

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.2 OF 2018

GREGORY KIAMBA MWANTHI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Gregory Kiamba Mwanthi was convicted of two (2) counts of **obtaining money by false pretences** contrary to **Section 313** of the **Penal Code**. He was sentenced to pay a fine of Kshs.300,000/- or in default serve one (1) year imprisonment in respect of the 1st Count. He was fined Kshs.20,000/- or in default he was to serve six (6) months imprisonment. In the event that the Applicant failed to pay the fines, the default sentences were ordered to run consecutively. The Applicant is satisfied with his conviction. He has however filed an application before this court seeking to have the default sentences that he is serving reduced. He explained that he had been in remand custody since 4th August 2015 when he was arraigned and charged before the trial magistrate's court. Although the trial court granted him bail pending trial, he was unable to raise the bail terms. He was thus in remand custody during the entire period of his trial. He was sentenced on 21st December 2017. It was his plea that the period he has been in remand custody be taken into account by this court so that it can mete an appropriate sentence. The application was not opposed. Ms. Kimiri for the State was of the view that the time the Applicant spent in remand custody was sufficient punishment for him.

This court has carefully considered the plea by the Applicant 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, it was clear to the court that the trial magistrate erred in not taking into consideration the period that the Applicant has been in remand custody prior to his conviction. From the record of the trial court, it was apparent that the Applicant was unable to raise the bond terms imposed to have him released on bail pending trial. He was in remand custody for a period of two (2) years before his conviction. **Section 333(2)** of the **Criminal Procedure Code** mandates the court to take into account the period that a convict has been in remand custody at the time of sentencing. In the present application, it was clear to this court that if the trial court had taken into account the period that the Applicant was in remand custody, it would have sentenced the Applicant to serve a less severe default sentence.

In the premises therefore, this court holds that the period that the Applicant has been in lawful custody is sufficient punishment as a result of which the default custodial sentence imposed by the trial magistrate is hereby commuted to the period served. The Applicant is ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF MARCH 2018

L. KIMARU

JUDGE