

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.838 OF 2018

BRIAN OTIENO RADIN.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Brian Otieno Radin was charged with the more serious charge of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** but was convicted of the less serious charge of **simple robbery** contrary to **Section 296(1)** of the **Penal Code**. He was sentenced to pay a fine of Kshs.100,000/- or in default three (3) years imprisonment. He was further charged and convicted of the offence of **handling stolen property** contrary to **Section 322(1)** of the **Penal Code**. He was sentenced to pay a fine of Kshs.50,000/- or in default he was to serve five (5) months imprisonment. In default of paying the fine, the court ordered the custodial sentences imposed to run concurrently. The sentence was meted on 15th March 2018.

The Applicant has applied to this court to have the period that he was in remand custody taken into account. Ms. Sigei for the State confirms that indeed the Applicant was in remand custody for a period of one (1) and three (3) months prior to his conviction. She conceded that although the trial court did not take this period specifically into account while sentencing the Applicant, the custodial sentence that was meted out on the Applicant was extremely lenient that the only conclusion that this court can reach is that the trial court indeed took the said period into account when sentencing the Applicant. What Learned State Counsel is saying is that although the trial court did not indicate that it had taken that period into account, nevertheless, this court ought to conclude from the nature of the custodial sentence that was meted out that the trial court had indeed taken this period into account. The Applicant reiterated that he ought to benefit from the law that requires the period that a convict has been in custody be taken into account during sentencing.

The Court of Appeal in **Ahmad Abolfathi Mohammed & Another Criminal Appeal No.135 of 2016** (unreported) held thus at Page 28:

“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.”

In the present application, whereas this court agrees with Learned State Counsel that the default custodial sentence imposed upon the Applicant was extremely lenient (noting that the maximum sentence is fourteen (14) years imprisonment), this court does not agree with the said Learned State Counsel that the period that the Applicant was in remand custody ought not to be taken into account even though it was apparent that the trial court had not taken it into consideration when sentencing the Applicant to serve the default custodial sentence. **Section 333(2)** of the **Criminal Procedure Code** is couched in mandatory terms. That being the case, it is imperative that that period be taken into account when considering the custodial sentence that the Applicant should serve.

In the premises therefore, this court finds favour with the Applicant’s application as a result of which the custodial sentence of three (3) years imprisonment that was imposed on the Applicant by the trial court is hereby reduced by a period of one (1) year and three (3) months that the Applicant was in remand custody. That means that the Applicant shall serve a custodial sentence of one (1) year and nine (9) months with effect from 15th March 2018. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2019

L. KIMARU

JUDGE