**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL REVISION CASE NO. 8 OF 2020**

**EMMANUEL OJUKI OTIENO.....APPLICANT**

**VERSUS**

**DPP.....RESPONDENT**

**RULING**

The applicant, **EMMANUEL OJUKI OTIENO**, has brought this application under Article 50(2) of Constitution of Kenya and section 362 and 364 of the Criminal Procedure Code. the application is dated 2.12.2019. He basically prays for 2 orders as follows:-

> **2. THAT this honorable court to review his custodial sentence from 3 years to a non-custodial sentence or an affordable fine. He has proposed Kshs.50,000/=.**
>
> **3. THAT this court do consider (in the sentence), the period of 1 year and 11 months that he spent in remand awaiting determination of his case.**

The parties consented to this application being canvassed by way of written submissions. Both counsel for the applicant, Mr. Ayuo, and Ms. Kibathi for the state/Respondent duly complied to that effect.

The submissions for the applicant were to the effect that the applicant spent a period of 1 year 11 months prior to his conviction while in remand custody, and had as at April 2021 been in prison for 1 year, 4 months. Relying on the decision of ***Abdul Aziz Oduor & Another Versus Republic (2019)eKLR***, it was submitted that the trial court did not take into consideration the period the applicant spent in custody.

The applicant also showed various testimonials and certificates as proof that he has reformed.

The state has opposed this application on the ground that whereas the first count on which the applicant was convicted carries a sentence of upto 7 years imprisonment, the trial court meted out a sentence of 3 years imprisonment. For the other counts, he was sentenced to serve 1 year imprisonment against maximum terms of 3 years and 2 years imprisonment terms provided. That those sentences were lawful and lenient. Finally, that in sentencing the court took into account the mitigation of the applicant including the fact that he had then been in custody for 1 year.

I have considered the submissions of both sides. It is agreed by both sides that in sentencing the trial court ought to take into account the period taken in custody in accordance with section 333(2) of the Criminal Procedure Code. I have considered the sentencing proceedings of the lower court of 19.11.2019. In the mitigation of the applicant, he clearly stated that he had been in custody for 1 year. He also made statements pointing towards how he had reformed. The court, in passing the sentence duly noted the mitigation of the applicant, and the fact that it was guided by the sentencing guidelines. It proceeded then to pass the sentences as above, which are clearly both proper and within the law.

Counsel for the applicant referred this court to the case of ***Abdul Aziz Oduor and Another Versus Republic (2019)eKLR,*** in which the Hon. Justice L. Kimaru was guided by the Court of Appeal finding in ***Ahmad Abolfathi Mohamed and Another Versus Republic, Criminal Appeal No. 135/2016***, In the said case, the Court of Appeal had directed that in sentencing, it is not enough for the sentencing court to merely state that it had taken note of the period spent in custody. However, it has turned out that that decision of the Court of Appeal has since been wholly overturned by the Supreme Court of Kenya in ***Republic Versus Ahmad Abolfathi Mohamed and Another, (2019)eKLR***. It is therefore unsafe for this court to apply the directions of this court of Appeal on this issue after the same have been set aside by the Supreme Court.

As rightly submitted by counsel for the state, on count I, the maximum sentence provided in law is 7 years imprisonment. The trial magistrate meted out a sentence of 3 years imprisonment. On counts IV, V and VI, he was sentenced to serve 1 year imprisonment on each as

against a maximum of 7 years imprisonment provided for in law. For count VII, he was sentenced to serve 1 year imprisonment against a maximum of 2 years provided for. Lastly, on count VIII, he was sentenced to serve 1 year imprisonment, against a legal sentence of 2 years imprisonment.

The above sentences were proper and within the law. They were also lenient confirming the fact that the trial magistrate duly considered the period taken in custody as stated in the mitigation of the applicant and captured in the sentencing proceedings of the trial court.

Sentencing is a matter of discretion of the trial court which an appellant court would not interfere with unless the same is manifestly excessive, overlooked a material factor, or based on wrong material or wrong principle (see ***Bernard Kimani Gacheru Versus Republic (2002)KLR)***. None of these elements have been shown by the appellant with regard to the sentence of the trial court. In the absence of such proof, this court refrains from, (as I hereby do) interfering with the legal sentence passed by the trial court.

The sum total is that this court is not convinced that the application of the applicant dated 2.12.2019 has any merit. The same is accordingly dismissed.

**Orders accordingly.**

**D. O. OGEMBO**

**JUDGE**

**30.6.2021.**

Court:

Ruling read in court (online) in presence of the applicant (Kamiti Medium), Mr. Ayuo for the accused and Ms. Kimani for Mr. Kiragu for the state.

**D. O. OGEMBO**

**JUDGE**

**30.6.2021.**