

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.300 OF 2019

MERCY WAMBIA MAINA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Mercy Wambia Maina was charged with the offence of **obtaining goods by false pretences** contrary to **Section 313** of the **Penal Code**. The particulars of the offence were that on 26th April 2018 at Ngara in Nairobi County, the Applicant, jointly with others not before court, with intent to defraud obtained 4,800 kilograms of rice all valued at Kshs.624,000/- from Jemimah Wangeci Warui by falsely pretending that she was in a position to pay her once she supplied her client, a fact she knew to be false. When the Applicant was arraigned before the trial magistrate's court, she pleaded not guilty to the charge. After full trial, she was convicted as charged. She was sentenced to pay a fine of Kshs.200,000/- or in default serve two (2) years imprisonment. The Applicant was unable to pay the fine. She is serving the default sentence. The sentence was meted out on 17th September 2019.

The Applicant made an application to this court to have the said custodial sentence reviewed. She was remorseful contrite and regretted the act that led to her conviction and incarceration. She was a first offender and had learnt her lesson in the period that she had been in prison. She urged the court to take into consideration that she was in remand custody for a period of one (1) year and five (5) months prior to her conviction. This period was not taken into account when she was sentenced by the trial court. She urged the court to take into consideration that she was her family's sole breadwinner and the fact that she was a single mother of three (3) children. Apart from that, she was taking care of her elderly mother who was sickly. In the premises therefore, she pleaded with the court to review her custodial sentence. Ms. Akunja for the State did not oppose the Applicant's application for review of sentence. She noted that indeed the Applicant was in remand custody for the period stated and therefore this period ought to be taken into account in determining the ultimate custodial sentence to be meted out on the Applicant.

When the trial court sentenced the Applicant it was exercising judicial 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 the court that the trial court did not take into account the period that the Applicant was in remand custody when it sentenced her to serve the default custodial sentence. That being the case, under **Section 333(2)** of the **Criminal Procedure Code**, that period shall be taken into account. That being the case, taking into consideration the total period that the Applicant has been in remand custody and serving the default custodial sentence, in the view of this court, the Applicant has been sufficiently punishment. The court has taken into consideration the mitigation of the Applicant and the value of property that was lost by the complainant.

In the circumstances therefore, the default custodial sentence of the Applicant is hereby 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 19TH DAY OF FEBRUARY 2020

L. KIMARU

JUDGE