



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION CASE NO. 518 OF 2020

JOSEPH MWANGI MAINA alias WAMBOGAAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Joseph Mwangi Maina alias Wamboga was convicted of the charge **being found in possession of ammunition without a valid firearm certificate** contrary to **Section 4(2) (a)** as read with **Section 4 (3)(b)** of the **Firearm Act**. The trial court, after full trial, held that the prosecution had established to the required standard of proof beyond any reasonable doubt that the Applicant on 16th June 2018 at Kariobangi Round-About in Huruma within Nairobi County without any reasonable excuse, was found in possession of 23 rounds of ammunition 9mm caliber, one round of 7.62mm caliber, 1267 rounds of spent cartridge of 7.62mm caliber and 86 rounds of spent cartridge of 7.62mm caliber without a valid firearm certificate. The Applicant was sentenced to serve (5) years imprisonment.

The Applicant is not challenging his conviction. Indeed, he told the court in the oral submission that he made during the hearing of the application for revision that he was satisfied with his conviction. The Applicant was however aggrieved by the sentence that was meted on him. He faulted the trial Magistrate for failing to take into consideration the period that he was in remand custody prior to his conviction before sentencing him to serve the custodial sentence. He stated that his mitigation, particularly the fact that he was suffering from acute chronic illness that requires home based treatment and care was not taken into consideration. He pleaded with the court to take into consideration his age (he is 58 years) and the fact that he was a husband whose five children depended on him. He pointed out that during his incarceration, his family has been adversely affected. He was apprehensive that with the current COVID 19 pandemic with his pre-existing condition, he may not live to finish his sentence. He therefore urged the court to favourably consider his mitigation and treat his plea for reduction of sentence with sympathy.

Ms Kibatha for the State was not opposed to the Applicant's application to have the period that he was in remand custody prior to his conviction taken into account. She noted that the Applicant was sentenced to serve the minimum sentence under punishment section of the law that he was charged. The trial court failed to take into consideration the period that the Applicant was in remand custody prior to his conviction. As regard the other general prayer for reduction of sentence, learned Prosecutor demurred. She submitted the custodial sentence that the Applicant is servicing is neither harsh nor excessive. It fitted the crime. Other than the concession made, she was of the view that the Application should be disallowed. The Applicant is asking this court to interfere with the sentencing discretion of the trial court. This court can only interfere with the said sentence if the circumstances prevail as observed by Korir W J in **Republic Vs Maxwel Musundi [2016] eKLR:**

“4. When an Appellate Court is asked to review a sentence, it is guided by the principles laid down in the cases of Wanjama Vs Republic [1971] E A 494 and Bernard Kimani Gacheru Vs Republic [2002] eKLR. Those principles show that an Appellate Court can intervene with the sentencing discretion of the trial court when

- i) The sentence is manifestly excessive in the circumstance of the case,***
- ii) The trial court overlooked some material findings***
- iii) The trial court took into account some irrelevant material or***

iv) *The trial court acted on the wrong principle of law*

In the present application, it was clear to the court that the Applicant has a case when he complains that the period that he was in remand custody was not taken into account when the trial court sentenced him to serve the custodial sentence. The Applicant was sentenced to serve the minimum sentence provided under **Section 4(3)(b)** of the **Firearms Act**. That minimum sentence is five (5) years imprisonment. The trial court did not take into account the period of fourteen (14) months that the Applicant was in remand custody prior to his conviction. **Section 333(2)** of the **Criminal Procedure code** mandates that:

“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 that sentence, been held in custody, the sentence shall take account of the period spent in custody.”

Ms Kibatha for the State conceded to the fact. In the premises therefore, the custodial terms of the Applicant shall be reduced by a period of fourteen (14) months, that is the Applicant shall serve a custodial term of three years and ten months in prison with effect from 27th August 2018. With remission, the Applicant will have a few months before he completes his sentence.

This court shall not consider the other grounds submitted by the Application. The same lack merit. The courts have ruled time and time again that the prison authorities have facilities where the convicts can be treated of their ailments. In the event that the ailment will require specialized medical attention, the prison authorities have the mandate to refer such convicts to the National Referral Hospitals.

That being the case, the court will reduce the Applicant’s custodial sentence by taking into account the period he was in remand custody prior to his conviction.

It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF OCTOBER 2020

L. KIMARU

JUDGE