



**Okwiri v Republic (Criminal Revision E739 of 2023)
[2024] KEHC 4031 (KLR) (Crim) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4031 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL REVISION E739 OF 2023**

**LN MUTENDE, J
APRIL 25, 2024**

BETWEEN

KELVIN OCHIENG OKWIRI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The accused, Kevin Ochieng Okwiri, was jointly charged with another and and convicted for the offence of kidnapping with an intent to confine contrary to Section 259 of the Penal Code and after full trial he was sentenced to serve three(3) years imprisonment.
2. Through an undated application filed herein on 7th November 2023 he seeks review / revision of sentence under Section 362 of the Criminal Procedure Code(CPC).
3. The application is premised on grounds that the trial court did not consider the period spent in remand custody as per the provisions of Section 333 of the CPC.
4. The application is supported by an affidavit sworn by the applicant where he depones that he is a family man with a wife and son who depend on him; he has acquired skills in financial management and leadership during the period of incarceration and is also reformed from substance abuse.
5. The application was disposed through submissions where the applicant urges that the sentence was illegal and irregular and that no provision in law directs the court to omit Section 333 of the CPC. That the applicant was also sentenced in Makadara Chief Magistrate’s Criminal Case No 2629 where the court considered the 5 year period served while in custody.
6. That in the instant case the court presumed that the sentences in the two cases run consecutively and erred in finding that the period served should not be considered.



7. The State/respondent have conceded to the application and have enjoined this court to consider the time spent in remand custody.
8. I have considered the application and supporting arguments. The provisions of Section 362 of the CPC provide that:

“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.”
9. The sentence meted out was for the applicant to serve a period of 3 years, no direction was given on the period the applicant was in remand.
10. Section 333(2) of the CPC 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.
11. The applicant was arrested on 14/12/2016 and only managed to comply with bail terms in March 2021 when his bond terms were reviewed and he was able to execute recognizance of Kshs 200,000/=. He was released on 21/4/2021, and subsequently convicted and sentenced on 21/10/2023. The court had a duty to consider the period served before the applicant managed to post bail, that omission was irregular and a serious violation.
12. 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.”
13. The violation is that the unaccounted period served in remand amounts to 4 years and 4 months, this is between 2016 and 2021. The applicant has further served 6 months in custody.
14. In the case of *Ogolla s/o Ownor v Republic*, (1954) EACA 270 the East Africa Court of Appeal spelt out the circumstances which the superior court can alter a sentence. Therefore, by principle, the Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.
15. The court overlooked a material issue and the consequence of that fault is that the period served is beyond the stipulated period. In the result, the application is meritorious, therefore, the applicant shall be released forthwith unless otherwise lawfully held.
16. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 25TH DAY OF APRIL, 2024.



L. N. MUTENDE
JUDGE

