



**Gichui v Republic (Criminal Revision E139 of 2022)
[2022] KEHC 14729 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14729 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E139 OF 2022
GL NZIOKA, J
OCTOBER 26, 2022**

BETWEEN

BERNARD MWANGI GICHUI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was charged the Senior Principal Magistrate’s Court at Engineer vide Criminal Case No. E3303 of 2021, with the offence of having suspected stolen property contrary to; section 323 of the *Penal Code*. The particulars of the charge are as per the charge sheet.
2. He pleaded guilty and was sentenced five (5) years imprisonment. However, he now seeks for sentence review vide a notice of motion application filed in court on; 12th September 2022 and prays that, the custodial sentence herein, be reduced or converted to a non-custodial sentence.
3. He relies the affidavit in support thereof and a document entitled as “the memorandum of sentence review” in which he states that: -
 - a. That, I am a first offender.
 - b. That, I pray that this Honourable court allow me to spend the remaining period of my sentence under Community Service Order (C.S.O) or set me at liberty.
 - c. That, I am remorseful of my offence and I have learnt to be a law-abiding citizen.
 - d. That, I am from a poor family background.
 - e. That, I did not give proper mitigation during my sentencing and hence would like to present during the hearing and determination of this application.



- f. That, I am the sole breadwinner of my family and my incarceration has placed them in a very difficult situation.
 - g. That, I humbly beg this honourable court for leniency and reduce my (5) year sentence.
 - h. That, I am not appealing against sentence and conviction but applying for a review of sentence.
4. The Court directed that, the Respondent to file a respond se to the application, the parties file submissions and the Probation Officer file a pre-sentence report. However, none of the said were filed.
 5. Be that as it were, the revisionary power of the High Court is provided for is under sections 362 of the [Criminal Procedure Code](#) which states as follows:

“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. Further the provisions of; section 364 of the [Criminal Procedure Code](#) states as follow: -
 - (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—
 - (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
 - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
 - (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.
 - (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
 - (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
 - (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”
 7. It is clear from the above provisions that, the Court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. The objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be involved where the decision under challenge is; grossly onerous, there is no compliance with the provisions of the law,



or the finding re-ordered are based on no evidence, or material evidence is ignored or judicial discretion is exercised arbitrarily or perversely.

8. Further, in exercise of revision powers, it is not the responsibility of the High Court to take into account the benefit of the evidence, it merely has to see if the provisions of the law have been properly adhered to by the court whose order is the subject of the revision, as held in; *Major S.S Khanna vs Brig F.J Dillon* 1964 AIR 497, 1964 SCR (4) 409).
9. It is also noteworthy therefore that, the revision jurisdiction does not allow the court to interfere and correct errors of facts, or of law when the order is within the jurisdiction of the subordinate court; even if the order is right or wrong, or in accordance with the law, unless it exercised its jurisdiction illegally or with material irregularity. Reference is made to the cases of; *Wesley Kiptui Rutto & Another vs Republic* [2017] eKLR, *Republic vs Everlyne Wamuyu Ngumo* (2016) eKLR, *Public Prosecutors vs Muhavi Bi Mond Jani & Another* 1996 4 LRC 728, 743-5, DPP vs Samuel Kimuche.
10. Be that as it may. I have considered the application I find that, the offence with which, the applicant was charged with and convicted of is provided for under section 323 of the *Penal Code*, which sections states as follows: -

“Any person who has been detained as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code (Cap. 75) and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanour.”

11. However, although no express sentence is provided for under the aforesaid provision, section 36 of the *Penal Code* makes provision for a general punishment and states as follows: -

“When in this Code no punishment is specially provided for any misdemeanour, it shall be punishable with imprisonment for a term not exceeding two years or with a fine, or with both.”

12. Thus, for the offence herein the applicable and appropriate sentence is an imprisonment term for a period not exceeding two (2) years, with a fine or both.
13. However, the sentence meted herein is an imprisonment term for five (5) years, which is this incorrect, illegal and improper and therefore I exercise the revisionary powers under section 362 and 364 of the *Criminal Procedure Code* set it aside and substitute it with a custodial sentence of two (2) years' imprisonment from the date of sentence,
14. It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 26TH DAY OF OCTOBER, 2022

GRACE L NZIOKA

JUDGE

In the presence of:

Applicant in person

Ms Maingi for the Respondent

Ms Ogutu; Court Assistant

