



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gitau v Republic (Criminal Revision E171 of 2022)  
[2023] KEHC 21334 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 21334 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL REVISION E171 OF 2022**

**GL NZIOKA, J  
JUNE 29, 2023**

**BETWEEN**

**JEREMIAH WACHIRA GITAU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant was arraigned before the Senior Principal Magistrate’s Court at Naivasha charged *vide* Criminal Case No E1047 of 2022, with the offence of house breaking contrary to section 304 (1) (b) and stealing contrary to section 279 (b) of the *Penal Code*, and an alternative charge of handling stolen goods contrary to section 322 (1) (2) of the *Penal Code*. The particulars of the charge are as per the charge sheet.
2. He pleaded guilty, was convicted and sentenced to a term of four (4) years imprisonment. By application filed on November 8, 2022, he now seeks that the sentence be reduced and/or converted into a non-custodial one.
3. The application is supported by the grounds, in a document entitled “memorandum of sentence review” and in his affidavit where he avers his submissions wherein he avers that is a first offender, is remorseful, has learnt the consequences of crime and has become a law abiding citizen.
4. That is from a poor family background, is the sole breadwinner of his family and that his incarceration has placed them in a difficult situation. Further, that he is not pending appealing and is only applying for review of sentence and prays for leniency.
5. The application was deposed by written submissions. The applicant in his submission gave mitigating grounds that he is 35 years old. That, he was raised by a single mother and he supports her to raise his siblings and since his incarceration they have suffered a lot.



6. Further, that he has learnt the consequences of his crime, has become a law abiding citizen and is ready to be a role model in the society to serve his family and the nation.
7. That, he tendered his mitigation but the trial court did not consider the same. He therefore seeks that the court reduces his sentence and order that he serves it under the Community Service Order or he be set at liberty.
8. However, the respondent in its submissions opposed the application and argued that the trial magistrate considered the circumstances of the case and the applicant's mitigation before sentencing him.
9. That, in Petition No 15 of 2015 *Francis Karioko Muruatetu and another v Republic* the Supreme Court recognized the objectives of sentencing are retribution, deterrence rehabilitation, restorative justice, community protection, and denunciation.
10. That in the instant case a deterrent sentence is appropriate and therefore the sentence meted out is sufficient in line with the circumstances of the case. That if the court is inclined to review the sentence it should mete out a harsh sentence.
11. The Probation Department filed a sentence review report as directed by the court that indicates the applicant is 35 years old the 1<sup>st</sup> born out of six (6) siblings and that he was raised by his mother after his parents separated.
12. That, he dropped out in class 7 due to truancy and a lack of interest in education and engaged was engaged in casual jobs prior to his arrest.
13. The applicant admitted to have used bhang but stated that he has been rehabilitated during his the one (1) year in custody and has learnt his lesson and seeks for leniency. His family visit him regularly in prison and they are willing to assist his rehabilitation and resettlement.
14. The complainant, is the applicant's first cousin and stated that he recovered his good, he is not bitter with the inmate and has forgiven him believing that the applicant has learnt his lesson during the one year he has spent in custody.
15. The area chief, Kapteni, stated that the applicant has no previous record and that the community is a safe landing for him, hoping the applicant learnt his lesson while in custody.
16. In prison, the applicant is attached to the cleaning section and the prison officials stated that he does not have a record of indiscipline. The Probation Officer recommended the applicant be released unconditionally stating that the complainant had forgiven him, the goods were recovered and that he has already spent a year in prison.
17. I have considered the application in the light of the material before court and 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."
18. 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.”
19. Pursuant thereto, the power will only be exercised 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.
20. The applicant was convicted of the offence under section 304 (1) (b) of the [Penal Code](#) that states: -  
Any person who—
- (b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.
21. Further section 279 (b) of the [Penal Code](#) states: -  
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.
22. Sentence meted out is lawful and legal in that, the sentence provided for under the law is 14 years.
23. However
- a. The stolen goods were recovered
  - b. The applicant is a first offender



- c. The pre-sentence review report is positive
  - d. He has been in custody and on sentence for one year
24. I therefore find that, this is an appropriate case for sentence review.
25. I direct that, the applicant serve a period of 2 years imprisonment and be released after the completion thereof.
26. It is so ordered.

**DATED, DELIVERED AND SIGNED THIS 29<sup>TH</sup> DAY OF JUNE 2023**

**GRACE L. NZIOKA**

**JUDGE**

