



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Wanyama v Republic (Criminal Revision E002 of 2023)
[2023] KEHC 20971 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20971 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL REVISION E002 OF 2023**

DK KEMEL, J

JULY 28, 2023

BETWEEN

GEOFFREY WASIKE WANYAMA APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. By a notice of motion filed in court on January 20, 2023, the applicant sought a review of sentence on the grounds that he is a father figure who left his children at home who are no longer going to school. That he has since reformed and enrolled in courses in organic farming and theological studies. That he is remorseful and has undergone punishment. That the period spent behind bars has taught him a lesson.
2. By directions, the matter was disposed by way of oral submissions. The parties herein tendered their submissions in court on April 13, 2023. The applicant sought forgiveness and regretted stealing somebody's property. That he had reformed while in prison and now respect's people's properties and will obey the laws of the land. He has learnt his lessons and will lawfully work for his needs. He stated that he had a family and parents who depended on him. This being his first offence, he sought to be given a second chance in life.
3. The respondent opposed the application stating that the applicant had been handed down a 3-year sentence out of a possible 7 years which was arrived at after a consideration of his mitigation. That the court can only interfere with the sentence if it can be shown that there was a misdirection by the trial court or that the court overlooked a material factor or considered an immaterial factor or that the sentence was excessive. The learned counsel cited the case of *Joseph Mureithi Kanyita V Republic* (2017) eKLR for the proposition that a prison is to rehabilitate an accused person which is still being done in the instant case. That the applicant should learn to respect people's property.



Analysis and determination

4. As can be seen from the record, the applicant was charged with the offence of stealing a motor cycle contrary to section 278A of the [Penal Code](#). The trial court after considering the evidence on record sentenced the applicant to 3 years imprisonment after pleading guilty to the charges.
5. The issue to be addressed in this matter is whether this is a proper case where the court can exercise its powers under Article 165 (6) and (7) of [the Constitution](#) and section 362 of the Criminal Procedure Code. Article 165(6) provides;
 - (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
6. Section 362 of the [Criminal Procedure Code](#) on the other hand provides;

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.
7. Under the said section, the issues that can be referred to the High Court on revision is limited to correctness, legality or propriety of any finding, sentence or order or passed, and as to the regularity of any proceedings.
8. The penalty provided for under the section the applicant was charged with is a 7-year prison term. In this case, the applicant was sentenced to 3 years imprisonment instead of the 7 years. Prior to his sentence, the appellant was accorded a chance to tender his mitigation. He indeed mitigated by saying that he was a family man and prayed for leniency.
9. I have noted the applicant's mitigation and the fact that the applicant had initially filed a similar application before this court vide Revision No E015 of 2022 which was handled by Hon Riechi J wherein a sentence review report was filed on May 5, 2022 which showed that the applicant was not suitable for non-custodial sentence as he was not remorseful. The learned Judge considered the plea and dismissed it.
10. I have on my part considered the evidence on record and the mitigation by the applicant. I have taken into account the record and the fact that the applicant is a first time offender. The fact that he is a family man who is the sole-bread winner for his family and also caring for his parents as well as the fact that he is remorseful is not automatic right to pardon.
11. I take cognizance that sentencing is a prerogative of the trial court and that this court can only interfere under very limited circumstances as was held by Odunga J (as he then was) in [MM1 v Republic](#) [2022] eKLR while quoting from *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12 that:

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed



by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”

12. In the instant application, I find that the applicant’s main reason for seeking a review of the sentence is because he has reformed and is remorseful. There are no compelling reasons to interfere with the sentence handed down or that the applicant has established any of the grounds contemplated by section 362 of the *Criminal Procedure Code*. The applicant has not show that the sentence handed down was illegal and or that the trial magistrate took into account irrelevant facts or that he overlooked material facts that ought to have been taken into account. In any case, the sentence review that had been presented earlier in Revision E015 of 2022 indicated that the applicant was not remorseful. There has been no other review report presented since then. It would then mean that the status quo regarding the applicant’s circumstances appear not to have changed somewhat. In the circumstances, I find that this is not one of the matters that can be admitted on revision. The trial magistrate correctly handed down the sentence after taking into account the mitigation of the applicant.
13. For the above reasons, I find no merit in the application and I hereby proceed to dismiss it. The applicant to continue serving his sentence.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF JULY 2023.

D.KEMEI

JUDGE

In the presence of :

Geoffrey W. Wanyama Applicant

Ayekha for Respondent

Kizito Court Assistant

