



REPUBLIC OF KENYA



**Kosgei v Republic (Criminal Revision E024 of 2023)
[2023] KEHC 3015 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3015 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E024 OF 2023
GL NZIOKA, J
MARCH 24, 2023**

BETWEEN

DAVID KIPRONO KOSGEI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged before the Chief Magistrate’s Court at Naivasha in Criminal Case No E1533 of 2022 with the offence of stealing in a dwelling house contrary to section 279 (b) of the [Penal Code](#). The particulars of the charge are as per the charge sheet.
2. He pleaded guilty, was sentenced and convicted to serve a term of eighteen (18) months imprisonment. He now seeks for review of that sentence vide an application filed herein on February 23, 2023, that the sentence be reduced and/or converted to a non-custodial sentence.
3. The application is supported by a document titled “memorandum of sentence review” and applicant’s 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. Further he comes from a poor family background.
4. The Respondent did not file any response to the application despite being granted an opportunity to do so, as such the application is unopposed.
5. The Probation Department filed a report dated, March 9, 2023, as directed by the court. The report indicates that, the applicant is 46 years old and 7th born of eight siblings. Further his only surviving parent is the mother though she is elderly. Furthermore, he is married with two (2) children of school going age. That, he dropped out of school in class 7 due to poverty and was working as a casual labourer in Laikipia before his arrest.



6. However, the report indicates that, he is sly and dishonest as he gave misleading information that made it difficult to contact his family. That similarly, he gave misleading information about his home area and consequently the probation officer at Molo was unable to locate his home.
7. That the Chief of the location the applicant gave did not know of his family within his locality and therefore it was not possible to verify the information he gave.
8. On the other part, the complainant stated that the applicant stole all her float cash which affected her Mpesa business and took away her livelihood and that of her children. Further, he sold cattle so as to compensate her but he never did. That she still bitter and wants the applicant to complete his sentence in custody so that it can serve as a lesson.
9. The prison authorities indicated that he is attached to the crusher department in Prison and has no record of indiscipline. The Probation officer conclusion in the report is that the applicant is not fit for a non-custodial sentence.
10. In considering the application, I note that, the revisionary power of the High Court is stipulated 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.”
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 aforesaid provisions 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 the instant matter the applicant was convicted and sentenced of the offence under section 279 (b) of the *Penal Code* that provides 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.
14. Pursuant to the aforesaid, the eighteen (18) months sentence is lawful. Even then the pre-sentence report is extremely negative and therefore there is no reason to interfere with the sentence meted out. Therefore, the application is therefore dismissed for lack of merit.
15. It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 24TH 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

