



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI**

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO.50 OF 2019**

**MOSES MUIRURI.....APPLICANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Moses Muiruri was convicted of two counts of **stealing motor vehicles** contrary to **Section 278A** of the **Penal Code**. The particulars of the charge were that on 10<sup>th</sup> and 18<sup>th</sup> October 2017 at Diamond Plaza, Highridge in Nairobi County, the Applicant with another, stole two motor vehicles registrations No.KCE 060Y (Toyota Axio) and KBW 883Q (Toyota Premio), the properties of Hassan Ali Yusuf Mitwani. He was sentenced to serve four (4) years imprisonment on each count. The sentences were however ordered to run concurrently. The Applicant was aggrieved by his sentence and has applied to this court for revision of sentence.

In his application, the Applicant faulted the trial court for not sentencing him to an option of a fine or alternatively explore the option of a non-custodial sentence. The Applicant pleaded with the court to review the said sentence and mete out an appropriate sentence. The Applicant relied on the case of **Julius Matata v Republic [2018] eKLR** in support of his application for review of sentence. Specifically, the Applicant urged the court to consider the provisions of **Section 26(3)** of the **Penal Code** and direct that he pays a fine instead of serving a custodial sentence.

Ms. Akunja for the State opposed the application. She submitted that under the **Section** of the **Penal Code** that the Applicant was convicted the maximum sentence provided is seven (7) years imprisonment. The sentence imposed of four (4) years imprisonment was fair in the circumstances. She urged the court to note that the two motor vehicles that were stolen from the complainant were never recovered. She further noted that the Applicant appeared not to be remorseful. In the circumstances, she urged the court not to interfere with the sentence.

The trial court, in sentencing the Applicant, was exercising judicial discretion. This court will not interfere with such exercise of discretion unless it is established that the trial court acted capriciously without regard to the applicable legal principles guiding the court on sentencing. 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 trial court properly exercised its discretion when it sentenced the Applicant to serve the said term in prison. One of the considerations which was uppermost in the mind of the trial court was that the motor vehicles that were stolen were never recovered. From his submission before this court, it was evident that the Applicant was not remorseful. Indeed, part of the grounds he presented in his application appears to challenge his conviction. This court was not persuaded by the argument advanced by the Applicant that he ought to have been fined instead of being sentenced to serve a custodial sentence. In the circumstances of this case, this court agrees with the trial court that a custodial sentence serves the interest of justice.

In the circumstances therefore, the Applicant’s application for review of the custodial sentence imposed on him by the trial court lacks merit. It is hereby dismissed. However, in exercise of its discretion, this court shall reduce the term of imprisonment from four (4) years imprisonment to three (3) years imprisonment with effect from 19<sup>th</sup> December 2018 when the Applicant was convicted by the trial court. The court has taken into consideration the period that the Applicant was in remand custody prior to his conviction. It is so ordered.

**DATED AT NAIROBI THIS 5<sup>TH</sup> DAY OF NOVEMBER 2019**

**L. KIMARU**

JUDGE