in custody as part of the sentence served.



6. THAT the omission by the trial court was not in consideration of his right of a fair trial under Article 25(2) of the Constitution.
2. The facts of the case are that the Applicant was charged with the offence of attempted murder contrary to section 220 (a) of the Penal Code and a second count of grievous harm contrary to section 234 of the Penal Code. He was arraigned in court on September 10, 2018 where he denied the charges. The matter proceeded to a full trial after which he was convicted on both counts and sentenced to serve 5 years imprisonment for the first charge and 3 years imprisonment for the second charge.
3. The Respondent did not oppose the Application and submitted that the period spent in remand could be computed in meting out the sentence.
4. The legal foundation of the High Court’s powers of Revision is Article 50 (2) (q), sections 362 and 364 of the Criminal Procedure Code. The said laws provide as follows: -

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.

The Criminal Procedure Code, Cap 75

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.'

5. On Revision, the High Court must, in considering the decision of a subordinate court, satisfy itself on the parameters of correctness, legality and propriety.
6. In the present case, the Appellant was first arrested on September 3, 2018 as per the charge sheet even though he submitted that he was arrested on September 2, 2018. He was granted a bond of Kshs 500,000/= with a surety of a similar amount which he was unable to raise. He therefore remained in custody during the entire trial period. I have also noted that judgment was rendered on October 9,



2019 and the Applicant was sentenced on the same date. This means that he had spent a total of 13 months and 6 days in pre-trial custody.

7. In light of the foregoing, courts are required to consider the time spent by an accused in pre-trial custody at the point of sentencing. Section 333 of the Criminal Procedure Code, provides 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.'

8. In the case of *Abamad Abolfathi Mohammed & Another vs Republic [2018] eKLR*, the Court of Appeal held thus: -

'The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. 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 June 19, 2012.'

9. I find that the trial court was required to consider the period that the Applicant spent in custody in the final sentence. In the Circumstances, I find that the period of 1 year, 1 month and 6 days ought to be considered in the computation of the sentence.

10. I therefore find merit in this Application and allow it. In the final orders, I direct that the sentence of the trial court shall run from the date of the Applicant's first court appearance.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 13TH DAY OF JULY 2023.

W. A. OKWANY

JUDGE

