



**Ongadi v Republic (Criminal Revision E223 of 2021)
[2022] KEHC 11595 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11595 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E223 OF 2021**

**EKO OGOLA, J
MAY 26, 2022**

BETWEEN

LABAN ONGADI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

INTRODUCTION AND BACKGROUND

1. The applicant filed this application for review pursuant to the provisions of Sections 362,364 and 365 of the Criminal Procedure Code. He is inviting this court to call for the original file in Eldoret Magistrate Court Criminal Case Number 1202/2018 and satisfy itself as to the correctness, legality and propriety of the findings and order of sentence as recorded therein.
2. The factual matrix leading to this application is that the applicant was charged with the offence of burglary contrary to Section 304 (2) of the Penal Code and stealing contrary to Section 268 (a) of the Penal Code. The particulars of the offence were that on the night of 6th March 2018 at Matunda Shopping Centre in Likuyani Sub-County within Kakamega County jointly with others not before court, broke and entered the dwelling house of Charles Mwangi with intent to steal and did steal therein GLD Television set, StarTimes decoder, GLD DVD Player and cash Kshs 4,200/- all valued at Kshs 20,000/- the property of the said Charles Mwangi.
3. In the alternative, the applicant was charged with the offence of Handling stolen goods contrary to Section 322(1)(2) of the Penal Code. The particulars of the offence were that on the night of 6th March 2018 at Matunda Shopping Centre in Likuyani Sub-County within Kakamega County otherwise than in the course of stealing dishonestly retained a StarTimes decoder serial number 01801763591 having reason to believe it to be stolen goods.



4. The applicant pleaded not guilty to the charge and the matter was set down for hearing. The prosecution called four witnesses to prove its case.
5. PW1, the complainant Mr. Charles Mwangi testified on the 25th of July 2018 that on the 6th of March 2018 at around 5a.m, he left his house together with his wife Rahab Mwangi and locked the door to their house and went to the market. PW1 further testified that at around 7 pm the following day, they got back home from the market only to find their door open and a number of items including LG TV 21', video deck, StarTimes decoder and Kshs 2,200/- which was in his jacket stolen together with his driving license and some documents. He also noted that some items were scattered on the floor. His wife's handbag and other utensils and pots were also missing.
6. The witness further stated that they reported the matter at Matunda Police Station the next morning, and on the same day on the 10th of March 2018, he received a call from the police station and proceeded to the station where he was asked to check if any of the items on the table belonged to him. He positively identified his decoder and remote through his star times card number and was informed that a person had been arrested in connection with the burglary. On cross examination, PW1 stated that the decoder was at the police station after it was recovered from the applicant who was shown to him by the police officer. He however admitted that he didn't know the applicant and did not see him steal the items from his house.
7. PW2, Rahab Nyawira Mwangi, wife to PW1 corroborated the testimony of her husband PW1. On cross, she admitted to not knowing the applicant and further that she had never seen the applicant before. She also showed receipts that they had made for payments for the decoder.
8. PW3, PC Robert Too, the investigating officer from the Matunda Police Station, testified that PW1 reported the incidence on the 7th of March 2018 and he recorded PW1's and PW2's statement. It was his testimony that on the 10th of March 2018 while investigating another case of robbery with violence, he received information that the applicant herein had been found at the scene and had locked himself in the house. He testified that he proceeded to the applicant's house and arrested him. He also carried out a search on the person and house of the applicant and recovered several electronic items including a StarTimes decoder. PW3 further testified that at this point, he charged the applicant because PW1 had positively identified his decoder and card using payment details for the services.
9. On cross-examination, PW3 testified that other electronic items were recovered but were not in court since they do not involve the instant case.
10. After hearing the prosecution case, the learned trial magistrate placed the applicant on his defence. The applicant gave a sworn defence stating that he worked at a hotel in Matunda where he cooked mandazi. He testified that he was arrested while at work and taken to Matunda police Station and then to his home where he stated the police took everything from his house. Thereafter he was charged with the offence of burglary and stealing.
11. At the conclusion of trial, the learned trial magistrate found the applicant guilty of handling stolen goods contrary to Section 322 (1) (2) of the *Penal Code* and sentenced him to 7 years imprisonment.
12. It is this sentence that the applicant is challenging and not the conviction.
13. The applicant vide oral testimony in court on the 24th of November 2021 informed court that he has served 2 years in prison and seeks review of his sentence. Furthermore, he claims that the trial court while sentencing him failed to look at alternative options including fine and or probation. He also claims that the court failed to take into account the fact that he was a first-time offender and further, that he was never informed of the facts of the case in a language he understood.



14. The respondent opposed the application and submitted that taking into account previous criminal history/record of the applicant, the probation report and the sentencing policy guidelines, the sentence was correct.

Determination

15. On perusal of the application the affidavits and the submissions, it is my finding that the singular issue for determination herein is whether the applicant is entitled to the orders sought herein.
16. It is not in doubt that the High Court has supervisory powers over the Subordinate Courts and Tribunals.
17. Section 362 of the [Criminal Procedure Code](#) donates the power thus,

“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. Section 367 [Criminal Procedure Code](#) provides that;

“when a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed and the court to which the decision of order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith”.
19. The purpose of the revisionary powers of the High Court is to correct manifest irregularities or illegalities and give appropriate directions. See [Director of Public Prosecution v Joseph Murimi Mugweru](#) [2020] eKLR.
20. The case of [Joseph Nduvi Mbuvi v Republic](#) [2019] eKLR provides a persuasive authority on the revisionary jurisdiction of the High Court as provided under section 362 of the [Criminal Procedure Code](#). In that case, Odunga, J. opined as follows:

“A strict reading of section 362 of the [Criminal Procedure Code](#), however, does not expressly limit the High Court’s revisionary jurisdiction to final adjudication of the proceedings. The section talks of “any criminal proceedings”. “Any criminal proceedings” in my view includes interlocutory proceedings.

In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions....”
21. The issue that this court must therefore address is whether there was any irregularity that is manifest in the sentencing of the applicant. As I have noted above, the applicant is not challenging his conviction but the sentence and in particular, failure to be given alternative sentence such as a fine and or probation.
22. I have perused the record of proceedings in the lower court and note that after delivery of judgement on the 29th of July 2017, the learned trial magistrate asked the applicant whether he had anything to say



in mitigation. The applicant indicated that he had nothing to say. In this regard, the court ordered for a pre-sentence report which was availed by the probation office and was dated the 7th of August 2019.

23. The same was not favorable to the applicant. Quite the contrary, the report noted that the offender was not remorseful and that community and family members were bitter with the offender and are not willing to receive him back home. Furthermore, the report indicated that members of the public dared to lynch him if he is released on non-custodial sentence. It also emerged that the applicant was a repeat offender involved in other crimes and had been convicted before for house breaking and stealing by Eldoret Law Court vide file no 5249/15 and placed on one-year probation. However, a month later, he was convicted for a similar offence by the same court in 6674/15 and committed to Kamiti Youth Correctional and training centre for a mandatory period of 4 months. Based on the foregoing, the probation officer Lugari area recommended a custodial sentence. The probation officer especially noted that the offender is not remorseful and had not demonstrated willingness to reform. Finally, the report indicated that the community fear for their lives since the applicant operates with a dangerous group of thieves.
24. There is every indication to show that the learned trial magistrate considered the report and mitigation by the applicant. The record of proceedings does confirm that on the 7th of August 2019, the learned trial magistrate did consider the probation officers report and the mitigation by the applicant and circumstances of the offence prior to sentencing the applicant to 7 years imprisonment.
25. As regards the submission by the applicant that the learned trial magistrate did not consider alternative non-custodial measures, the provisions of Section 322 (1) and (2) of the Penal Code under which the applicant was charged and convicted, does not provide for an alternative form of sentence. In particular, Section 322 (1) and (2) provide: -
 322. Handling stolen goods
 - (1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.
 - (2) A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.
26. The above provision does not provide an option for a fine and or probation. Rather, the provision sets out a maximum sentence of 14 years but no minimum. This therefore gives discretion to the court to decide the appropriate sentence taking into account the circumstances of each case, whether the accused is a first-time offender, the gravity of the offence, criminal history of the offender, character of the offender, protection of the community among other factors.
27. The above factors are reflective of the Sentencing Guidelines and in particular Section 7 dealing with imprisonment. In particular, the sentencing guidelines are clear that a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence. Further, the sentencing guidelines recommend that non-custodial sentences be given to petty offences. In addition, the guidelines are clear that in deciding whether to impose a custodial or a non-custodial sentence, the court should take into account the following factors:
 1. Gravity of the offence: In the absence of aggravating circumstances or any other circumstance that render a non-custodial sentence unsuitable, a sentence of imprisonment should be avoided in respect to misdemeanors.



2. Criminal history of the offender: Taking into account the seriousness of the offence, first offenders should be considered for non-custodial sentences in the absence of other factors impinging on the suitability of such a sentence. Repeat offenders should be ordered to serve a non-custodial sentence only when it is evident that it is the most suitable sentence in the circumstance. Previous convictions should not be taken into consideration, unless they are either admitted or proved.
 3. Children in conflict with the law: Non-custodial orders should be imposed as a matter of course in the case of children in conflict with the law except in circumstances where, in light of the seriousness of the offence coupled with other factors, the court is satisfied that a custodial order is the most appropriate and would be in the child's best interest. Custodial orders should only be meted out as a measure of last resort.
 4. Character of the offender: Non-custodial sentences are best suited for offenders who are already remorseful and receptive to rehabilitative measures.
 5. Protection of the community: Where there is evidence that the offender is likely to pose a threat to the community, a non-custodial sentence may not be the most appropriate. The probation officer's report should inform the court of such information.
 6. Offender's responsibility to third parties: Where committing an offender to a custodial sentence is likely to unduly prejudice others, particularly vulnerable persons, who depend on him/her, a court should consider a noncustodial sentence if, in light of the gravity of the offence, no injustice will be occasioned. Information on the offender's responsibility to third parties should be substantiated.
28. In the instant case, I am satisfied that the trial magistrate did consider the report and that therefore the sentence was proper. That is, the applicant has not demonstrated that the learned trial magistrate committed any irregularity while sentencing him.
29. Accordingly, the applicant's application is unmerited and is hereby dismissed. The lower court's sentence is hereby affirmed.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 26TH OF MAY 2022.

E. K. OGOLA

JUDGE

