



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Republic (Criminal Revision E022 of 2023)
[2023] KEHC 3434 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3434 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E022 OF 2023
GL NZIOKA, J
MARCH 31, 2023**

BETWEEN

DAVID MBUGUA KAMAU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the Chief Magistrate's Court at Naivasha charged vide Criminal Case No E1275 of 2022, with the offence of stealing contrary to section 268 (1) as read with section 275 of the *Penal Code*. The particulars of the charge are as per the charge sheet.
2. He pleaded guilty, was convicted and sentenced was sentenced to pay a fine of Kshs 50,000 and in default to serve one (1) year imprisonment. He now seeks for review of that sentence through his application herein filed on February 21, 2023, in that the time he spent in custody be considered, the sentence be reduced and/or converted into a non-custodial sentence.
3. The application is supported by the grounds, in the 'mitigation grounds of revision' and in his affidavit where he avers that he pleaded guilty and is a first offender. He is remorseful, has learnt to be a law abiding citizen and will not be involved in criminal activities again. Further, he seeks for mercy and the four (4) months in remand custody be considered.
4. The Respondent did not respond to the application despite being granted an opportunity to do so as such the application is unopposed.
5. In considering the application, I note that the revisionary power of the High Court is provided for under sections 362 of the *Criminal Procedure Code* (herein 'the Code'), which states 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.'

6. However, the above provisions should be read together with section 364 of the Code which provision states as follow: -

- ' (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 sections 354, 357 and 358, and may enhance the 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: 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 lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.'

7. Pursuant to the above provisions the court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. Thus the objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be invoked where the decision under challenge is; grossly onerous, there is no compliance with the provisions of the law, or the finding re-ordered are based on no evidence, or material evidence is ignored or judicial discretion is exercised arbitrarily or perversely.

8. Therefore, it is not the responsibility of the High Court to take into account the benefit of the evidence, it merely has to see if the provisions of the law have been properly adhered to by the court whose order is the subject of the revision, as held in; *Major SS Khanna vs Brig FJ Dillon 1964 AIR 497, 1964 SCR (4) 409*.



9. To revert back to the matter herein, the applicant was convicted and sentenced of the offence under section 268 (1) of the Penal Code that states: -

' (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.'

10. Further section 275 of the Penal Code states as follows: -

' Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.'

11. In view of the aforesaid the sentence of one year in default of payment of fine is legal and lawful and there is no basis to interfere with it.

12. However, I note from the trial court record the Probation Department filed a report dated November 9, 2022 which indicates the applicant is 36 years old 1st born out of five (5) siblings.

13. He is married and his wife is a casual labourer. Further he has three children, two of whom are in primary school while the last born is two (2) years old. That he studied up to university where he pursued Information Technology at Eldoret University and worked for various companies as a freelance agent in Nakuru, Kimende and Naivasha before his arrest.

14. Further he suffers from ulcers, is remorseful and pleads for leniency stating that he will pay the complainant once released. That his sister stated that he can reform within the family. The Community is ready to support him to compensate the complainant.

15. The complainant on his part claimed that Co-operative Bank, Gilgil Branch was the actual complainant. The report indicated that his wife is sick with fistula and cannot work and the family is therefore dependant on him.

16. The report recommends that the applicant be given a non-custodial sentence on probation for three (3) years to allow him to take care of his family and that he Probation Department will oversee alternative dispute resolution over the stolen money.

17. However, I note that the applicant does not explain what he did with the stolen money. He does not explain how the bank that lost the funds will recover it. It is noteworthy that the bank has already refunded the complainant the money and therefore the real victim is the bank. Again the bank is a mere agent holding depositors' money as a Trustee; see (*Foley vs Hill 1848*).

18. Therefore, to allow the applicant to walk to freedom in disregard of the loss incurred will encourage other potential offenders and be a mockery to justice. Even though I have considered the period he was in custody, I note that, the sentence imposed is too lenient in the circumstances given. I decline to review the sentence.

19. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 31ST DAY OF MARCH, 2023.

GRACE L. NZIOKA

JUDGE

In the presence of:



Appellant present in person, in court virtually

Mr Atika for the Respondent

Ms Ogutu: Court Assistant

