

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. APPLICATION NO.34 OF 2018

JOHN MUTUNGA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, John Mutunga was tried and convicted of the charge of breaking into a building with **intent to commit a felony** contrary to **Section 307** of the Penal Code. He was sentenced to serve four (4) years imprisonment on 31st August 2017. The Applicant made an application to this court for revision of sentence. The Applicant states that the trial magistrate did not take into account the period that he was in remand custody before sentencing him to serve the custodial sentence. It is the Applicant's application that had this period been taken into account, most probably he would have been sentenced to serve a lesser period in prison.

The Applicant reiterated this fact during the hearing of the application. Ms. Aluda for the State opposed the application. While conceding that it was within the discretion of the court to impose an appropriate custodial sentence, she was of the view that the circumstances under which the offence was committed called for the custodial sentence that was imposed by the trial magistrate. She urged the court not to interfere with the sentence.

This court has carefully considered the facts of this application. The Applicant is seeking this court's intervention in respect of the sentence that was imposed upon him by the trial magistrate's court. Sentence is an exercise of discretion. 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, the record of the trial court confirms that indeed the Applicant was in remand custody for a period of one (1) and ten (10) months prior to his conviction. The trial magistrate noted this period but did not take the same into account when sentencing the Applicant to serve the custodial sentence. This court is of the considered view that the period of four (4) years imprisonment was harsh and excessive in the circumstances taking into account the period that the Applicant was in remand custody and further taking into account that the Applicant was a first offender. The Applicant was charged with an inchoate offence. The crime was not completed due to diligence of security guards and the police. This court hopes that the Applicant has learnt his lesson and will not be a repeat offender.

In the premises therefore, this court is of the view that the period that the Applicant has been in lawful custody is sufficient punishment. His custodial sentence is commuted to the period served as a result of which the Applicant is ordered set at liberty and released from prison forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 19TH DAY OF APRIL 2018

L. KIMARU

JUDGE