

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.670 OF 2018

MUMIN IDDI KATHELE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Mumin Idd Kathele was charged with the offence of **causing death by dangerous driving** contrary to **Section 46** of the **Traffic Act**. The particulars of the offence were that on 9th February 2015 at Olookisaile Area along Magadi Road in Kajiado County, being the driver of motor vehicle Registration No.KCA 257L Mazda Van drove the said motor vehicle dangerously and at a high speed and failed to keep a reasonable distance and thereby rammed into the rear of motorcycle Registration No.KMCR 532K make Tiger thereby causing the death of Francis Kilanti. When the Applicant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty as charged. He was sentenced to pay a fine of Kshs.200,000/- or in default serve a custodial sentence of two years imprisonment. The Applicant did not pay the fine. He is serving the default custodial sentence. The Applicant was aggrieved by the sentence that was imposed on him.

He filed an application before this court seeking the revision of the sentence. The Applicant's challenge to the custodial sentence imposed is that the trial court failed to take into consideration that he had been in remand custody for a period of three years and two months prior to being sentenced to serve the default custodial sentence. The Applicant pleaded with the court to take into account this fact and sentence him to serve an appropriate custodial sentence. He states that he is a first offender and the only breadwinner for his family, who include three young school going children. He was remorseful and had learnt his lesson in the period that he has been in lawful custody. Ms. Sigei for the State opposed the application. She was of the view that taking into consideration the entire circumstances of the case, the default custodial sentence that was imposed on the Applicant was lenient. She urged the court not to disturb the 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 whereas the trial court properly exercised its discretion when sentencing the Applicant, this court is of the view that the trial court erred when it did not take into account the period of three years that the Applicant was in remand custody prior to his conviction. It is not sufficient for the trial court to say that it had taken into consideration that period that the Applicant had been in remand custody before his conviction. The trial court must give an explanation why, after taking into consideration the period that the Applicant had been in remand custody, it chose to sentence him to serve a further period of custodial sentence. Further, it was clear to this court that the trial court had not taken into consideration the fact that the Applicant was a first offender. In the premises therefore, this court is of the view that the Applicant made a case for this court to interfere with the default custodial sentence imposed by the trial court.

In the circumstances therefore, the default custodial sentence imposed on the Applicant is commuted to the period already 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 16TH DAY OF NOVEMBER 2018

L. KIMARU

JUDGE