REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL REVISION NO. E004 OF 2021

EMMANUEL MUSUNGU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From the sentence passed in Criminal Case No. E168 of 2021 in the Chief Magistrate's Court at Eldoret by Hon. L. Kassan, CM on 14 January 2021)

RULING ON REVISION

[1] The Applicant herein, **Emm anuel Musungu**, was charged with the offence of burglary contrary to **Section 304(2)** of the **Penal Code,** and stealing contrary to **Section 279 of the Penal Code**. The particulars thereof were that on **8 January 2021** at Musioma Village in Koromait Sub-location Chekalini Location in Lugari Sub-county within Kakamega County, jointly with others not before the court, the applicant broke and entered the dwelling house of Eunice Nyamwita Mwinami with intent to steal therein and did steal from therein 10 litres cooking oil, assorted clothing, thermos flask, frying pan, a pair of slippers, shopping basket, 2 plates, 3 ducks and 3 chicken, all valued at **Kshs. 20,000/=** the property of the said **Eunice Nyamwita Mwinami**.

[2] In the alternative, the applicant was charged with handling stolen property contrary to **Section 322(1) and (2)** of the **Penal Code**; in that, on **8 January 2021** at Musioma Village in Koromait Sub-location Chekalini Location in Lugari Sub-county within Kakamega County, otherwise than in the course of stealing, the applicant dishonestly retained 1 litre cooking oil, one red trouser, a thermos flask, a frying pan, a pair of slippers, a shopping basket and two plates, knowing them to be dishonestly acquired.

[3] The applicant admitted the allegations against him and was accordingly convicted on his own plea of guilty and sentenced to 2 years' imprisonment. Being aggrieved by his sentence, he filed the instant application for review on **20 January 2021**, praying for orders that:

> **[a]** the Court be pleased to allow the hearing of his application on priority basis;
>
> **[b]** the Court be pleased to allow his application and be granted a fine as an alternative penalty;

[4] The application was filed pursuant to **Article 50(2)(q)** of the Constitution and **Sections 362, 364(1)(b) and 365** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**. It is supported by the applicant's affidavit sworn on **20 January 2021** filed therewith, in which he deposed that he is a first offender and is remorseful for his offensive actions. He added that he has accepted the responsibility for his own actions and is only seeking to be granted an alternative of fine to safeguard his deteriorating health conditions. He further deposed that he is suffering from asthma and diabetes and risks falling victim of the COVID-19 virus which has been reported at the Eldoret G.K. Prison.

[5] Pursuant to its supervisory mandate under **Article 165(6) and (7)** of **the Constitution,** the Court is empowered to call for and examine the records of the proceedings of subordinate courts and tribunals for correctness, legality or propriety. In particular, **Section 362** of the **Criminal Procedure Code** provides that:

> **"The High court may call for and examine the records 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] In the same vein, **Section and 364(1)(b)** of the **Criminal Procedure Code** stipulates that:

> **"In the case of a proceeding in 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 ... in the case of any other order other than an order of acquittal, alter or reverse the order."

[7] Accordingly, the lower court record was called for and availed for perusal. The typed copy of the proceedings availed, though indicated as proceedings in **Republic vs. Rachel Wairimu**, bear the correct lower court file number and the actual proceedings undertaken by the Chief Magistrate's court in **Criminal Case No. E168 of 2020: Republic vs. Emmanuel Musungu** for **14 January 2021**. Hence, the lower court record confirms that the substance of the charge and every element thereof was stated by the court to the applicant in Kiswahili language; and that, having understood the same, he expressly admitted it, whereupon a plea of guilty was entered. The facts were then stated to the applicant in Kiswahili language which he admitted to be true and correct. Consequently, the applicant was convicted on his own plea of guilty and accordingly sentenced to imprisonment for two years.

[8] The plea-taking was undertaken in accord with **Section 207** of the Criminal Procedure Code and the guidelines laid down in the case of Adan vs. Republic [1973] E.A. 445. Indeed, the Applicant did not impugn the plea-taking process. He questioned the propriety of the sentence imposed on him; and I would agree that, in that respect, he has a valid complaint. The fact that he had no previous convictions; and that most of the stolen items were recovered ought to have counted for something. It is manifest therefore that no thought was given to the mitigating factors that played out in the accused favour; and therefore that the sentence was disproportionate to the offence. Moreover, there is no indication that the applicant was given an opportunity to express himself in mitigation.

[9] In the Judiciary Sentencing Policy Guidelines it is proposed that in sentencing, a three-step approach be employed, firstly, to determine the sentencing options provided by the specific statute creating the offence; and secondly, to determine whether a non-custodial or a custodial order would be the most appropriate order in the circumstances and, thirdly, if custodial sentence is the most appropriate option, to determine the duration of the custodial sentence taking into account the mitigating and aggravating circumstances. Thus, t*he suggestion given in* ***Paragraph 23.9*** *is that:*

> **"The first step is for the court to establish the custodial sentence set out in the statute for that particular offence. To enable the court to factor in mitigating and aggravating circumstances/factors, the starting point shall be fifty percent of the maximum custodial sentence provided by statute for that particular offence. Having a standard starting point is geared towards actualizing the uniformity/impartiality/consistency and accountability/transparency principles set out in paragraphs 3.2 and 3.3 of these guidelines. A starting point of fifty percent provides a scale for the determination of a higher or lower sentence in light of mitigating or aggravating circumstances."**

[10] And, at **Paragraph 22.12** of the **Sentencing Policy Guidelines**, it is recommended that:

> **"To pass a just sentence, it is pertinent to receive and consider relevant information. The court should, as a matter of course, request for pre-sentence reports where a person is convicted of a felony as well as in cases where the court is considering a non-custodial sentence…Whilst the recommendations made in the pre-sentence reports are not binding, the court should give reasons for departing from the recommendations."**

[11] Thus, taking all the foregoing factors into account, including the fact that the applicant has been in custody for about 4 months, it is hereby ordered that the sentence of two years' imprisonment imposed on him be and is hereby reduced to the period served; and that he be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH DAY OF MAY 2021

OLGA SEWE

JUDGE