



REPUBLIC OF KENYA



**Karanja v Republic (Criminal Revision E162 of 2022)
[2023] KEHC 3451 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3451 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E162 OF 2022
GL NZIOKA, J
MARCH 24, 2023**

BETWEEN

WILSON THATHI KARANJA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged in the Senior Principal Magistrate's Court at Engineer *vide* criminal case No E1085 of 2022 with the offence of; store breaking with intent to steal contrary to section 307 of the *Penal Code*, in count 1 and being in possession of narcotic drugs contrary to section 4 as read with section 4 (A) (ii) of the *Narcotic and Psychotropic Substances Control Amendment Act* No 4 of 2022 in count 2. The particulars of each charge are as per the charge sheet.
2. He pleaded guilty, was convicted and sentenced to fourteen (14) months imprisonment on count 1 and one (1) year imprisonment in count 2. The sentences were ordered to run concurrently. However, he argues that the committal warrant does reflect that the sentence is to run concurrently.
3. The applicant thus seeks *vide* an application on October 4, 2022 that the sentence be reviewed and ordered to run concurrently, and/or be converted into a non-custodial sentence. The application is supported by the grounds in a document labelled "memorandum of sentence review" and his supporting affidavit wherein he avers he is a first offender, remorseful and has learnt to be a law abiding citizen.
4. That he is from a poor family background and is the sole breadwinner of his family. Further, he is not appealing against the sentence and conviction but applying for sentence review and prays for leniency.
5. The respondent opposed the application *vide* submissions which states that the honourable trial magistrate considered the circumstances of the case, that he is a first offender and his mitigation prior to sentencing and proceeded to sentence him to fourteen (14) months imprisonment which is lenient.



6. That the sentence imposed will deter the applicant and also discourage other persons from committing a similar offence. The court was urged to uphold the sentence and dismiss the application.
7. Following the court's directive, the Probation Department filed a pre-sentence review report dated February 13, 2023 which indicates he is 32 years old and the 2nd born out of four (4) siblings. He separated from his wife and has two (2) children. That he studied up to class 8 and has no technical training. He was doing logging and carpentry work before his arrest.
8. The report further indicates that he admitted to using alcohol and drugs and he blames his addiction to alcohol for the offence. That he is positively rehabilitated and prays for leniency. The applicant's parents are farmers and they reside on their own piece of land at Mumui, Kipipiri. That they stated that his alcoholism could be the reason he committed the crime but they believe that he has been rehabilitated during the eight (8) months he has been in custody. His family, friends and ex-wife visit him regularly in prison.
9. The area chief also stated that the applicant has a problem with alcoholism but does not have a criminal record within the community. The complainant said that she had employed the applicant and caught him in the process of stealing. However, she did not lose any property and therefore has no objection to his sentence review as she believes that the eight (8) months the applicant has spent in custody has taught him a good life lesson.
10. The prison authorities indicated that he is deployed to the quarry and building department and is yet to enrol in any course though he intends to enrol in masonry. He has no record of indiscipline. The probation officer recommends that his sentence runs concurrently and the three (3) months he spent in remand be considered.
11. In considering the application, I note that, the law that guides 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.”
12. However, the afore 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.”

13. As such, 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.

14. In regard to the aforesaid and to revert back to the matter herein, I note that the applicant was convicted and sentence in count one of an offence under section 307 of the [Penal Code](#) that states as follows:

“Any person who breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, with intent to commit a felony therein, is guilty of a felony and is liable to imprisonment for five years”.

15. Further, he was convicted and sentenced in count two of an offence under section 4 as read with section 4 (a) (ii) of the [Narcotic, Drugs and Psychotropic Substances Control Act](#) that provides:

“Any person who trafficks in, or has in his or her possession any narcotic drug or psychotropic substance or any substance represented or held out by him or her to be a narcotic drug or psychotropic substance, shall be guilty of an offence and liable—

(a) in respect of any narcotic drug or psychotropic substance—

(ii) where the person is in possession of more than 100 grams, to a fine of not less than fifty million shilling or three times the market value of the narcotic drug or psychotropic substance, whichever is greater, or to imprisonment for a term of fifty years, or to both such fine and imprisonment”

16. It follows that the sentence imposed in the subject matter is legal and lawful. The court ordered that the sentence runs concurrently. I realise the mistake is on the committal warrant. It does not indicate the sentence is to run concurrently yet that is what the lower trial court indicates. Therefore, the applicant will serve a total of 14 months less remission (if any) to a sentence of about 9 months. The applicant was sentenced on September 8, 2022, therefore he has served about 6 months.



17. However, the applicant seeks that the remaining sentence be converted to a non-custodial one under the Community Service Order Act. I note the pre-sentence report is positive. However, in view of the fact that he only has 3 months to finish his sentence I direct that he concludes the custodial sentence and be released.
18. A proper committal warrant be prepared by the trial court and submitted to the prison authority for the necessary amendment and calculation of the date of release of the applicant.
19. 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

