



**Makokha v Republic (Criminal Revision E249 of 2022)
[2022] KEHC 16488 (KLR) (28 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16488 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL REVISION E249 OF 2022**

**DK KEMEL, J
NOVEMBER 28, 2022**

BETWEEN

ISAACWANYAMA MAKOKHA APPLICANT

AND

REPUBLIC RESPONDENT

*(Being an application for review of sentence meted in Bungoma
Chief Magistrate's Court Criminal Case No E948 of 2022.)*

RULING

1. Isaac Wanyama Makokha, the applicant herein, has approached this court through an application seeking review of his sentence. He had been convicted in Bungoma Chief Magistrate's Court Criminal Case No E 948/2022 for the offence of stealing contrary to section 268 (1) of the *Penal Code*. The trial court sentenced him to serve two years' imprisonment.
2. The application is premised on grounds that the applicant is remorseful and won't repeat the offence. He prays for a non-custodial sentence so as to be able to continue with his education.
3. The lower court record reveals that the applicant was charged with the offence of stealing contrary to section 268 (1) as read with section 275 of the *Penal Code*. The particulars of the offence were that on June 28, 2022 at around 10.00am at Nachara Village in Bumula Sub-County within Bungoma County he stole one mountain bike, 240 Kg of maize and three pairs of shoes all valued at Kshs 44, 600/=, the property of Rachel Makokha. He also faced an alternative count of handling stolen goods contrary to section 322(1) of the *Penal Code* with the particulars being that on the July 10, 2022 at around 4.00pm at Khelela village in Bumula Sub county within Bungoma County, otherwise than in the course of stealing, unlawfully retained one mountain bike make Next and one pair of open shoes all valued at Kshs 15, 200/ the property of Rachel Makokha. Upon his arrest, the recovered items were released to the complainant.



4. The applicant pleaded guilty to the main charge at the outset and was heard on his mitigation where he claimed that his mother had passed on while his father remarried and that he remained with his brothers who required something to eat. The court noted the mitigation and considered that he was a first offender. It also noted that the cases of theft had been rampant in the area and were being committed by young men. As a result, the court sentenced him to serve two years' imprisonment.
5. The prosecution opposed the application and argued that the sentence was legal and that there was no reason to warrant revision.
6. The applicable principle in interfering with the sentence of the trial court by an appellate court was settled in the case of *Ogolla s/o Owuor* (1954) EACA 270, where the court stated as follows:

“The court does not alter a sentence unless the trial judge has acted upon wrong principles or overlooked some material factors.”

7. This jurisdiction of the court to review has been invoked under section 362 of the [Criminal Procedure Code](#) which states 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.

The revision sought by the applicant herein is not one contemplated under section 362 of the [Criminal Procedure Code](#) but one intended to interfere with the sentence pursuant to the applicant's mitigation. Indeed, the applicant is not challenging the conviction or sentence imposed before the trial court as confirmed by his affidavit and in his oral submissions that he confirms having admitted the charge and is remorseful for the offence. That being the position, this court's duty is to consider whether the sentence imposed is harsh or excessive so as to warrant for a revision of the same.

8. The charge of stealing is enacted under the provisions of section 268 of the [Penal Code](#) and the corresponding punishment is under section 275 of the [Penal Code](#) that provides as follows:

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.

9. The applicant was sentenced to serve two years' imprisonment which was within the law. The fact that the applicant pleaded guilty at the outset saved the courts judicial time; he was a first offender, and that the stolen property was recovered.
10. In the case of [Stanley Kiprono Bett v Republic](#) [2022] eKLR where the accused stole 1000/- Kshs and 28 metal rods from his employer. Kamau J held that:

“.... Bearing in mind that the Appellant breached the trust that had been bestowed upon him by his employer by stealing the very goods that he had been employed to protect from bad elements in the society, it was the considered opinion of this court that the sentence of two (2) years imprisonment was not excessive for such an offence.



Further that:

“25. However, this court took the view that as the Appellant pleaded guilty to offence at the first instance thus saving the court valuable time in going through the rigors of a full trial and he was a first offender, he ought to have benefited from a lower sentence.”

The court substituted the two years’ imprisonment meted out with nine months’ imprisonment.

11. The offence of stealing contrary to section 268(1) carries a sentence of three years’ imprisonment. I find the sentence of two years’ imprisonment imposed by the learned magistrate was lenient as the same is neither harsh nor excessive. The applicant requires custodial rehabilitation so as to be a good citizen and able to fend for himself legally without resorting to enjoying the sweat of other members of the society. Hence, the sentence imposed is appropriate for the said rehabilitation.
12. As noted by the trial court, there is a rampant increase of theft across the country in general by young men. This sentence would serve as an example to others who are also contemplating to venture into this line of ‘hustle’. It was disheartening for the applicant to break into the house of the complainant and steal from therein yet he ought to eat from the sweat of his brow but not to enjoy the sweat of other people.
13. The application does not fit in the provisions of section 362 of the *Criminal Procedure Code* as the applicant is only seeking for revision of his sentence and not challenging the legality or regularity of the lower court proceedings and sentence. In any event, the applicant duly pleaded guilty to the charge and that during his oral submissions herein, he confirmed that indeed he had admitted the charge and now seeks to be pardoned.
14. The upshot of the foregoing observations is that the applicant’s application for revision of sentence lacks merit. The same is dismissed.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF NOVEMBER, 2022.

D KEMEI

JUDGE

In the presence of:

Isaac Wanyama Makokha, applicant.

Miss Omondi, respondent.

Kizito, Court Assistant.

