

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.156 OF 2019

BRIAN MURAGE MWANGIAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Brian Murage, was convicted of two counts: firstly, **preparation to commit a felony** contrary to **Section 308(1)** of the **Penal Code**. He was sentenced to serve two (2) years imprisonment. Secondly, **being found in possession of a firearm without a firearm certificate** contrary to **Section 4(1) as read with Section 4(2)** of the **Firearms Act**. He was sentenced to serve seven (7) years imprisonment. The sentences were ordered to run concurrently. The Applicant was sentenced to serve the custodial term on 6th July 2018.

The Applicant made an application to this court for review of his sentence. He told court that the period that he was in remand custody was not taken into account by the trial court when it sentenced him. He stated that during the period of his incarceration, he had undertaken various courses that have made him a better person. He is now ready to be integrated back to society because he has learnt a useful trade. Mr Momanyi for the State was not opposed to the Applicant's application seeking to have the period that he was in remand custody taken into account.

This court has carefully considered the arguments made by the parties to this application. It has also had the benefit of perusing the proceedings and the judgment of the trial court. The issue for determination by this court is whether the Applicant made a case for this court to review the custodial sentence that was imposed on him. It is trite law that this court will not interfere with the sentencing discretion of a trial court unless it is established that the said court overlooked some material facts or took into account some wrong material or acted on wrong principles of the law [**see Bernard Kimani Gacheru Vs Republic [2002] eKLR**].

The Applicant's main complaint in this application is that the period of three years that he was in remand custody prior to his conviction was not taken into account by the trial court before he was sentenced. Is that the correct position? Perusing the notes that the trial magistrate recorded before sentencing the Applicant, it was clear to the court that although the trial noted that the Applicant had been in remand custody for that period, when he sentenced the Applicant, he did not take that period into account.

What does taking into account mean in law? The Court of Appeal in **Ahmed Abofathi Mohammed & Another Vs Republic [2018] eKLR** held thus:

“Although the learned Judge stated that he had taken into account the period the Appellant had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the Appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period spent in custody and still order the sentence to run from the date of conviction because that amounts to ignoring altogether the period spent in custody.”

In the present application, it was clear to the court that although the trial court stated that it had considered the three (3) years period that the Applicant was in remand custody, in fact, when it sentenced the Applicant, it was apparent that that period was not taken into account. That being the case, the Applicant has a case when he justifiably complains that the period that he was in remand custody prior to his conviction was ignored.

In the premises, therefore, this court finds merit with the Applicant's application as a result of which the custodial sentence imposed by the trial court on the Applicant is commuted to the period served. The Applicant is ordered set at liberty and released from prison forthwith unless otherwise lawfully held.

It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF OCTOBER 2020

L. KIMARU

JUDGE