



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.649 OF 2018

BERNARD INGWELA AKONYA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Bernard Ingwela Akonya, together with three others, was charged with the offence of **attempted murder** contrary to **Section 220(a)** of the **Penal Code**. The particulars of the offence were that on the night of 14<sup>th</sup> December 2015 at Kangemi, Nairobi County, the Applicant unlawfully attempted to cause the death of one Susan Wangui Thiong'o by stabbing her with knives. The Applicant pleaded not guilty to the charge. After full trial, the Applicant was convicted as charged. He was sentenced to serve four (4) years imprisonment. The Applicant was aggrieved by the custodial sentence imposed upon him. He has made an application to this court to have the sentence revised.

In his application, the Applicant contends that the trial court did not take into account the period of two years and two months that he was in remand custody prior to his sentence to serve the custodial term. The record of the trial court shows that indeed the Applicant was in remand custody due to his failure to meet the terms of bail. His co-accused were however released on bail pending trial. The Applicant urged the court to take into account this period. He further states that he is a severe asthmatic. The prison condition has exacerbated his condition. He reminded the court that he was a first offender and pleads for the leniency of the court.

Ms. Sigei for the State objected to the application. She was of the view that the custodial sentence that was imposed on the Applicant was lenient considering the circumstances of the case. She pointed out that the Applicant has only been in prison for a period of eight months which is not sufficient punishment for him. As regard the period that he was in remand custody, she insisted that the same was taken into consideration by the trial court before the custodial sentence was meted. She urged the court not to be persuaded by the Applicant's plea to the effect that his medical condition should be a factor in determining whether or not he should serve the custodial sentence. She reiterated that the prison authorities have medical facilities that will address any medical challenges that the Applicant may suffer from. She urged the court to disallow the application for revision of sentence.

The Applicant is essentially asking this court to revise the exercise of judicial discretion by the trial court which sentenced him. 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 clearly erred when it placed the Applicant on the same footing as his co-accused who were out on bond upon convicting him. The Applicant was sentenced to serve the same period in prison as his co-accused who were out on bond prior to their conviction. **Section 333(2)** of the **Criminal Procedure Code** requires a convicting court to take into consideration the period that a convict has been in remand custody prior to his conviction and take that period into account before sentencing him.

In the present application, the Applicant has established to the satisfaction of this court that indeed the period of two years and two months that he was in remand custody was not taken into account before he was sentenced to serve the four (4) years in prison. Further, this court noted that from the judgment of the trial court, the Applicant's role in the commission of the offence was that of an accessory. He was not the main perpetrator. This fact ought to have been taken into account when the Applicant was sentenced. It was clear to this court that the trial court applied the wrong principle of the law when he sentenced the Applicant to serve the custodial period in jail.

That being the case, this court shall remedy the situation by commuting the custodial sentence of the Applicant 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 16<sup>TH</sup> DAY OF NOVEMBER 2018

L. KIMARU

JUDGE