

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.486 OF 2017

JOHN VICTOR OBURO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, John Victor Oburu was convicted of the charge of **obtaining money by false pretences** contrary to **Section 313** of the **Penal Code**. The charge was that the Applicant had obtained Kshs.87,970/- from the complainant under the pretext that he would assist her obtain a loan from Uwezo Fund, a fact the Applicant knew to be false. The Applicant was sentenced to serve two (2) years imprisonment on 9th March 2017. In his mitigation, the Applicant asked the court to consider the period of two (2) years that he had been in remand custody before conviction and sentence. It was apparent that the trial court did not specifically indicate that it had taken into account the period that the Applicant had been in remand custody before it sentenced the Applicant to serve a further period of two years in prison.

In his application seeking reduction of custodial sentence, the Applicant told the court that he was arrested on 22nd June 2015 and arraigned before court. Although the trial court granted him bail, he was unable to raise bail hence his remand in custody until the conclusion of his trial on 10th March 2017. The Applicant urged the court to take this period into account and issue an appropriate sentence. Ms. Atina for the State was not opposed to the Applicant's application. She agreed with the Applicant that indeed the period that he was in remand custody should have been taken into consideration when the trial court sentenced the Applicant.

The Court of Appeal in **Ahmad Abolfathi Mohammed & Another Criminal Appeal No.135 of 2016** (unreported) held thus at Page 28:

“By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants 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 already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.”

In the present application, it is clear that the Applicant has a case when he states that the trial magistrate's court did not take into account the period that he was in remand custody before it made the order that he serves a further period in prison. Taking into consideration the nature of the offence that the Applicant committed, this court is of the view that the total period that the Applicant has been in lawful custody is sufficient punishment.

In the premises therefore, the custodial sentence of the Applicant is commuted to the period served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF MARCH 2018

L. KIMARU

JUDGE