

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. APPLICATION NO.89 OF 2015

JOSEPH GATERE KARANJA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Joseph Gatere Karanja was charged and convicted of **committing an unnatural offence** contrary to **Section 162(a)** of the **Penal Code**. He was sentenced to serve ten (10) years imprisonment. The Applicant has made an application to this court to have the sentence that was imposed upon him revised by this court. The grounds in support of the application are that the trial court failed to take into consideration the period that he was in remand custody before his conviction. The Applicant stated that he was in remand custody for a period of four (4) years and five (5) months before the conclusion of the trial and his subsequent conviction. He further stated that at the time of his conviction, the right to benefit from remission had been removed by statute. It was restored after he had already started serving sentence. It was the Applicant's application therefore that he will be prejudiced if this court does not revise his sentence.

During the hearing of the application, the Applicant reiterated the contents of this application. He urged the court to take into account his plea for appropriate intervention on his sentence and allow the application. Ms. Atina for the State was not opposed to the application. She however urged the court to take into account the serious nature of the offence that the Applicant committed.

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, it was clear to this court that the Applicant has a case when he states that the trial magistrate did not take into account all the applicable sentencing principles before he sentenced the Applicant to serve the custodial sentence that was imposed. The Applicant was in remand custody for a period of four (4) years and five (5) months prior to his conviction and sentence. This period ought to have been taken into account at the time of sentence by the dint of **Section 333(2)** of the **Criminal Procedure Code**. This period was however not taken into consideration. The Applicant was thus prejudiced.

Another issue that the Applicant raised was in regard to the question of remission of sentence by prison authorities. **Section 46** of the **Prisons Act** grants the prisons authorities power to remit the sentence of a convict under the circumstances specified in the **Act**. At the time the Applicant was convicted, this section had been repealed. It was later restored under **The Statute Law (Miscellaneous Amendments) Act, 2015**. The restoration was assented to on 15th December 2015. The Applicant therefore has a case when he states that at the time of his conviction and sentence on 20th May 2015, he was not entitled to benefit from remission because that power had been removed from prison authorities.

Taking into consideration the totality of the factors applicable in this application, and taking into account the offence that the Applicant committed, and also taking into consideration the period the Applicant has been in lawful custody, this court is of the considered view that the Applicant has been sufficiently punished. If the trial court had taken into account the period that the Applicant was in remand custody prior to his conviction, and if the Applicant was entitled to benefit from remission, in all accounts he would have served his custodial sentence. In the premises therefore, the custodial sentence of the Applicant is commuted to the period served. He 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