



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**MISC CRIMINAL APPLICATION NO. 92 OF 2019**

**MUIA KIVINDYO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Appellant had appealed against his conviction and sentence. He was convicted and sentenced to 3 years imprisonment in respect of obtaining money by false pretenses contrary to section 313 of the Penal Code (Cap 63) Laws of Kenya. The appeal was unsuccessful and was dismissed.

2. The appellant is aggrieved by the sentence and has lodged this application that he sought to invoke section 333(2) of the Criminal Procedure Code as amended so that the period of time spent in custody is taken into account as part of the time served

3. The appellants therefore prayed that the court considers the time served and award him a non-custodial sentence for the time served.

4. On the part of the Respondent, he conceded to the application but however pointed out that the applicant was charged on 25.6.14 and was granted bond the same day and was released on 30.6.2014 and on 3.9.15 a warrant of arrest was in force and he remained in custody till 9.3.2016 when his bond was reinstated.

5. I have considered the submissions made before me in this appeal. The singular issue to be determined is whether the court may make a downward review of the sentence by the trial court.

6. Section 333(2) of the Criminal Procedure Code provides 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.**

7. It is therefore clear that the foregoing provision imposes an obligation on the trial court to take into account the period an accused has spent in remand in the determination of an appropriate sentence. Failure to comply with the foregoing provision renders the subsequent sentence a contravention of the law.

8. In this regard, I find that the applicant was arrested on 24.6.2014 and was subsequently released on bond but which was cancelled on 3.9.2015 after he jumped bail. He remained in custody up to 9.3.2016 when the bond was reinstated. Hence the applicant had remained in custody for about a year and which should have been taken into account during sentencing.

9. Another issues for consideration is whether or not the sentence should be revised downwards. **Section 382 of the Criminal Procedure Code Act provides for instances where finding or sentence are reversible by reason of error or omission in charge or other proceedings. It states that:**

***“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings***

*under this Code, unless the error, omission or irregularity has occasioned a failure of justice:*

*Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”*

10. The trial magistrate is vested with wide discretion which an appellate court can only interfere with, if it occasioned a failure of justice, and justice will apply both ways to the victim and to the accused. In the instant appeal a miscarriage of justice has occurred to the applicant since the period spent in custody was not factored and this warrant a need to interfere with the sentence, of 3 years. I find an illegality of principle when the learned magistrate sentenced the appellant to 3 years imprisonment instead of discounting one year spent in custody. As the maximum sentence for the offence is three years imprisonment the applicant ought to have been sentenced to two years imprisonment.

11. In the result the application succeeds to the extent that the applicant's sentence of 3 years is substituted with a sentence of 2 years from 13.2.2018.

It is so ordered.

**Dated and delivered at Machakos this 15<sup>th</sup> day of October, 2019.**

**D. K. Kemei**

**Judge**