REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION-MILIMANI

CRIMINAL REVISION NO. E387 OF 2021

ALFRED OUMA NGARA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Alfred Ouma Ngara**, the Applicant, was charged with the offence of obtaining money by false pretence contrary to **Section 313** of the Penal Code. Particulars being that he obtained Ksh. 320,000/- from **Paul Musau Kawila** by falsely pretending that he would sell to him a motor-vehicle registration **No. KCK 376Q** make Pro- Box, a fact he knew to be untrue.

2. At the outset he denied having committed the offence, but, subsequently he changed plea, pleaded guilty to the charge and was sentenced to serve eighteen (18) months imprisonment.

3. On the 2nd November, 2021, he approached this court through a Notice of Motion seeking review of the sentence meted out. The application is supported by an affidavit deposed by the applicant where he avers that having been arrested on 16th December, 2019 and arraigned, he changed plea on the 28th October, 2021, admitted the charge, was sentenced to serve eighteen (18) months imprisonment, having been in remand custody for three (3) months. That he is the sole provider of his family consisting of his mum and brother who is in secondary school; he suffers from chronic illness and prolonged stay in prison may lead to irreversible deterioration of his health.

4. Ms. Kibathi, learned counsel for the State conceded the application on the grounds that the applicant was in custody from 19th December, 2019 to 28th October, 2021 when he was convicted on his own plea of guilty and there was no indication if time spent in custody was considered. That the period he is required to serve sentence in addition to time spent in custody comes to forty (40) months which is more than the stipulated sentence under **Section 313** of the Penal Code, which provides for a period of three (3) years.

5. The revisional jurisdiction of this court that is limited to rectifying irregularities, illegalities and impropriety on record is donated by **Section 362** of the Criminal Procedure Code (CPC)which provides that:

> **The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.**

6. The applicant herein was accused of contravening the provisions of **Section 313** of the Penal Code, a misdemeanor that attracts a sentence of up to three (3) years imprisonment.

7. In passing the sentence the court is obligated to consider time spent in remand custody. **Section 333 (2)** of the Criminal Procedure Code (CPC) provides as follows:

> **(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.**
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> **Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.**

8. In the case of ***Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR*** the Court of Appeal held that:

> **"The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. 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. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."**

9. This court can only intervene to regularize the record to reflect the actual intention of **Section 333** of the Criminal Procedure Code (CPC) and to avoid any miscarriage of justice.

10. The record of the trial court is clear, the trial magistrate failed to consider time spent in custody.

11. This court has been called upon to reduce the sentence and its jurisdiction is limited. The applicant has demonstrated that time spent in custody was not considered.

12. In the case of **Ogolla s/o Owuor vs. Reginum [1954] EACA 270** the Court of Appeal held that:-

> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we*** **would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - vs- Shershowsky (1912) CCA 28TLR 263)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo -v - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-**
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> > **sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"**

13. Having been in remand custody for twenty-three (23) months, an additional eighteen (18) months makes it three (3) years, five months, which is manifestly excessive and in fact illegal. This makes the sentence illegal that must be interfered with. The applicant was a first offender who saved court's time by admitting the charge. I also take into account the nature of the offence and circumstances in which it was committed.

14. In the result, I set aside the sentence meted out which I substitute with the term served. The applicant shall be released forthwith unless otherwise legally held.

15. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 15TH DAY OF FEBRUARY, 2022.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Applicant

Mr. Kiragu for the State

Mutai - Court Assistant