

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.24 OF 2018

ACHRAF SAIF HAMED AL HARTHI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Achraf Saif Hamed Al Harthi was charged with **obtaining credit by false pretences** contrary to **Section 316(a)** of the **Penal Code**. The particulars of the offence were that between 28th March 2017 and 21st April 2017 at Cloud Hotel and Suites in Nairobi County, the Applicant obtained credit to the tune of Kshs.240,850/- from the said hotel by falsely pretending that he was in a position to pay for the services. The Applicant pleaded guilty to the charge. He was given an opportunity by the trial court to pay the amount owed. He did not. He was convicted on his own plea of guilty and sentenced to serve two (2) years imprisonment. The Applicant has applied to this court seeking to have the sentence that was imposed upon him revised.

In his application, the Applicant contends that the sentence that was imposed upon him was illegal in the sense that he ought to have been sentenced to serve one (1) year imprisonment and not two (2) years imprisonment as was meted by the trial court. The Applicant was aggrieved that the trial court did not take into account the period that he was in remand custody prior to his conviction. During the hearing of the application, Mr. Mohamed for the Applicant reiterated the contents of the application. He submitted that the trial magistrate failed to apply the correct principles of sentencing and thereby reached the erroneous determination sentencing the Applicant to serve a custodial sentence that was not provided for by the law. He urged the court to be lenient to the Applicant taking into consideration the nature of the offence that was committed. Ms. Akunja for the State did not oppose to the court revising the custodial sentence of the Applicant on condition that the Applicant is repatriated to the Sultanate of Oman.

This court has carefully considered the Applicant's plea for reduction of custodial sentence. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No.135 of 2016** (unreported) held at Page 25 of its judgment as follows:

“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 the 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, anyone of the matters already stated is shown to exist. (See also Wanjema v. Republic [1971] E.A.493.”

In the present application, the Applicant has a case when he states that he was sentenced to serve a custodial sentence that was illegal. **Section 316(a)** of the **Penal Code** sets out the sentence for a person convicted under the section to be one year imprisonment. The trial court therefore erred when it sentenced the Applicant to serve two years imprisonment. For that reason, the custodial sentence imposed on the Applicant shall be set aside and substituted by an order of this court commuting the sentence of the Applicant to the period already served. This court takes cognizance of the fact that the Applicant has been in lawful custody since 16th May 2017.

In the premises therefore, he is ordered released from prison and handed over to the Directorate of Immigration who shall repatriate him to Sultanate of Oman at his own cost. It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF MARCH 2018

L. KIMARU

JUDGE