



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO.299 OF 2017**

**DANIEL JOSEPH MAMIRO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Daniel Joseph Mamiro was charged with another, with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. After full trial, they were acquitted of the charge but were found guilty of a lesser but cognate offence of **handling stolen property** contrary to **Section 322(1)** as read with **Section 322(2)** of the **Penal Code**. The Applicant was sentenced to serve four (4) years imprisonment. This was after the trial court had noted that the Applicant had been in remand custody for a period of three (3) years prior to his conviction. The sentence was meted out on 18<sup>th</sup> November 2016. This was in **Nairobi CMC Criminal Case No.48 of 2013.**

In his application before this court, the Applicant indicates that he was also convicted in another case being **Kajiado PMC Criminal Case No.11 of 2013** where he was sentenced to serve seven (7) years imprisonment on 2<sup>nd</sup> January 2015. The Applicant complained that during his first conviction, he did not benefit from remission, because at that time remission had been done away with by Parliament. When it was reinstated, it could not be applied retroactively. It is the Applicant's case that he has been prejudiced by the lacunae evident in law because other convicts who were sentenced to serve custodial sentence after remission was reinstated by Parliament are benefitting from the same, while he himself has been left in a lurch. Mr. Ondimu for the State was not opposed to the application.

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 was clear to the court that although the trial court explained that it had taken into consideration the period that the Applicant had been in remand custody prior to his conviction, however, what the trial court did was to deduct the years that the Applicant had been in remand custody from the seven (7) years imprisonment that the trial court sentenced the Applicant to serve. The Applicant has a point when he argued that he has been discriminated upon by not benefitting from the remission yet convicts who were sentenced before, and after him, have benefitted. This is because the Applicant found himself in a legal limbo.

In the premises therefore, this court finds favour with the Applicant's application as a result of which the sentence of seven (7) years imprisonment that he was sentenced in **Kajiado PMC Criminal Case No.11 of 2013** on 2<sup>nd</sup> January 2015 shall be reduced to four (4) years imprisonment with effect from that date. It is so ordered.

**DATED AT NAIROBI THIS 8<sup>TH</sup> DAY OF MARCH 2018**

**L. KIMARU**

**JUDGE**