



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

MISCELLANEOUS CRIMINAL APPLICATION NO. E078 OF 2021

HENRY OMONDI OLOO.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. The Applicant, **Henry Omondi Oloo**, was charged alongside two others in ***Criminal case No. 2314 of 2018*** and ***Criminal Case No. 2312 of 2018*** in the Chief Magistrate's Court at Naivasha. In both cases, they faced a principal charge of shop breaking and committing a felony contrary to **Section 306(a)** of the **Penal Code** and an alternative charge of handling stolen goods contrary to **Section 322(1)** of the **Penal Code**. The Applicant was the 2nd Accused in both cases and together with the 1st Accused therein, they were convicted of the principal charge on their own plea of guilty and sentenced to serve four (4) years imprisonment in each case on 17th October, 2018.
2. The Applicant has now approached this court vide a Chamber Summons application filed on 19th March, 2021 in which he seeks for reduction of his sentence; or for the sentences to be made to run concurrently; or to be set at liberty; or to be placed on Community Service Orders (CSO) for the remaining period of his sentence.
3. The application is supported by a self-sworn affidavit in which he has given a background of the cases in the trial court. He also filed a document titled Memorandum of Sentence Review in which he has tendered fresh mitigation claiming that he did not give a proper one during his sentencing in the trial court. He avers that he is a first offender and is remorseful for the offence as he has learnt to be a law abiding citizen. He states that he comes from poor family background. Further, he avers that he is the sole breadwinner of his family and his incarceration has placed them in a very difficult situation. Lastly, he urges the court for leniency in reviewing his sentence and promises to abide by all the conditions that the court may deem fit to give.
4. The application was canvassed before this court on 10th November, 2021. The Applicant appeared in person and learned State Counsel, Ms. Maingi was for the Respondent. The Applicant submitted that he has served three (3) years so far. On the other hand, Ms. Maingi stated that the matter was before Mwongo J. in May 2021 and the learned judge declined to issue a revision of sentence. She however noted that the Applicant's co-accused was sentenced to probation for three years hence there was a big discrepancy in sentencing which this court should know about.
5. The court record reflects that the Applicant has previously sought a revision of the sentence imposed in ***Criminal case No. 2314 of 2018*** vide ***Naivasha High Court Criminal Revision No. 4 of 2021*** and Hon. Justice Mwongo found that it was not a suitable case for revision for the reasons stated in his decision of 21st May, 2021. The record also shows that the Applicant has previously sought a revision of the sentence meted out in ***Criminal Case No. 2312 of 2018*** vide ***Naivasha High Court Criminal Revision No. 3 of 2021*** and again the learned Mwongo, J in his decision of 22nd July, 2021 found that it was similarly not a suitable case for revision.
6. With respect to the latter revision, being **Revision No. 3 of 2021**, the same was on a substantive application and not made under any special circumstances. The decision made therein was made by a court of concurrent jurisdiction. I cannot revisit such a decision as doing so would be tantamount sitting on an appeal of a court of concurrent jurisdiction which is unlawful. I find that there is nothing more that this court can do regarding the present application. I advise the Applicant to stop filing any further application(s) of revision and instead seek appeal in the Court of Appeal.
7. As regards **Revision No. 4 of 2021**, it is notable that the same was done under special circumstances, being under the Community Service Orders Act. Learned Mwongo, J in declining to issue a revision said: ***"The accused was sentenced to 4 years imprisonment. This does not fall under CSO Act."***
8. **Section 3 of the CSO Act** provides for the cases suitable for placement under CSO, namely where a person is convicted of an offence

punishable with:-

a) With imprisonment for a term not exceeding three years, with or without the option of a fine; or

b) Imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate.”

9. The fact that the Revision was under such special circumstances and the judge having made a finding that the case was not suitable for CSO, means that it did not bar the Applicant from filing for a revision under the Criminal Procedure Code. With this mind, I find that the Applicant is properly before the court as regards revision in **Criminal Case No. 2314 of 2018**.

10. In this case, the Applicant was convicted on his own plea of guilty for shop breaking and committing a felony contrary to Section 306(a) of the Penal Code. It was alleged that he and two others on the night of 12th September, 2018 at unknown time at Gilgil Township in Gilgil Sub- County in Nakuru County broke and entered into a shop of Dorren Selly and stole assorted trench coats, a sub-woofer, three dresses and two bras all valued at Ksh. 37,400/.

11. **Section 306** of the **Penal Code** provides for a punishment of imprisonment of up to seven years for the offence of breaking into a building and committing a felony. Hence, the four-year jail term imposed on the Applicant was lawful. I however note that the Applicant pleaded guilty. He also prayed for forgiveness. He remains remorseful as borne out in the present application. A punishment is intended to be rehabilitative. Taking into account that the Applicant was arrested on 4th October, 2018, he has been in custody for three years two months and 10 days which I consider to be sufficient punishment.

Conclusion

12. In the end, I find that the application succeeds only in so far as **Criminal Case No. 2314 of 2018** is concerned. In its regard, I hold that the Applicant has served sufficient sentence and is hereby set free unless otherwise lawfully held. As regards **Criminal Case No. 2312 of 2018**, the application fails and is dismissed. The prayer that the sentences in the two cases run concurrently is untenable in view of the final orders I have rendered. This order be served upon the prison authorities for compliance. The trial court file should forthwith be remitted back.

13. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 16TH DAY OF DECEMBER, 2021.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Applicant in person*

2. *Ms. Mainji for the Respondent*