



**Njeri & another v Republic (Criminal Revision E134 & E135 of 2022  
(Consolidated)) [2022] KEHC 14730 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14730 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CRIMINAL REVISION E134 & E135 OF 2022 (CONSOLIDATED)**

**GL NZIOKA, J  
OCTOBER 26, 2022**

**BETWEEN**

**FRANCIS MUNGAI NJERI ..... 1<sup>ST</sup> APPLICANT**

**PETER KINYANJUI KIMANI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicants were arraigned before the Senior Principal Magistrate’s Court at Engineer charged vide Criminal Case No E1102 of 2022, with the offence of; stealing stock contrary to section 278 of the *Penal Code*. The particulars of the charge are as per the charge sheet.
2. The applicants pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the trial court in a judgment dated; August 30, 2022 found that him guilty as charged, convicted him and was sentenced him to pay a fine of, Kshs 200,000 and in default to serve three (3) years imprisonment.
3. However, the applicants now seek for sentence review a notice of motion application filed in court on, September 12, 2022, in which he prays that the custodial sentence herein, be reduced or converted to a non-custodial sentence.
4. The application is supported by a document entitled “memorandum of sentence review” in which he outlines mitigating grounds as here below reproduced: -
  - 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 (CSO) 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 three (3) year sentence.
  - h. That, I am not appealing against sentence and conviction but applying for a review of sentence.
5. The application was served and the respondent accorded an opportunity to file a response but no response was filed and neither was a probation report filed as ordered.
6. Be that as it were, I have considered the application and note that, the law that governs the revisionary power of the High Court is provided for 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.”

7. Further the provisions of; section 364 of the [Criminal Procedure Code](#) states as follow: -

“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.”
8. 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.
9. It therefore follows that, 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 SS Khanna vs Brig FJ Dillon* 1964 AIR 497, 1964 SCR (4) 409).
10. 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*.
11. To revert back to the matter herein, I note that, the applicants were charged and convicted of the offence under section 278 of the *Penal Code*, which sections states as follows: -
- “If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, wether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.”
12. The sentence meted upon the applicant is a fine of; Kshs 200,000 in default serve three (3) years, imprisonment. The sentence is therefore within the limits provided for under the law and is not illegal, incorrect or improper. In fact, it is far below the maxim sentence and it is surprising that there was no application for enhancement.
13. However, on the default sentence is subject to the provisions of section 28 of the *Penal Code* provides that: -
- (1) Where a fine is imposed under any law, then in the absence of express provisions relating to the fine in that law the following provisions shall apply—
- (a) where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive;
- (b) in the case of an offence punishable with a fine or a term of imprisonment, the imposition of a fine or a term of imprisonment shall be a matter for the discretion of the court;
- (c) in the case of an offence punishable with imprisonment as well as a fine in which the offender is sentenced to a fine with or without imprisonment, and in every case of an offence punishable with fine only in which the offender is sentenced to a fine, the court passing sentence may, in its discretion—



- (i) the offender shall suffer imprisonment for a certain term, which imprisonment shall be in addition to any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of sentence;
- (2) In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act (cap 91) ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale—

Amount	Maximum period
Not exceeding Sh 500 .....	14 days
Exceeding Sh 500 but not exceeding Sh 2,500 .....	1 month
Exceeding Sh 2,500 but not exceeding Sh. 15,000 ...	3 months
Exceeding Sh 15,000 but not exceeding Sh. 50,000 ...	6 months
Exceeding Sh. 50,000 .....	12 months

14. From the foregoing the default period of three (3) years, imprisonment, meted out is unlawful and is subject to review under section 362 and 364 of the *Criminal Procedure Code* and I hereby set it aside and substitute it with the default sentence of a period of twelve (12) months.

15. It is so ordered.

**DATED, DELIVERED AND SIGNED ON THIS 26<sup>TH</sup> DAY OF OCTOBER, 2022.**

**GRACE L NZIOKA**

**JUDGE**

**In the presence of;**

Applicant in person

Ms Maingi for the Respondent

Ms Ogutu: Court Assistant

