



**Kigutia v Republic (Criminal Revision E133 of 2024)
[2024] KEHC 14963 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14963 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL REVISION E133 OF 2024
FN MUCHEMI, J
NOVEMBER 28, 2024**

BETWEEN

JOACHIM NGURE KIGUTIA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. The application for determination dated 13th June seeks for review of sentence in Ruiru SPM Criminal Case No. E2524 of 2021 on the premise that the period spent in custody pending trial was not taken into consideration during sentencing.
2. The applicant was convicted by Ruiru Senior Principal Magistrate, in Criminal Case No. E2524 of 2021 of the offence of stealing contrary to Section 268 as read with Section 275 of the *Penal Code* and was sentenced to a fine of Kshs. 2 million and in default (ten) 10 years imprisonment.
3. The applicant avers that during sentencing, the trial court failed to take into consideration the time spent in custody in pursuance to Section 333(2) of the *Criminal Procedure Code*.
4. The applicant further states that he is greatly remorseful and pleads leniency from the court. He further states that he has learnt his lesson the hard way and strives to be a good role model for other in the community to emulate.
5. The respondent concedes to the application and states that the sentence meted by the trial court was illegal as the maximum sentence under Section 275 of the *Penal Code* is three (3) years imprisonment. The respondent states that the applicant has currently served two years and eleven (11) months and as such he has almost served the maximum sentence under the law.



The Law

6. This court is empowered by Article 165(6) of the [Constitution](#) of Kenya to review a decision by a subordinate court. Article 165(6) provides:-

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

7. Section 362 of the [Criminal Procedure Code](#) provides:-

The High Court may call and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.

8. Section 364(1) of the [Criminal Procedure Code](#) provides:-

In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to his knowledge, the High Court may”-

- a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;
 - b. In the case of any other order other than an order of acquittal alter or reverse the order.
- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.

9. The revisionary jurisdiction of the High Court was discussed by Odunga J in a persuasive decision of [Joseph Nduvi Mbuvi vs Republic](#) [2019] eKLR:-

“In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court’s revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.”

10. Similarly Nyakundi J in [Prosecutor vs Stephen Lesinko](#) [2018] eKLR outlined the principles which will guide a court when examining the issues pertaining to section 362 of the [Criminal Procedure Code](#) as follows:-

- a. Where the decision is grossly erroneous;
- b. Where there is no compliance with the provisions of the law;
- c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;
- d. Where the material evidence on the parties is not considered; and



- e. Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.
11. The above provisions convey jurisdiction to this court to exercise revisionary powers in respect of orders of the subordinate courts. This court is therefore possessed of the requisite jurisdiction to hear and determine this application.
12. The applicant herein was convicted by Ruiru Senior Principal Magistrate, in Criminal Case No. E2524 of 2021 with the offence of stealing contrary to Section 268 as read with Section 275 of the [Penal Code](#) and was sentenced to pay a fine of Kshs. 2 million in default ten (10) years imprisonment. From the record, the applicant was arrested on 17th September 2021 and convicted on his own plea of guilty. During sentencing, the applicant presented his mitigation and stated that he is a first offender, the breadwinner in his family and that he has high blood pressure and diabetes. The trial court considered the applicant's mitigation and fined him Kshs. 2 million in default 10 years imprisonment on 6th December 2021.
13. Upon further perusal of the record, it is not ascertainable whether the trial court considered the time the applicant spent in custody which is about two (2) months. That notwithstanding, the offence of stealing as provided in Section 275 of the Penal Code carries a maximum penalty of three years imprisonment. As such, the trial court by imposing a ten (10) years imprisonment sentence was illegal and improper as it exceeded the sentence provided for by the law. The applicant has currently served three (3) years of the imprisonment sentence. Furthermore, the period he spent in custody before he was convicted and sentenced was about (3) months. It is not in dispute that the applicant has fully served the sentence of three years as prescribed by the law. Accordingly, the sentence of ten years meted against him is illegal and improper and should be set aside.
14. Accordingly, I find that the application dated 13th June 2024 is merited and is hereby allowed. The sentence of ten (10) years imprisonment is hereby set aside and substituted with three (3) years imprisonment.
15. The applicant has fully served three years imprisonment. He is hereby set at liberty unless otherwise lawfully held.
16. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 28TH DAY OF NOVEMBER 2024.

F. MUCHEMI

JUDGE

