



**Gathimba v Republic (Criminal Revision E012 of 2022)  
[2022] KEHC 10292 (KLR) (Crim) (24 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10292 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL REVISION E012 OF 2022  
LN MUTENDE, J  
MAY 24, 2022**

**BETWEEN**

**IRENE WANJIKU GATHIMBA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Irene Wanjiku Gathimba, the Applicant, was charged with the offence of Stealing by servant contrary to Section 281 of the Penal Code, having stolen from Equity Bank the sum of Ksh.4,048,477.66/- between 7<sup>th</sup> April, 2017 and 4<sup>th</sup> May, 2017; and, Attempting to steal Ksh.790,000/- from the same bank on the 4<sup>th</sup> day of May, 2017.
2. She was taken through full trial, convicted of both counts and sentenced to pay a fine of Ksh.500,000/- and in default to serve eight (8) months imprisonment. A further order was made that she refunds Ksh.2,000,000/- to the Bank, a sum that was to be paid within four (4) months of the judgment and in default the bank was at liberty to institute proceedings to recover the sum.
3. By an application filed herein on the 31<sup>st</sup> January, 2022, the applicant seeks review of the sentence meted out. She expresses remorse and urges the court to grant her a non-custodial sentence on grounds that she is a young mother of children aged seven (7) and five (5) years respectively; and is a sole bread winner of her ailing parents.
4. The State through learned Counsel, Ms. Ntabo opposed the application. She urged that the sentence meted out was legal and proper as the lower court exercised discretion. That the applicant did not demonstrate existence of an illegality, impropriety or incorrectness.



5. The power of this court in its revisionary jurisdiction is founded under Section 362 of the *Criminal Procedure Code* (CPC), which enacts that:

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.

6. In the Malaysian case of *Public Prosecutor vs. Muhari bin Mohd Jani and Another* [1996] 4 LRC 728 at 734, 735, the court delivered itself thus:

“...The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion... This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.

7. Section 268(1) of the *Penal Code* provides thus:

- (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

8. Section 281 of the Penal Code provides that:

If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years.

9. Section 364(1) (2) of the CPC that is in respect of powers of the High Court on revision provides thus:

- (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—

.....

- (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. (Emphasis mine).

10. The court opted to impose a fine instead of meting out a custodial sentence. This is permissible in law. (See section 28(2) of the Penal Code). And it is apparent that the sentence imposed was lenient.

11. The applicant caused this court to call for the record of the lower court and on perusal of the record, it came to its knowledge that the trial court misdirected itself by not pronouncing the sentence on the second count which was a miscarriage of justice.



12. Section 389 of the *Penal Code* provides that:

Any person who attempts to commit a felony or a misdemeanor is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.

13. With regard to the first Count, the applicant failed to demonstrate an existence any irregularity that would call for revision.

14. As for the second count, the trial Court having opted to impose a fine on the first count, I do hereby impose a fine of Ksh.100,000/- and/ or in default, the applicant will be required to serve a sentence of one(1) year imprisonment, that will run consecutively with the sentence meted out on the first count which was effective from the 10<sup>th</sup> January, 2022.

15. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF MAY, 2022.**

**L. N. MUTENDE**

**JUDGE**

**IN THE PRESENCE OF:**

Applicant

Ms. Adhiambo for the State

Court Assistant - Mutai

