



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO. E082 OF 2020**

**GABRIEL MAINA GITONGA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The applicant filed a chamber summons application on 17<sup>th</sup> November 2020 under certificate of urgency and supported by his own undated affidavit stating that; he was arrested and charged vide criminal case number 2590 of 2019 at the Chief Magistrate's Court at Makadara. He pleaded guilty and was sentenced to three (3) years imprisonment on 9<sup>th</sup> March 2020.

2. However, while meting the sentence the court did not take into account the nine (9) months he was in custody, therefore, he seeks for the following orders: -

*a) That the court calls for the subordinate court file for perusal and satisfaction in accordance with section 362 of CPC;*

*b) The Honourable court be pleased to make an order to invoke section 333(2) of the CPC;*

*c) The Honourable court be pleased to make an order to invoke section 35 of the CPC;*

3. In a nutshell, the applicant wants the sentence revised. However, the application was opposed by the Respondent vide grounds of opposition that the applicant is estopped from appealing against conviction having pleaded guilty. That, the sentence imposed was very lenient and discretionary. That he requires more time to be rehabilitated and the application lacks merit.

4. In the submissions filed, the Respondent stated that, the trial court considered the mitigation and equally factored in the period he was in custody. That he should serve full term to deter others. The Respondent referred to the case of the *Directorate of Public Prosecution vs Samuel Kimuchu & Anor (2012) e KLR*, where the court held that, the main question to consider on revision is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice.

5. That the discretion bestowed upon the court to sentence should be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case.

6. I have considered the application in the light of the lower court record, the arguments of the parties and the statutory provisions cited. In that regard, the provisions of; section 362 states 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.”***

7. In that respect I have perused the lower court record which reveals that, the applicant was charged with the offence of stealing contrary to section 268(1) as read with section 275 of the penal code, in three counts and an alternative offence of handling suspected stolen goods, contrary to section 322(1) to count 2 and 3.

8. The complainant in the first count withdrew the complaint and the same was compromised, under section 204 of the Criminal Procedure Code (CPC). He pleaded guilty on the other main counts of stealing and was convicted accordingly.

9. I gather from the applicant's averments and the committal warrant that he was sentenced to serve three (3) years imprisonment on each count and that the sentence will run concurrently.

10. The applicants argue that, the court did not take into account the provisions of section 333(2) while sentencing him. The provisions of section 333(2) of the *code* stipulates that:

*(2) Subject to the provisions of section 38 of the Penal Code, 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. By dint of section 333(2) of the Criminal Procedure Code, the Court of Appeal has held in the case of; **Ahamad Abolfathi Mohammed & Another vs. Republic (2018) eKLR** .

that, the court is obliged to take into account the period the Appellant has spent in custody before he or she are sentenced.

12. The Court of Appeal stated that: -

***“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; 19<sup>th</sup> June 2012.”***

13. Similarly, clause 7.10 to and 7.12 of 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. I considered the record of the lower court as to establish whether; the lower court took into account the period the applicant was in custody and noticed that, the record of sentencing was missing, both in the handwritten record and the typed copy. I adjourned the judgment to request for the same, however, it was not forthcoming.

15. The Honourable Deputy Registrar making a note that, she had spoken to Linda Thuma the E.O Makadara to check on the same but there was no record availed. The court was left with no alternative but give the applicant the benefit of doubt.

16. In that regard, I note that, the applicant was arrested on 23<sup>rd</sup> July 2019, and remained in custody until his sentence on 9<sup>th</sup> March 2020, for a period of about seven (7) months. However, even as the court considers the same, the court cannot ignore the fact that, the applicant had previous record of conviction over an offence similar to the one he was charged with, with an indication that, there were two other pending cases.

17. It is therefore obvious that, the applicant has chosen the path of crime. He did not reform from the non-custodial sentence meted on 17<sup>th</sup> February, 2004. To allow the applicant any discounted custodial sentence will amount to celebrating criminality and embracing immunity.

18. The offence the applicant was charged with carries a custodial sentence of three (3) years imprisonment and as much as he was given the maximum period, he has benefited from the order that, the sentence run concurrently.

19. The upshot of the aforesaid is that, I find no merit in the application and I dismiss it in its entirety.

It is so ordered.

**DATE, DELIVERED VIRTUALLY, AND SIGNED ON THIS 7TH DAY OF JUNE, 2021.**

**GRACE L. NZIOKA**

**JUDGE**

In \_\_\_\_\_ the \_\_\_\_\_ presence \_\_\_\_\_ of:  
Applicant present in person

Ms Kibathi for the Respondent

Edwin Ombuna: Court Assistant