



**REPUBLIC OF KENYA**

**CRIMINAL DIVISION OF HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL REVIEW NO. 122 OF 2019**

**TEDDY INGOZI MUNDEKU.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in; Criminal Case No. 4732 of 2010:**

**Chief Magistrate's Court at, Makadara, by Hon. D. Kinaro (Senior Resident Magistrate)**

**RULING**

1. The Applicant filed the subject application herein dated 29<sup>th</sup> March 2019, seeking for orders as here below reproduced:

*a) That the court be pleased to hear and determine this application for review of the imposed sentence;*

*b) That the Honourable court be pleased to make an order to vary the sentence meted and discount time spent in remand pursuant to section 333(2) of the Criminal Procedure Code;*

*c) That the court be pleased to make any other order which it deems fit and just.*

2. The application is based on the grounds, that before pronouncing the sentence, the trial court did not take into account, the period of over two (2) years, which the Applicant spent in remand custody. Hence the prayer that the subject period be discounted from the sentence meted.

3. The application was further supported by an undated affidavit sworn by the Applicant, wherein he deposes that, he was convicted vide; criminal case number 4732 of 2020, filed at the Chief Magistrate's Court at Makandara, and is currently serving fourteen (14) years imprisonment at, Kamiti Maximum Prison.

4. He avers that, during the entire trial there was unreasonable delay occasioned by the prosecution and in view of the aforesaid, he decided to abandon the right of appeal, in order to pave way for review and negotiation of the sentence imposed. He therefore prays that, the court exercises its unlimited inherent power and deal with the matter.

5. The application was served upon the Respondent but they did not file any formal response thereto. However, on the hearing date, the Learned State Counsel Ms Ndombi, orally addressed the court and stated that; the Respondent has no objection to the application being allowed, so long as the court confirms that, the period in question was not considered before the sentence was imposed.

6. I have considered the application alongside the grounds, supporting affidavit and the response thereto. I have also considered the proceedings in the lower court file and find that, the Applicant was initially charged with the offence of; assault contrary to Section 251 of the Penal Code. The charge was subsequently substituted wherein with the charge of; grievous harm contrary to section 234 of the Penal code. The particulars thereof are as per the charge sheet.

7. Subsequently, the charge was read to the Applicant and he pleaded not guilty thereto. The prosecution called a total of four (4) witnesses in proof of its case, whereupon the trial court ruled that, the accused had a case to answer and placed him on his defence. The accused defended himself vide an unsworn statement. He did not call any witnesses.

8. The trial court evaluated the evidence and convicted him and sentenced him to fourteen (14) years imprisonment. However, although the Applicant avers that, he abandoned the appeal to file the subject application for revision, he is being dishonest. The court record indicates that; he filed High Court Criminal Appeal No. 213 of 2012, which was heard and dismissed by; Hon Lady Justice L.A Achode on 17<sup>th</sup> September, 2013.

9. Be that as it were, it is not clear from the decision on appeal, whether the issue of sentence and in particular the revision thereof pursuant to the provisions of section 333 (2) of the Criminal Procedure Code were considered.

10. The subject provisions states 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. In the same vein, the Court of Appeal has in the case of; Bethwel Wilson Kibor vs. Republic [2009] eKLR pronounced itself on the subject provisions as follows:

*“By the 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 22nd September, 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.”*

12. Further, the Court of Appeal, in the case of; Ahamad Abolfathi Mohammed & Another vs. Republic (2018) stated that: -

*“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 19th June 2012.”*

13. Finally, the Judiciary Sentencing Policy Guidelines states that: -

*“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.*

*7.11. 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.*

*7.12. An offender convicted of a misdemeanor and had been in custody through-out the trial for a period equal to or exceeding the maximum term of imprisonment provided for that offence, should be discharged absolutely, under section 35 (1) of the Penal Code.*

14. Be that as it were, the powers of the court to revise a sentence, is provided for by sections 362 and 364 of the Code, 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.”*

Section 364 of the Criminal Procedure Code provides that:

*(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.*

15. Similarly, the Court of Appeal in the case of; Ogolla s/o Owuor vs Republic. [1954] EACA 270, held that, the principles that an appellate court will consider while exercising its discretion to interfere with a sentence imposed by the trial court are now well settled that;

*"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."*

*In Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:*

*"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered."*

16. In addition, in exercising supervisory jurisdiction under Article 165(6) of the Constitution, the High Court does not exercise appellate jurisdiction and therefore the court cannot under its powers of revision, review or re-weigh evidence upon which the determination of the lower court was based

17. To revert back to the issue herein, it is noteworthy that, before sentencing the Applicant, the court stated as follows: -

*"The offence attracts a maximum of life imprisonment. The accused is a first offender. He has offered nothing in mitigation. The Accused shall serve fourteen years in prison. Right of appeal 14 days explained".*

18. It is therefore evident that, the trial court, did not consider the period the accused was in custody. Further in dismissing his appeal, the Appellate court stated that:

*"I must therefore, respectively agree with the learned trial magistrate that, the prosecution testimony, looked at in totality, was consistent watertight and overwhelming against the appellant;*

*For the foregoing reasons I find no merit in the appeal, before me and I dismiss it in its entirety"*

19. From the aforesaid, the Appellate court did not also address the provisions of; section 333 (2) of the Criminal Procedure Code. The Respondent has no objection to revisionary orders sought save for justification thereof. However, it is important to establish whether indeed the Applicant was in custody as alleged.

20. In that regard, I find that, the Applicant was arrested on 7<sup>th</sup> December 2010. He was arraigned in court on 8<sup>th</sup> December 2010. Apparently he was granted cash bail of; Kshs 8000, however, when the charge was substituted to; grievous harm the cash bail was enhanced to Kshs 20,000. There is no evidence from the record that, he was ever released on cash bail. I have seen committal warrant dated 8<sup>th</sup> December 2010 then extended to 22<sup>nd</sup> March 2011, then severally to 23<sup>rd</sup> July 2012, when judgment was delivered.

21. Therefore, he was in custody from the date of; 7<sup>th</sup> December, 2010 to 23<sup>rd</sup> July 2012, when he was sentenced. That is a period of; one (1) year, seven (7) months and sixteen (16) days, which should have been considered.

22. The upshot of the aforesaid is that; the sentence meted against the Applicant shall run from the date of his arrest on 7<sup>th</sup> December 2010, and not from the date of conviction. Consequently, the sentence is revised accordingly. The same shall be recalculated as per this order and the necessary documentation to follow with notice to all concerned parties.

23. It is so ordered.

**Dated and delivered virtually in an open court on this 10<sup>th</sup> day of February, 2021.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Applicant----- in person

Ms Akunja-----for the Respondent

Yusuf----- Court Assistant