



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUNGOMA**

**MISC. CRIM. APPLICATION NO.E044 OF 2021**

**CLEODIA ASASIA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

The applicant was charged in the subordinate court with the offence of trafficking in Narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994. He was tried, convicted and sentenced to serve 20 years imprisonment and an additional fine of Kshs 14.7 Million or 1 year imprisonment in default.

The applicant then appealed to this court vide Criminal Appeal No. 4 of 2018 which was dismissed by Sitati J. as lacking in merit. The sentence of the subordinate court was therefore upheld.

The applicant then preferred the instant application which was filed in court on 15/9/2020 seeking; firstly, that the application be allowed under Articles 19, 22, 23, 27, 50(2)(p) and 165 of the Constitution together with Section 333(2) of the Criminal Procedure Code, and; secondly, that the court allows his sentence to run from the date of his arrest.

The applicant states that he does not intend to appeal against the sentence, that he left children of tender age who are in need of basic needs and that he has undergone several rehabilitation trainings while in prison. The certificates have been annexed.

The court directed parties to file written submissions on the application. Only the applicant filed.

In support of his application, the applicant has cited the authorities in; *Wycliffe Wangusi Mafura Vs r (2018)eKLR*, *Vincent Etyang Vs R (2019)eKLR*, *Paul Odhiambo Mbola Vs R (2020) eKLR* and *Daniel Onyango Ochar(2020)eKLR*.

From the application and submissions, it is clear the applicant has undertaken several rehabilitation programmes while in prison. The Sentencing Policy Guidelines mandates the court to consider the objectives of sentencing *inter alia* rehabilitation of the offender.

On the plea that the court considers the period served in remand, Section 333(2) of the Criminal Procedure Code provides;

***(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.***

Under clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines, it is provided;-

***“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. 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.”***

In *Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR*, the Court of Appeal held;

***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, .....*

From the proceedings, the trial magistrate indeed addressed his mind to the issue of period spent in remand. In the sentence, the learned trial magistrate stated;

*The accused has been treated as a first offender in the absence of record. The court did not receive the pre-sentencing report ordered as it was not ready. The court had determined to proceed with the sentence not to prejudice the accused by remanding him unduly long. I have noted that the accused has been in custody for exactly 2 years now. I have noted his mitigation of having a family and that he has reformed and even studied the bible to acquire a Diploma. However, the offence is also serious attracting a sentence of upto life imprisonment in addition to a fine of three times the value of the narcotic drug of Kshs 1,000,000/= whichever is higher. In this case, the value of the trafficked narcotic is higher and stands at Kshs 14.7 Million. I will impose a sentence lesser than the one liable of life imprisonment and I addition, the appropriate fine.*

*Therefore, I sentence the accused to serve 20 years (Twenty) imprisonment and in addition a fine of Kshs 14.7 Million, in default, 1 year imprisonment.*

The trial magistrate and the 1<sup>st</sup> appellate court having considered the issue of period spent in remand in computing the sentence, I find the issue was considered in and is not therefore available for reconsideration in this application.

I therefore find no merit in the application which is hereby dismissed.

**DATED AT BUNGOMA THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2021**

**S. N. RIECHI**

**JUDGE**