



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. E013 OF 2020

LENGES LONGONYANI.....APPLICANT

VERSES

REPUBLIC.....RESPONDENT

*(Being Review from Proceedings and Judgment in Criminal Case No. 1306*

*Of 2019 at the Chief Magistrate Court at Makadara by Honourable*

*Stephen Jalang – PM on 29th April 2020)*

RULING

1. **Lenges Longonyani**, the Applicant, by way of Notice of Motion seeks review of a two (2) year sentence imposed for the offence of stealing stock.
2. The Application is supported by an affidavit deposed by the Applicant where he avers that he has been in custody for a duration of one (1) year from the time he was incarcerated; he is the sole bread winner of his elderly parents, having learnt a lesson, he will not commit another offence.
3. In his oral application, the applicant urged that the period he was in custody during trial was not taken into consideration while being sentenced.
4. The State/Respondent through learned counsel, Ms. Chege opposed the application on grounds that the penal section for the offence for which the Applicant was convicted provides for an imprisonment term of fourteen years (14) years which makes the sentence meted out proper.
5. The Applicant was found guilty of stealing nine (9) goats valued at Ksh.56,000/- having contravened **Section 278** of the **Penal Code** that provides follows:

*“...Stealing stock*

*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...”*

6. The power of this court to grant orders sought is enshrined in **Section 362** of the **Criminal Procedure Code** that provides 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.”*

7. In the case of **Bernard Kimani Gacheru Vs. Republic, Cr. App No. 188 of 2000** the Court of Appeal stated thus:

*“...It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive i the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”*

8. The trial court that had the discretion of imposing sentence took into consideration the nature of the offence and mitigating factors stated by the Applicant prior to meting out the sentence.

9. The Applicant also complains that the period he was in custody during trial was not taken into account. **Section 333(2)** of the **Criminal Procedure Code** provides thus:

*“...Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.*

*Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.....”*

10. In the case of *Ahmad Abolfathi Mohammed & Another Criminal Appeal No.135 of 2016 (unreported)* the Court of Appeal held thus:

*“By dint of Section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.”*

11. The trial court was required to specifically state that it had considered the period the Applicant was in custody which was not the case herein. But, looking at what the Applicant stole and the sentence meted out which was lenient, I have no reason to interfere with the discretion of the trial court.

12. From the foregoing, the application fails and, is accordingly, dismissed.

13. It is so ordered.

**DATED, SIGNED, AND DELIVERED VIRTUALLY, THIS 25TH DAY OF MARCH,2021.**

**L .N. MUTENDE**

**JUDGE**