



REPUBLIC OF KENYA



KENYA LAW
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**Nyambura v Republic (Criminal Revision E037 of 2022)
[2022] KEHC 11666 (KLR) (Crim) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11666 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL REVISION E037 OF 2022**

CW GITHUA, J

JULY 27, 2022

BETWEEN

JOHN NJENGA NYAMBURA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant, John Njenga Nyambura, was convicted on his own plea of guilty in Milimani Chief Magistrate's Court Criminal Case No. E855 of 2021 in which he was charged with the offence of stealing by servant contrary to Section 281 of the Penal Code.
2. The particulars of the charge allege that on 1st November 2018, at Stone Code Mobile Phone Repair Shop at Kenya Cinema building along Moi Avenue within Nairobi County, being a servant of Josphat Karonji Kamau, the applicant stole the following mobile phones; one iPhone 6, two iPhone 7, two iPhone 4, one Infinix 602, one Infinix 600, one GioneeX1s, one LG G4 and one Samsung tablet phone all valued at KShs.480,000 and cash KShs.21,000 all valued at KShs.501,000, the property of Josephat Karonji Kamau, which came into his possession by virtue of his employment.
3. Upon his conviction, he was sentenced to serve 2 years imprisonment. He has now approached this court through the instant application seeking review of his sentence and praying that the same be substituted with a non custodial sentence on grounds that he was a first offender; that he was remorseful having stayed for four months in prison since his conviction; that he was the sole breadwinner for his family of one wife and child which was disintegrating due to his incarceration. He promised that if his application was successful, he will not engage in any criminal activity in future.
4. This court called for a pre-sentence report which was filed on 5th July, 2022. The report is not favourable to the applicant as according to the probation officer, the applicant was not genuinely remorseful and



was not suitable for a non custodial sentence. The report reveals that the applicant was not candid in his averments in support of his application as he had already separated from his family at the time he committed the offence and therefore, his claim that he was his family's sole breadwinner was false.

5. The report also contains the views of the victim of the offence who expressed anger and bitterness towards the applicant for the heavy financial loss he incurred as a result of the applicant's unlawful action which led to the closure of his phone business. The victim was opposed to sentence review and even threatened to revenge by harming the applicant if his prison term was revised and substituted with a non custodial sentence.
6. At the hearing, the applicant relied entirely on the depositions in his supporting affidavit. In her opposition to the application, learned prosecuting counsel Ms Chege urged the court to consider the views expressed by the victim and exercise its discretion judiciously in determining the application.
7. I have considered the application, the brief oral submissions made by the applicant and the learned prosecuting counsel as well as the presentence report. I have also read the original record of the trial court. Having done so, I find that the instant application invokes the revisional jurisdiction of the court which is donated by Section 362 as read with Section 364 of the *Criminal Procedure Code* which empowers this court to call for and examine the record of the lower court in criminal proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order made by the trial court or the regularity of any proceedings before the trial court.
8. In *Veerappa Pillai V Raman & Raman Ltd*, AIR 1952 SC 192 the Supreme Court of India had this to say regarding this court's supervisory jurisdiction:

“.... The supervisory powers is obviously intended to enable the High court use them in grave cases where the subordinate tribunal or bodies or officer acts wholly without jurisdiction or excess of it or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in them or there is an apparent error on the face the record and such action, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide and large as to enable the High Court to convert itself into a court of appeal and examine for itself the correctness of the decision impugned and decide what the proper view on the order be made.....”
9. It is trite that as a general rule, sentencing is dependent on the trial court's discretion. This court in its supervisory jurisdiction whether appellate or revisional jurisdiction cannot interfere with a sentence passed by the trial court unless it is satisfied that the sentence was either illegal or that in passing the sentence, the court considered irrelevant or extraneous factors or failed to consider relevant ones or that the sentence was manifestly harsh and excessive in the circumstances of the case. See: *Macharia V Republic*, [2003], KLR 115.
10. In this case, the applicant was convicted of the offence of theft by servant contrary to Section 281 of the *Penal Code* which attracts a maximum sentence of seven years imprisonment.

The trial court's record shows that in sentencing the applicant to two years imprisonment, the learned trial magistrate considered the nature of the offence and the circumstances in which it was committed.
11. It is clear from the facts of the case which the applicant admitted before he was convicted on his own plea of guilty that he abused the trust and generosity extended to him by the complainant who had offered to accommodate him in his house and offered him a job. It is also clear that the items stolen from the complainant which were valued at KShs.501,000 were not recovered.



12. Though according to the trial court's record the court was invited to treat the applicant as a first offender, it is my view that the learned trial magistrate did not err in failing to grant him a non custodial sentence given the circumstances in which the offence was committed and the sentence prescribed for it by the law. I find nothing on record to indicate that the learned trial magistrate considered extraneous factors in passing the impugned sentence or failed to consider relevant ones and I cannot say that the sentence was manifestly harsh and excessive. It is my finding that the sentence was lawful and well deserved.
13. Given the foregoing, I am satisfied that the instant application lacks merit and it is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2022.

C. W. GITHUA

JUDGE

In the presence of:

Applicant present in person

Ms Oduor for the respondent

Ms Karwitha: Court Assistant

