



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**MISC. APPLICATION NO.86 OF 2015**

**KENNEDY WARIITHI NGUYO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Kennedy Wariithi Nguyo was charged with the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code** but was convicted of the lesser but cognate offence of **robbery with violence** contrary to **Section 296(1)** of the **Penal Code**. He was sentenced to serve seven (7) years imprisonment. The Applicant has applied to this court to have the period that he was in remand custody taken into account. According to the Applicant, he was in remand custody from 3<sup>rd</sup> December 2009 when he was charged before the trial magistrate's court to 31<sup>st</sup> January 2012 when he was convicted and sentenced to serve the custodial sentence. It is the Applicant's application that if this period was taken into account, then, he would have served the period that he was ordered to serve by the trial magistrate's court.

The Applicant reiterated this position when he appeared before this court. Ms. Sigei for the State left the issue of sentence to the court although she observed that the period that the Applicant had been in remand custody had been taken into account at the time the trial magistrate's court sentenced the Applicant to serve the custodial sentence.

When the trial magistrate sentenced the Applicant to serve the custodial sentence, it was exercising judicial discretion. This court can only interfere with such exercise of discretion if it is established, either that the sentence was too harsh or too lenient in the circumstances. The court will also interfere with the imposition of the custodial sentence if it is established that the trial magistrate applied the wrong principles of the law in sentencing the Applicant or that the sentence was illegal.

In the present application, it was clear to this court that the trial court sentenced the Applicant to serve a legal custodial sentence. However, it was clear to this court, following the Court of Appeal in **Ahmad Abolfathi Mohammed & Another Criminal Appeal No.135 of 2016** (unreported) the trial magistrate did not take into account the period that the Applicant spent in remand custody before his conviction. As was held at Page 28 of the Judgment:

**“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, the Applicant pleads with the court for this court to take into account that period that he was in remand custody. This court takes into account that period as a result of which the custodial sentence of the Applicant is commuted to the period served.

The Applicant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

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

**L. KIMARU**

**JUDGE**