



REPUBLIC OF KENYA



**Mburu v Republic (Criminal Revision E005 of 2023)
[2023] KEHC 2278 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2278 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E005 OF 2023
GL NZIOKA, J
MARCH 24, 2023**

BETWEEN

SIMON KAMAU MBURU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the Senior Principal Magistrate's Court at Engineer charged vide Criminal Case No E1124 of 2022, with the offence of stealing contrary to section 268 as read with section 275 of the *Penal Code*. The particulars of charge are as per the charge sheet.
2. He pleaded guilty and was convicted and sentenced to pay a fine of Kshs 20,000 and to pay restitution of Kshs 38,000 and in default to serve a term of 18 months' imprisonment.
3. He now seeks for review of vide application filed on January 17, 2023. The application is supported by the affidavit he has sworn wherein he avers that, he pleaded guilty and is a first offender. That he has a young family that depends on him. That he is remorseful and if accorded a chance he shall not indulge in criminal activity again.
4. The Respondent did not respond to the application despite being granted an opportunity to do so therefore the application is unopposed.
5. The Probation Department filed a report dated; March 13, 2023 which indicates that the applicant is 46 years old. His father is deceased while his mother is sickly. That he is the 4th born out of seven (7) siblings. He is married with three children all of whom are in primary school. That he dropped out of primary school in class 6 due to financial constraints and that prior to his arrest he was working for a Chinese company in Ol Kalau.



6. That he admits that he committed the offence and is remorseful. Further the period spent in prison had traumatized him and prays for leniency and a second chance to fend for his family and sickly mother. That his wife and brother states that he is industrious and rely on him for their daily subsistence and pray for a non-custodial sentence as they are ready to receive him and help him settle.
7. That the complainant holds the view that the applicant has reformed his behaviour while in custody and supports his release to enable him continue with his normal life. The area Chief states that he has no previous records of conviction and is not a threat to the society and that he has learnt his lesson and he is not opposed to his release.
8. Further he is engaged in building work at the Prison which will empower him earn an income in the society. The Probation officer states that he has huge family obligations, and is willing to be rehabilitated and he recommends the applicant be given a non-custodial order and placed on community service for a period of five (5) months.
9. The revisionary power of the 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.”
10. 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.”



11. It is therefore clear from the above 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.
12. In the instant matter the applicant was convicted of the offence under section 268 as read with section 275 thereof. Section 268 of the *Penal Code* that states: -

“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”.
13. The provisions of section 275 of the *Penal Code* that provides the

“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”.
14. To revert back to the matter herein the sentence meted of Kshs 20,000.00 has an error in that no default period is provided for in case of default to pay the fine. Further taking into account the value of the subject matter is Kshs 38,000.00, and restitution has been ordered for, then the fine of Kshs 20,000.00 is punitive as the applicant will be prejudiced. Furthermore, a default period of a fine of Kshs 38,000.00 is 12 months and not 18 months.
15. In that regard I set aside the sentence of a fine of Kshs 20,000.00 and substitute it with a sentence of one year imprisonment which will run concurrently with default period of 12 months if the restitution fine of 38,000.00 is not paid. The sentences to run from the date of conviction. If he has served the sentence he should be released forthwith unless otherwise lawfully held.
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

