

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.14 OF 2019

EMILIO MUKUNDI NJUE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Emilio Mukundi Njue was convicted of two counts of the offence of **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. He was sentenced to death. The death sentence was later commuted to life imprisonment. Pursuant to the decision of **Francis Karioko Muruatetu –vs- Republic [2017] eKLR**, the Applicant applied for resentencing before the Kibera Chief Magistrate’s Court. He presented his mitigation before the trial court. He was sentenced to serve fifteen (15) years imprisonment with effect from 17th February 2014. The court further ordered that the Applicant be not eligible for remission of sentence. The Applicant was aggrieved by the decision and made an application before this court for revision of sentence. He had two issues which he was of the view the trial court erred. The first issue was the non-consideration of the period that he was in remand custody prior to his conviction and secondly, the denial of remission. The Applicant therefore urged the court to reconsider his sentence.

During the hearing of the application, this court heard the submission made by the Applicant and Ms. Akuja for the State. The issue for determination by this court is whether the Applicant made a case for this court to interfere with this 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.”

It was clear from the submission made that the trial court was exercising its resentencing discretion when it sentenced the Applicant. Upon considering the Ruling, this court finds no reason to interfere with such exercise of the discretion. When the Applicant was resentenced, his position is different from that of an accused who is sentenced by the trial court in the first instance. This is where **Section 333(2)** of the **Criminal Procedure Code** behooves the trial court to take into consideration the period that the accused was in remand custody prior to his conviction. In resentencing, the Applicant was already serving a legal sentence when the trial court sentenced him to serve a lesser sentence. **Section 333(2)** of the **Criminal Procedure Code** does not therefore apply. This court is of the view that the sentence that was meted out on the Applicant fitted the crime. It will not interfere with the same.

The only issue that this court will revise is to set aside the order that the Applicant be denied remission as provided under **Section 46** of the **Prisons Act**. Other than that, the application lacks merit and is hereby dismissed. It is ordered.

DATED AT NAIROBI THIS 6TH DAY OF FEBRUARY 2020

L. KIMARU

JUDGE