



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO. 778 OF 2018**

**OMAR MUSEE BAKARI alias THOMAS OCHIENG ORIGI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. **Omar Musee Bakari alias Thomas Ochieng Origi**, the Applicant, approached this court through a Notice of Motion seeking review of the Six (6) years custodial sentence that he is serving to most preferably a non-custodial sentence.

2. The Application is supported by an affidavit most probably through error deposed by Patrick Angoyea Asira who deposes that he is serving a six years sentence which was punitive and excessive and the period he was in remand was not considered. That he is diabetic, his father died and he is the one responsible for his elderly mother and his nuclear family.

3. The application was canvassed by way of oral submissions. It was urged by the Applicant that during trial he was in custody and having been found guilty of both counts, he was sentenced to serve five (5) and six (6) years respectively, sentences that were ordered to run consecutively. Further, he stated that his wife has financial constraints and sought merger of both sentences.

4. The State through Mr. Mutuma submitted that time spent in custody by the Applicant should have been considered. Therefore, he did not oppose the appeal.

5. The Applicant was charged with two (2) counts: -(1) Stealing motor vehicle contrary to section 278A of the Penal Code. The motor vehicle stolen was valued at Ksh. 400,000/-

(2) Obtaining money by false pretences contrary to section 312 as read with section 313 of the Penal Code. The sum obtained was Ksh. 295,000/-

6. The applicant's 1<sup>st</sup> limb of complaint is failure of the court to take into consideration section 333(2) of the CPC which provides as follows:  
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**“(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...”**

7. In the case of **Ahamad Abolfathi Mohamed v Republic (2018) eKLR** the court of Appeal stated thus: -

**“...The appellants have been in custody from the date of their arrest on 19th June 2012. 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(s) 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.....”

8. Looking at the trial court record, it was stated thus: -

“ .....having considered his mitigation and...being a first offender he is sentenced as follows;

**Count 1: Five years imprisonment.**

**Count 2: One year imprisonment.**

**The sentences are to run consecutively....”**

9. It is apparent that the trial court that was obligated to consider the period that the Applicant was in custody during trial failed to do so.

10. The Applicant also complains that the lower court should have ordered sentences imposed to run concurrently. Section 14 of the CPC provides as follows:-

“... (1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently...”

11. In the case of **Peter Mbugua Kabui vs Republic (2016) eKLR** the Court of Appeal stated as follows: -

“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment. It is our considered view that the exception in Section 14 (3) of the Criminal Procedure Code is inapplicable to this case in light of the provisions of Section 7 (1) of the Criminal Procedure Code. We further observe that Section 14 of the Criminal Procedure Code stipulates that for purposes of an appeal, the aggregate of consecutive sentences imposed in case of convictions for several offences at one trial, shall be deemed to be a single sentence. We take the view that given the circumstances of this case, the consecutive sentences totaling 20 years imposed on the appellant, cannot said to be excessive. In any event, as we have pointed out earlier, severity of sentence is a question of fact and this Court has no jurisdiction to consider issues of fact in a second appeal. Is the sentence illegal or unlawful” We find that the sentence was legal and lawful, and we have no legal basis for interfering with the same ”

12. The Applicant herein committed two distinct offences at different times. The offence of stealing was committed on the 15<sup>th</sup> day of July, 2015, then, two months later, he obtained money by false pretenses from the second complainant. Therefore, the trial court did not fall into error. The order made by the learned magistrate was lawful.

13. On the issue of the sentence meted out, on the 1<sup>st</sup> count, the Applicant was in custody for approximately 2 ½ years, I hereby set aside the sentence imposed which I substitute with 2 ½ years imprisonment, to run with effect from the date he was convicted and sentenced ( 22.2.2018) Sentences on both counts shall run consecutively.

14. It is so ordered.

**Dated, Signed and Delivered Virtually at Nairobi this 3<sup>rd</sup> Day of March, 2021.**

**L. N. MUTENDE**

**JUDGE**