



REPUBLIC OF KENYA



**Muthama v Republic (Criminal Review E388 of 2021)
[2022] KEHC 16054 (KLR) (Crim) (30 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16054 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CRIMINAL
CRIMINAL REVIEW E388 OF 2021
LN MUTENDE, J
NOVEMBER 30, 2022**

BETWEEN

NICHOLAS MUTISO MUTHAMA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Nicholas Mutiso Muthama, the Applicant was jointly charged with another, with the offence of stealing contrary to Section 268(1) as read with Section 275 of the *Penal code*.
2. They stole a mobile phone make F1 Techno valued at Ksh. 15,000/-, which was recovered and released to the owner.
3. Both accused persons admitted having committed the offence at the outset. The applicant was sentenced to serve three(3) years imprisonment while his co-accused was granted a conditional discharge. He was not required to commit any other offence within a duration of two (2) years.
4. Through an undated application filed herein on 2nd November, 2021, the applicant seeks review of sentence. The application is premised on grounds that the applicant is the only surviving child of his mother who suffers from chronic illness.
5. In an affidavit sworn by the applicant in support of the application, he avers that he is remorseful for his actions. That while in prison he has trained in health and financial management, drugs and substance abuse, leadership, sanctuary and painting. That his mother suffers from diabetes and she depends solely on him. He seeks review of sentence so as to be under probation supervision, and/or the sentence to be reduced to six (6) months imprisonment.
6. At the hearing of the application the applicant reiterated what is captured in the application.



7. The application is opposed by the State/Respondent. Through Ms. Chege, learned Prosecution Counsel, the respondent urges that in sentencing the applicant, the court noted that he was not remorseful. That the penalty provided for the offence is three (3) years imprisonment, therefore, there is nothing illegal, improper, incorrect warranting intervention of the court. That no error exists on record. However, she argued that since the applicant pleaded guilty and saved court time, and the phone having been recovered, the case was suitable for decongestion of prison.
8. I have considered rival arguments of both parties. This court is seized of revisionary jurisdiction to rectify systematic discrepancy. Article 50(2)(q) of the Constitution provides thus:

Every accused person has the right to a fair trial, which includes the right—
If convicted, to appeal to, or apply for review by, a higher court as prescribed by law.
9. The stated supervisory jurisdiction is provided for by the provisions of Section 362 of the Criminal Procedure Code(CPC) that enacts 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.
10. Although the Constitution is clear as it provides for an option to seek review to a superior court, a jurisdiction that is invoked in a wider and larger sense; Looking at what is provided by Section 362 of the CPC, the jurisdiction of the superior court is confined to dealing with a situation where the order/ finding/sentence of the court is incorrect, illegal, improper or irregular. This means that a superior court should not vary an order/finding of the lower court if an appeal lies to the superior court.
11. As correctly pointed out by the learned Prosecution Counsel, the sentence imposed was within the law. In order for a superior court to interfere with a sentence meted out by a subordinate court the sentence must have taken into account irrelevant factors or wrong principles. In the case of *Shadrack Kipkoech Kogo vs. Republic*, Eldoret Criminal Appeal No. 253 of 2003, the Court of Appeal stated that:

“ Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka – vs- R.* (1989 KLR 306)”
12. It is the principle of the law that when a court of law is exercising its judicial authority, it has to ensure justice is done (See Article 159 (2) (a) of the Constitution). Section 275 of the Penal Code provides thus:

Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.
13. The Applicant herein was a first offender who saved judicial time by pleading guilty at the outset. The stolen item was recovered. It would have been imperative to call for a Probation Officer’s report to establish circumstances in which the twenty-nine (29) years old offender committed the offence.



14. In exercise of my supervisory duty, I did call for a report which was filed following a social inquiry. According to the report, it was established that the offender has a wife and two (2) children who solely depend on him and has reformed following rehabilitative programs in prison.
15. The applicant has no criminal past according the report, he is a young, adult aged twenty-nine (29) years who was not a habitual offender, the victim of the offence was not injured as the offence was non-violent, therefore, the maxim sentence for the offence was not called for.
16. In the circumstances I find the sentence to have been excessive, which I set aside and substitute with a period of eighteen (18) months imprisonment. The sentence will be effective from the 14th day of September, 2021.
17. It is so ordered.

WRITTEN, DATED AND SIGNED BY HON. LADY JUSTICE

L. N. MUTENDE, THIS 24TH DAY OF NOVEMBER, 2022.

L. N. MUTENDE

JUDGE

RULING DELIVERED BY HON. JUSTICE D.O.

OGEMBO ON THIS 30TH DAY OF NOVEMBER, 2022.

D. O. OGEMBO

JUDGE

