



**Kinuthia v Republic (Criminal Revision E023 of 2023)
[2023] KEHC 2575 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2575 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E023 OF 2023
GL NZIOKA, J
MARCH 24, 2023**

BETWEEN

BERNARD GACHUA KINUTHIA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the Senior Principal Magistrate's Court at Engineer charged vide Criminal Case No E1463 of 2022, with the offence of breaking into a building and committing a felony contrary to section 306 (a) of the *Penal Code* in count one and an alternative charge of handling stolen goods contrary to section 322 (1) (2) of the *Penal Code*. He was also charged with a further offence of; breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code, in count two. The particulars of each charge are as per the charge sheet.
2. He pleaded guilty, was convicted on the main counts and sentenced to serve a term of eight (8) years imprisonment on count 1 and five (5) years imprisonment on count 2. The sentence was ordered to run concurrently.
3. However, the applicant seeks that the sentence be reviewed to a non-custodial one vide an application filed on February 21, 2023. The application is supported by his affidavit and the grounds in a document entitled "the memorandum of sentence review". He avers that he pleaded guilty and is a first offender. That, he is remorseful and has learnt to be a law abiding citizen.
4. That he is from a poor family background, is the sole breadwinner for his family. Further his incarceration has placed the family in a difficult position. Furthermore, he has no pending appeal and is only applying for review of sentence.
5. The Respondent has not responded to the application despite being granted an opportunity to do so and therefore the application is unopposed.



6. The court ordered for and a pre-sentence review report dated March 13, 2023 was filed which indicates that he is 24 years old and the 2nd born out of five (5) siblings. His parents are alive and that he is not married and has no children.
7. That he dropped out of primary school in class 7 for no reason and had not attained any technical skills. That he was engaged in farming and other casual jobs for daily wages before his arrest.
8. That the applicant states he is remorseful, has learnt his lesson and will not repeat the offence. Further his family have a good relationship with him and are ready to assist him with his rehabilitation. That the family hold the view that the sentence meted out is harsh considering the value of the subject matter is Kshs 3,000, and pray for a non-custodial sentence.
9. Similarly, that, the complainant is of the view that the applicant had learnt his lesson while in custody and that he has forgiven him and supports his release. The village elder stated that the applicant does not have any record of crime in the community, he is youthful and be given a second chance.
10. The Prison authority states that, he is deployed at the Industry department carrying out repairs works and has completed a rehabilitation programme known as “the prisoner’s journey” and does not have any record of indiscipline.
11. The Probation officer observes that he has been in custody for four (4) months and recommends he be placed on probation supervision order for two (2) years.
12. In considering the application, I note that the High Court draws its revisionary power from 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.”

13. However, the above section should be read together with section 364 of the [Code](#) which 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.”

14. Pursuant to the above provisions that, the court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. As such, 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.

15. In the instant matter, I note that the applicant was convicted of the offence under section 306 (a) of the Penal Code which states that: -

“ Any person who—

- (a) 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, and commits a felony therein; is guilty of a felony and is liable to imprisonment for seven years.

16. The applicant in this case was sentenced to eight (8) on the 1st count which sentence is illegal, unlawful, incorrect, improper and irregular as the maximum sentence is seven (7) years. I therefore set it aside.

17. Furthermore, taking into account that the applicant pleaded guilty and saved the court’s time. That he is a first offender and the pre-sentence report is positive and more so, the value of the subject matter of Kshs 3,000 the maximum sentence under the law is seven (7) years, is harsh and unjust.

18. In the given circumstances both sentences are set aside and substituted with 15 months’ imprisonment on each count. The sentence will run concurrently. The applicant may be released after serving seven (7) months imprisonment from November 18, 2022 and the remaining eight (8) months to be served under Community Service Order, at a place to be identified by the in charge of the Probation Department at Engineer.

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

