



REPUBLIC OF KENYA



**Kirima v Republic (Criminal Revision E165 of 2022)
[2023] KEHC 2484 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2484 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E165 OF 2022
GL NZIOKA, J
MARCH 24, 2023**

BETWEEN

JOEL MACHARIA KIRIMA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the Senior Principal Magistrate's Court at Engineer charged vide Criminal Case No E1166 of 2022, in two counts with the offences of stealing contrary to section 268 as read with section 275 of the *Penal Code*. The particulars of each charge are as per the charge sheet.
2. He pleaded guilty and was convicted on his own plea of guilty, and sentenced to serve a term of three (3) years on the 1st count as indicated on the court record although the committal warrant reads two (2) years and two (2) years imprisonment on the second count. The sentences were ordered to run consecutively.
3. However, vide an application filed on October 6, 2022, the applicant seeks the sentence be reviewed to a non-custodial one or to run concurrently.
4. The Respondent did not respond to the application despite being granted an opportunity to do so as such the application is unopposed.
5. The application is considered in the light of the material before the court, in particular the mitigation in the affidavit in support thereof wherein the applicant avers that he pleaded guilty and is a first offender. That he is remorseful, has learnt to be a law abiding citizen and promises never to engage in criminal activities.



6. That he is from a poor family and has a harmonious relationship with his neighbours. Further, that he has no pending appeal and is only applying for review of sentence and prays that the court is merciful and reduces his sentence.
7. Similarly, the pre-sentence review report dated; March 3, 2023, indicates that he is 22 years old and 2nd born out of a family of; four (4) siblings. He is married with one child aged two (2) years old. That he dropped out of school in class 7 due to financial constraints and was engaged in small scale farming for a living before his arrest.
8. That he accepts his mistake and is remorseful having learnt a lot in prison. That his family members have a positive attitude towards him and states that he is hardworking and has strong family ties with no prior misconduct. He is assigned to work in the Prison's farm and has learnt to make ornaments at the Prison's industry. Further he has good conduct and relates well with other inmates and prison officials. The Probation officer recommends that he is suitable for favourable review of his sentence.
9. To revert back, the offences the applicant is convicted of are provided for under section 268 as read with section 275 of the Penal Code. Section 268 (1) that provides that: -
 - “(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. On the other part section 275 states that: -
 - “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. It suffices to note that, revisionary power of the High Court is provided for under sections 362 of the Criminal Procedure 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.”
12. However, the 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.”

13. Pursuant to the above provisions, the court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. Indeed, 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.

14. The sentences meted herein were lawful, however, taking into account that the applicant pleaded guilty and saved court’s time and is a first offender the sentences meted are harsh. The objective of sentence is both rehabilitative and deterrence and first offenders should not be subjected to the harshest sentence at the first instant.

15. In the given circumstances I set aside the sentences on both counts and sentence the applicant to fifteen (15) months imprisonment on each count and order the sentences runs concurrently.

16. 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

