



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO.481 OF 2017**

**JACKSON MUSYOKA KITHIMBA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Jackson Musyoka Kithimba was tried and convicted of **stealing three (3) motor vehicles** contrary to **Section 278** of the **Penal Code**. He was sentenced to serve three (3) years imprisonment. The Applicant has applied to this court to have his sentence revised. He stated that the trial court did not take into account the period of one (1) that he was in remand custody before sentencing him to serve the custodial sentence. During the hearing of the application, he stated that during the period that he has been in prison, he has learnt a trade, masonry in particular, and was now prepared to be a useful member of the society. Taking into consideration that he had already served one (1) year of the sentence in prison, and the fact that the stolen motor vehicles were recovered, he was of the view that a non-custodial sentence would be appropriate in the circumstances. Mr. Momanyi for the State opposed the application for revision of sentence. He submitted that the custodial sentence that was imposed on the Applicant was lenient in the circumstances and should not be interfered with taking into account the period that the Applicant was sentenced to serve in prison.

This court has carefully considered the Applicant's application for revision of sentence. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No. 135 of 2016** (unreported) held at Page 25 thus:

*“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 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, any one of the matters already stated is shown to exist.”*

In the present application, it was clear to this court that the trial magistrate's court properly exercised its discretion when it sentenced the Applicant to serve the custodial sentence. This court notes however that in the period that the Applicant has been in prison, he has learnt his lesson. In fact, he has learnt a trade and is prepared to be a useful member of the society if he is released or ordered to serve a non-custodial sentence. The Applicant admits that he was a bad person before his incarceration. He has had time to reflect on his life in the period that he has been in prison. He is now prepared to be a useful member of the society. This court is persuaded that indeed the Applicant appears to have reformed.

This court will consider whether the Applicant shall be suitable to serve a non-custodial sentence in form of community service. In the circumstances therefore, this case shall be mentioned on 2<sup>nd</sup> May 2018 when the court shall receive a CSO Report as to the suitability of the Applicant to serve the non-custodial sentence. It is so ordered.

**DATED AT NAIROBI THIS 19<sup>TH</sup> DAY OF APRIL 2018**

**L. KIMARU**

**JUDGE**