



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.21 OF 2019

ALEX WAMAGU WAITITUAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Alex Wamagu Waititu was convicted of the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The prosecution was able to prove to the satisfaction of the trial court that the Applicant together with others on 31st August 2011, at Elena Estate in Ongata Rongai, Kajiado Country while armed with a pistol, robbed Salome Wairimu Ndungu of her motor vehicle registration No.KBM 363 K make Toyota Fielder and several electronic equipment listed in the charge sheet including two mobile phones and Kshs.5,600/- cash. The Applicant was sentenced to serve ten (10) years imprisonment on 9th October 2018.

The Applicant made an application to this court to take into consideration the period that he was in remand custody prior to his conviction. The Applicant stated that from the time of his arrest on 12th September 2011, he was in remand custody until his conviction by the trial court. He urged the court to take that period into account in line with the law. He further pleaded with the court to take into consideration that in the period that he has been in lawful custody, he had learnt his lesson. He was remorseful and had sufficiently been punished. His old parents had been denied support due to his incarceration. He urged the court to give him a second chance at life. During the hearing of the application, the Applicant reiterated that the period that he was in remand custody ought to be taken into account in computing the custodial sentence that he is to serve.

Ms. Nyauncho for the State while conceding that indeed the Applicant had been in remand custody for the period stated, however observed that that period was taken into account by the trial court when it sentenced the Applicant to serve the custodial period in prison. She urged the court to take into account the fact that the offence that the Applicant was convicted of was serious since a firearm was used during the robbery. Indeed, it was the Applicant who was armed with the firearm that was used to subdue the victims of the robbery before they were robbed. She urged the court not to interfere with the sentence that was imposed by the trial court.

In the present application, the Applicant challenges the exercise of judicial discretion by the trial court. This court can only interfere with such exercise of sentencing discretion in circumstances that are now settled in law. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No. 135 of 2016** (unreported) held at Page 25 thus:

“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v. Republic, Cr App No.188 of 2000 this Court stated thus:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist.”

In the present application, the thrust of the Applicant’s application was that the period of seven (7) years that he was in remand custody was not taken into account by the trial court when it sentenced him to serve the custodial term of ten (10) years imprisonment. The Applicant was of course relying on **Section 333(2)** of the **Criminal Procedure Code** which provides thus:

“Subject to the provisions of section 38 of the Penal Code every sentence shall 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.”

Ms. Nyauncho for the State disputes the Applicant’s assertion that the period that he was in remand custody was not taken into account by the trial court. She submitted that indeed the trial court did take that period into account before it sentenced the Applicant to serve the custodial sentence that was meted.

This court has perused the trial court’s proceedings. Prior to sentencing the Applicant, this is what the trial court said:

“I have considered the above. I have taken into account that accuseds are first offender and are of apparent or relatively young age. They qualify for a lenient sentence. They have also plead (sic) for mercy. They have been in custody for 6 years. Each accused sentenced to serve 10 years imprisonment.”

It was clear from the above quote that indeed the trial court took into consideration the period that the Applicant was in remand custody prior to his conviction. This court also noted that a firearm was used during the robbery. For all intents and purposes, a firearm is a dangerous weapon. From their testimony, the victims of the robbery told the court that they cooperated with the robbers when they were being robbed. This court shudders to imagine what would have happened had the victims resisted the robbery.

This court is of the view that the custodial sentence that was meted on the Applicant took into consideration all relevant factors that should have been taken by the trial court. The custodial sentence fitted the crime. The period that the Applicant was in remand custody was taken into account. The application lacks merit. It is hereby dismissed. The Applicant shall serve the custodial sentence that was imposed by the trial court. It is so ordered.

DATED AT NAIROBI THIS 26TH DAY OF FEBRUARY 2020

L. KIMARU

JUDGE