



REPUBLIC OF KENYA



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

**Mogire alias Ombiru v Republic (Criminal Revision E176 of 2023)
[2023] KEHC 27138 (KLR) (22 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27138 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL REVISION E176 OF 2023
HI ONG'UDI, J
DECEMBER 22, 2023**

BETWEEN

EDWARD NYAMACHE MOGIRE ALIAS OMBIRU APPLICANT

AND

REPUBLIC RESPONDENT

*(Revision against the sentence delivered by Hon. P.C. Biwott
SPM on 29.8.2023 in Ogembo Cr. Case No. E1272/2023))*

RULING

1. Edward Nyamache Mogire alias Ombiru/applicant filed the Notice of Motion dated 13th September 2023 seeking the following orders:
 - i. That this honourable court be pleased to review the sentence for the applicant being a first offender and grant him a non-custodial sentence.
 - ii. That the honourable court be pleased to grant any such orders it deems fit in the circumstances.
2. The application is supported by the grounds on its face and the Applicant's supporting affidavit sworn on 13th September 2023.
3. The applicant's case is that he was convicted upon admitting the charge, of burglary. That the items listed in the charge sheet as the stolen items are different from the ones produced in court. He pleads with the court to give him a non-custodial sentence.
4. The application is opposed by the Respondent who filed the following grounds of opposition:
 - i. The applicant is serving a legal sentence, moreover he received a lenient sentence of four years other than ten years provided for in law.



- ii. The applicant's only recourse is to appeal on sentence since he pleaded guilty to the charges.
- iii. The application doesn't meet the threshold of section 362 of the [Criminal Procedure Code](#) to warrant review of sentence.

Submissions

5. The Applicant's submissions are dated 1st November 2023 and were filed by Ochich & Company Advocates. Counsel identified the main issue for determination to be whether the applicant is entitled to review of sentence and be granted a non-custodial sentence. He further explained this Court's powers of revision under Sections 362 & 364 of the [Criminal Procedure Code](#). Further that the said powers can only be exercised if the court is satisfied that:
 - i. the sentence was either illegal; or
 - ii. that in passing the sentence the court considered irrelevant or extraneous factors or failed to consider relevant ones; or
 - iii. the sentence was manifestly harsh and excessive in the circumstances of the case.
6. In support he cited the cases of: *Macharia v Republic* [2003] KLR 115; *Veerrappa Pillai v Raman & Raman Ltd.* AIR 1952 SC 192; *Njagi Ndwiiga John v Republic* [2019] eKLR and *Omari v Republic* (Criminal Revision No. E043 of 2022) [2023] KEHC 3756 (KLR) (27 April 2023)
7. He further referred to the Judiciary Sentencing Policy Guidelines, while highlighting the objectives of sentencing. In further reference to the case of *Omari v Republic* (Supra) he cited Okwany J. as stating:

“I have reviewed the circumstances of this case and the fact that the Applicant was a first offender. I have also taken note of the fact that he has a young child who depends on him alongside his old sickly parents. While I strongly condemn the heinous acts of the Applicant, it is my view that the interests of justice will be best served from a less severe sentence. I am guided by the case of *J v. Scott Crossley* 2008 (1) SACR 223 (SCA) at para 35, where it was held:-

“ Plainly, any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the overruling ones.... It is trite that it is in the interest of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.”
8. He finally submitted that following the above, its clear that the applicant's four (4) years imprisonment is harsh and/or excessive and should be substituted with a non-custodial sentence or a fine as the Court may deem fit.
9. Learned Counsel Mr. Justus Ochengo filed grounds of opposition dated 19th October 2023. They are as follows:
 - i. The applicant is serving a legal sentence, moreover he received a lenient sentence of four years other than ten years provided for in law.
 - ii. The applicant's only recourse is to appeal on sentence since he pleaded guilty to the charges.



- iii. The application doesn't meet the threshold of Section 362 of the [Criminal Procedure Code](#) to warrant a review of sentence.

He wholly relied on those grounds in opposing the application.

Analysis and Determination

10. I have carefully considered the Notice of Motion, supporting grounds and affidavit, grounds of opposition, the applicant's submissions plus the law. The main issue I find falling for determination is whether the application is merited or not.
11. The charge sheet has two distinct counts plus an alternative count. Count 1 was burglary contrary to Section 304(2) of the [Penal Code](#) while Count 2 was stealing from a dwelling house contrary to Section 279(b) of the [Penal Code](#). When the applicant first appeared in court on the 21st August 2023, the charges were read to him and he pleaded guilty to the two counts. The Prosecution was not ready with the facts, and so the Court fixed the reading of facts on 23rd September 2023 before Court No.2. However, on 29th August 2023, the applicant was presented before the SPM Hon. Paul Biwott and this is what the record reads:
 12. 29/08/23
Coram: Before Hon. P. Biwott (SPM)
C/P- Ian for State
C/A- Abdi/ Faith
Accused called: Present

Prosecution: Facts. On 15th August 2023 at 3.00 a.m. the complainant locked his door and went away. On return found window dug and intruder entered, stole TV and smart phone. Community police patrol arrested accused with items. He was booked and now charged. Receipts for stolen items exhibit 1. That is all.

Accused: Facts correct

Court: Guilty on own plea convicted.

Biwott SPM

Prosecution: no previous report.

Accused on mitigation: Pardon me. I am 29 years old.

Court- Mitigation of 1st Offender record considered. Burglary needs deterrence. I sentence accused to serve 4 years imprisonment.

R/A 14 days

Biwott SPM

Order: recovered items be released to the Complainant.

Biwott SPM
 13. The above is a true account of what happened before the trial court. Despite facts being availed and read out to the applicant eight (8) days after the plea had been taken, the applicant was never reminded of the charges.



14. The Applicant was charged with two distinct counts of burglary contrary to section 304(2) of the [Penal Code](#), and stealing in a dwelling house contrary to section 279(b) of the [Penal Code](#). A perusal of the facts stated does not reveal what items were found with the applicant. They only talk of receipts for the stolen items which were marked as Exhibit 1.

Count 2 in the charge sheet mentions the stolen items as:
One amplifier
One USB of 32GB
Neon Kicker Mobile Phone

On the other hand, the facts read out in Court to the accused indicated that the items stolen were:
TV
Smart Phone

The receipt and not receipts produced as Exhibit 1 shows the items purchased by Charles Nyanducha Moreka on 15th March 2022 to be:
Amplifier
USB 32GB
Neon Kicker

15. The question that one asks is what indeed was stolen by the applicant, and what were the allegedly recovered items which were released to the complainant? The stated facts in court never mentioned any recovered items.
16. Upon further perusal of the record, I find that the Learned Trial Magistrate sentenced the applicant on only one count and yet he faced two counts. He mentions burglary meaning he sentenced him on the 1st count only.
17. There is a letter to the SPM's Court Ogembo dated 15th August 2023 and received at the criminal registry the same day. The letter was by the complainant herein. In the letter he indicated that he had elected to forgive the applicant. The letter was placed before the SPM who issued a P.O. for 29th August 2023 and I believe that's how the applicant was produced in Court on the said date. The complainant was directed to appear before the Court with his I.D. card.
18. The record of 29th August 2023 does not reveal anywhere the presence of the Complainant, Charles Nyanducha Moreka. It does not even show that the Court called out the Complainant's name and he was found to be absent.

I am satisfied that the main reason for the applicant's admission of the charge was the complainant's word that he had forgiven him.

19. I have reviewed all the circumstances of this case alongside the shortfalls I have pointed out above. The applicant is actually not denying the fact of theft, of items of the complainant. There may be some confusion on what was stolen but at least a common item is the phone. The value of the stolen items was placed at KShs.10,500/=. The items were recovered and even the complainant was ready and willing to forgive the applicant. They had talked and come to an agreement. Was four (4) years imprisonment the most appropriate sentence in the circumstances?
20. In a case of this nature and considering the objectives of sentencing as set out under paragraph 4.1 pg 15 of the Judiciary Sentencing Guidelines it would have been appropriate for the Learned Trial Magistrate to seek to know the character of the applicant. This would have been achieved through a Probation or Social Inquiry Report before passing sentence. This was not done.
21. The applicant was convicted and sentenced on 29th August 2023. He has served almost four (4) months of the sentence meted out on him. I am convinced he has learnt his lesson, and the need to keep himself out of crime. I therefore invoke this Court's revisional jurisdiction and set aside the four (4) years imprisonment sentence. I substitute it with a conditional discharge under Section 35(1) of the [Penal](#)



Code. The condition is that the applicant should not commit any criminal offence for a period of nine (9) months from today's date (22nd December 2023).

22. In the event that he dishonours the said condition, the order of discharge will be set aside and the original sentence reinstated less the period already served.
23. He will therefore be released forthwith unless otherwise lawfully held under a separate warrant.
24. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED AT KISII THIS 22ND DAY OF DECEMBER 2023.

H.I. ONG'UDI

JUDGE

In the presence of:

Mr. Arati for Mr. Chichi for the Applicant

Mr. Ochengo for the State

Otieno: Court Assistant

Applicant

