



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO. 818 OF 2018.**

**JOSEPH MBUGUA WAWERU.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. Joseph Mbugua Waweru, filed the present application by way of Notice of Motion citing Article 51(1) of the Constitution and Section 333(1) of the Criminal Procedure Code in which he sought orders that; (i) the time spent in remand custody prior to his conviction and sentencing be considered a part of his sentence, (ii) the court be pleased to either grant an acquittal, non-custodial sentence or to allow the sentences to run concurrently in light of the time he had spent in custody, and (iii) the court finds that the Applicant had already served the stipulated maximum imprisonment period of three years. His grounds were set out in a supporting affidavit sworn by himself. He pleaded that he had young school going children who depend on him as the sole breadwinner and he thus urged the court to grant the application sought.

2. The application was canvassed before me on 22<sup>nd</sup> October, 2018, The Applicant only urged the first prayer. Ms. Nyauncho for the Respondent opposed the application. She informed the court that the Applicant was found guilty in four counts of obtaining through false pretences. That he had absconded during the trial for almost two years after he was put on his defence and judgment had to be delivered in his absence. That this was not the first time as the Applicant had absconded but was finally arrested and produced in court after which the sentence begun to run. She thus opposed the application to have the sentences run concurrently.

3. In reply, the Applicant submitted that it was not true that he was arrested but instead was found in the corridors of court trying to sort out the matter with his lawyers. He submitted that he had been charged in about 33 files and in all warrants had been issued and that he used to rely on the investigating officer to inform him to which court he should appear. That when he was arrested in Criminal Cases 749 and 754 of 2018 he was within the corridors of justice trying to sort out the matter. He urged the court to order that the sentences run concurrently as he was remorseful and was a family man. He also urged that the period he spent in custody of more than three years be considered.

**Determination.**

4. After considering the submissions and perusing the trial court file I find it is necessary to first lay out a summary of the proceedings before the trial court. The Applicant faced six counts of obtaining through false pretences contrary to Section 313 of the Penal Code. He took plea on 2<sup>nd</sup> March, 2005 and was admitted to bond on the same day and a surety was approved. On 28<sup>th</sup> October, 2005 he absconded and a warrant for his arrest was issued. He resurfaced on 6<sup>th</sup> December, 2006 whereupon his bond terms were cancelled. His surety thereby withdrew on 16<sup>th</sup> January, 2007. In the course of the trial his bond terms, (which were non-existent) were varied on 4<sup>th</sup> July, 2007 to cash bail of Kshs. 500,000/- or in the alternative a surety of Kshs. 700,000/-. A surety was approved on 10<sup>th</sup> July, 2008. The Applicant then applied on 23<sup>rd</sup> March, 2010 for a release order which was granted.

5. The trial proceeded sluggishly until 22<sup>nd</sup> March, 2016 when the investigating officer testified and the prosecution closed its case. The Applicant sought to put in submissions before a ruling was rendered and was granted a month to do so. The hearing was set for 22<sup>nd</sup> April, 2016. On this date he was in court but the trial magistrate was indisposed. The matter next came up on 23<sup>rd</sup> May, 2016 and he was absent and a warrant of arrest was issued. On 21<sup>st</sup> July, 2016 his bond terms were cancelled and after a number of mentions the prosecution applied on 13<sup>th</sup> June, 2018 for the court to render judgment. The court's decision was pronounced on 31<sup>st</sup> July, 2018 and sentences on the four counts passed. The sentences passed were one year imprisonment in the 1<sup>st</sup> Count, 9 month imprisonment in the 3<sup>rd</sup> Count, 1 year imprisonment in the 4<sup>th</sup> Count and 10 months imprisonment in the 6<sup>th</sup> count. The sentences were ordered to run consecutively.

6. The Applicant was finally produced in court when he explained his absence and mitigated his sentence after the judgment was re-read but the court re-sentenced him in the same terms after finding that there was no reason to disturb the sentence.

7. From the above chronology, it is clear that the Applicant was not denied bail as submitted but was admitted to bail on the date of plea and he thereafter absconded only to re-appear more than a year later. While he did spend time in custody the period in question is simply from 6<sup>th</sup> December, 2006 until 10<sup>th</sup> July, 2008 when his surety was approved. Although the approval of his surety did not lead to his release it did not have anything to do with the present matter as he had several other matters. In fact, after he was admitted to bail in the matters he finally applied to the court for a release on 23<sup>rd</sup> March, 2010. The period in remand custody post the admission of his surety is therefore not connected to the present matter and can therefore not account for the time spent in remand custody.

8. Furthermore, the Applicant was thereafter arrested in another of the matters and again had to apply for a release on 22<sup>nd</sup> May, 2012 after it appeared he complied with the bond terms set out in that matter. The period again spend in custody during this time did not account for his remand custody in the present case.

9. The matter then proceeded until the Applicant absconded and a warrant of arrest was issued on 23<sup>rd</sup> May, 2016. In light of the above it appears that the amount of time to be taken into account as remand custody in the present case would be one year, seven months and four days.

10. The Applicant also contends that he was in remand since April, 2018 but the trial court file indicates that he was in remand custody after being arrested and charged in Criminal Case 749 and 754 of 2018. The period cannot therefore mitigate for reduction of his sentence in this case. His sentence in the present case begun running on 12<sup>th</sup> September, 2018.

11. I also do not find that the trial court was in error in ordering that the trial proceeds in his absence pursuant to Article 50(2)(f) of the Constitution and Section 206(1) of the Criminal Procedure Code. The latter applies to misdemeanors of which the Applicant faced. After all he had been on the run for a period nearing two years and the trial had to come to an end, anyway.

12. The offences arose from different transactions where there were multiple victims and therefore the trial court was correct to order that the sentences run consecutively. See: **Sentencing Policy Guideline 7.13**. Further, this court noted that when the court sought the Applicant's records prior to sentencing the prosecution indicated that the Applicant was a first offender, a fact that is easily disproved by the record where there is an indication that he pleaded guilty in Criminal Case 125 of 2005. The Applicant therefore benefited from some leniency from the trial court especially when one considers his absconding throughout the trial which led to the trial dragging for thirteen years, a serious waste of judicial resources. I have no reason to vary the manner in which the sentences will run.

13. The trial magistrate did not indicate that she had taken into account the period spent in remand custody pending his conviction. This period should be considered a part of the sentence as per Section 333(1) of the Criminal Procedure Code. On the whole, the application partially succeeds with the order that the period spent in remand of one year, seven months and four days be reduced from the sentence.

**DATED and DELIVERED 15<sup>TH</sup> DAY OF NOVEMBER, 2018.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Applicant in person.

2. Mr. Miiri for the Respondent.