



**Ndungu v Republic (Criminal Revision E334 of 2022)
[2023] KEHC 1544 (KLR) (Crim) (27 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1544 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E334 OF 2022
DR KAVEDZA, J
FEBRUARY 27, 2023**

BETWEEN

JOSEPH NDUNGU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged, convicted and sentenced to 12 months' imprisonment for the offence of stealing contrary to section 268 (1) as read with section 275 of the *Penal Code*.
2. The applicant now seeks a revision of his sentence to a non-custodial one. The Probation Officer Mr Ibrahim Mire, filed a report on the convict for consideration by the Court. The report shows that the Applicant is aged 19 years. He is the second born in a family of 4 siblings. He is currently serving his 12 months prison term at Kamiti Medium Prison. His parents are ready to vouch for an early release and are praying for a lenient sentence for their child. There is no objection as to non-custodial sentence by the community. In the end, he recommends community service orders for the remaining period of his sentence at Kichumbwini Primary School under the supervision of Kikuyu Probation office.
3. The powers of the High court in revision are contained in Section 362 through to 366 of the *Criminal Procedure Code* (cap 75). Section 362 specifically provides as follows: -

“The High Court may call for 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.”



4. What the High Court can do under its revision jurisdiction is stated under Section 364 of the *Criminal Procedure Code* Cap 5, which states as follows: -

- “(1) 1) 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 its 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 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 had had an opportunity of being heard either personally or through an advocate in his own defence. Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
- (3) Where the sentence dealt with under this section has been passed by a Subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- (5) When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”

5. The general punishment for the offence of theft contrary to section 268 (1) as read with section 275 of the *Penal Code* is imprisonment for 3 years. The sentence of 12 months imposed was within the law and by any standards lenient even considering that the applicant was a first-time offender.

6. It has not been demonstrated that the trial magistrate committed any illegality, impropriety or mistake in sentencing the applicant.

7. However, I take notice of the probation report by Mr Ibrahim Mire indicating that the applicant prays for a non-custodial sentence and that he is a reformed man now.

8. I am also alive to the Sentencing Policy Guidelines page 21 which provides: -

“Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence. The court should bear in mind the high rates of recidivism associated with imprisonment and seek to impose a sentence which is geared towards steering the offender from crime. In particular, imprisonment of petty offenders should be avoided as the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody. Further, short sentences are disruptive and contribute to re-offending.”



9. I also take into consideration the mitigation of the applicant that he is now reformed and now only seeks to acquire a national identity card and start his life afresh. I note that the applicant has already served two (2) months imprisonment and nearly 3 months.
10. In the circumstances, I invoke the provisions of Section 3 of the *Community Service Orders Act* No 18 of 2018 and set aside the sentence imposed by the trial court and substitute the remainder of the prison term with an order that the convict Joseph Ndungu shall serve supervised and unpaid community service at Kichumwini Primary School under close supervision by the Kikuyu Probation Officer.
11. It is so ordered.

RULING READ, DELIVERED AND SIGNED THIS 27TH DAY OF FEBRUARY 2023

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D. KAVEDZA

JUDGE

In the presence of:

