



REPUBLIC OF KENYA



KENYA LAW
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**Mugure v Republic (Criminal Revision E007 of 2023)
[2023] KEHC 3302 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3302 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E007 OF 2023
GL NZIOKA, J
MARCH 31, 2023**

BETWEEN

SIMON MBURU MUGURE APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the Senior Principal Magistrate’s Court at Engineer charged vide Criminal Case. No E1328 of 2022, with the offence of house breaking contrary to section 304 (1) (b) and stealing contrary to section 279 (b) of the *Penal Code*. He was also charged with an alternative count of handling stolen goods contrary to section 322 (1) of the *Penal Code*. The particulars of each charge are as per the charge sheet.
2. He pleaded guilty, was convicted on the main count and sentenced to five (5) years imprisonment. He now seeks for review of the sentence vide an application filed on January 17, 2023. The application is supported by the grounds in a document entitled “memorandum of revision” and his affidavit wherein he avers that he pleaded guilty and is a first offender. That he is remorseful and has learnt to be a law abiding citizen and will not indulge in crime again.
3. That he has a young family that requires provision and his imprisonment has left them in a difficult situation. Further he has no pending appeal and is applying for review of his sentence.
4. The Respondent filed submission opposing the application and stated that the trial court in passing its sentence considered the applicant’s mitigation and the fact that he is a first offender. That, while the sentence is lenient, it will deter the applicant from committing a similar offence. Therefore, the court should to uphold the sentence and dismiss the application.
5. The Probation Department filed a pre-sentence report dated; March 13, 2023 as directed by the court. It indicates that the applicant he is 23 years old and 5th born out of six (6) siblings. He is not married



and does not have any children. That he dropped out of school in form 2 due to a lack of interest. That he has acquired panel beating skills and was engaged in casual jobs before his arrest. He admitted to being a habitual user bhang.

6. The report further indicates that he is not wholly truthful with information and is not remorseful. That his brother stated that he is of bad character and steals from the family and the community and should serve his sentence in custody for him to learn his lesson. Further his mother stated that he has caused a rift between the family and the Community and she is against a non-custodial sentence as she fears members of the community will harm him. The family has never visited him in prison.
7. Similarly, the Nyumba Kumi elder stated that the applicant has been a nuisance for a long time and been reported severally to the police but was always given a second chance. That the Community is happy he was imprisoned as they were tired and vowed to cause harm him.
8. In the same manner, the complainant, who is the applicant's uncle, stated that he is of bad character and the family has exhausted ways to help him reform as he is a habitual thief. That he is against review of the sentence and states that the community may cause him harm if he is released.
9. However, the applicant is deployed at the Industry section at Prison and has no record of indiscipline. The Probation officer concludes that he is not reformed, is a high risk of reoffending and that his safety in the Community cannot be ascertained. Therefore, that the court maintains the sentence for the safety of the applicant and the Community.
10. In considering the application for review the provisions of sections 362 of the [Criminal Procedure Code](#) (herein "the Code"), that governs the revisionary power of the High Court is 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.”

11. However, the above section 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.”

12. Pursuant to the afore provisions, it is that, 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.

13. In that regard I note that, the applicant was convicted of the offence under section 304 (1) (b) of the [Penal Code](#) that states: -

“ Any person who—

- (b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years”.

14. Further section 279 of the [Penal Code](#) states as follows: -

“ If the theft is committed under any of the circumstances following, that is to say —

- (b) if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house; the offender is liable to imprisonment for fourteen years”.

15. It follows that the five (5) years meted out herein is lawful and legal and there is no basis for interference, Further the pre-sentence report is extremely negative. The applicant is described as a habitual offender who should be kept away from society. He has thus chosen his path in life and shall ride on it.

16. Be that, as it were, I order that the sentence meted runs from September 27, 2022, when he was arraigned in court and held in custody during trial. This is pursuant to the provisions of section 333(2) of the [Criminal Procedure Code](#).

17. 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

