



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL REVISION NO. 36 OF 2019**

**KELVIN FUNDI NJUKI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**A. Introduction**

1. This ruling is for the application dated 16<sup>th</sup> December 2019 in which the applicant seeks orders that alternative dispute resolution be used in this matter as the complainant, the applicant's mother, is willing to forgive his son.
2. It is applicant's case that he was charged, convicted and sentenced to four years imprisonment for the offence of stealing stock contrary to section 278 of the Penal Code in Criminal Case No. 530 of 2018. The applicant further states that he appealed vide Criminal Appeal No. 12 of 2019 but did not pursue the same after he was denied bail pending appeal.
3. The applicant states that his mother, the complainant, has decided to forgive him and that he is remorseful and prays that his application be allowed.
4. In rejoinder, Ms. Lokorio for the respondent did not oppose the application and stated that the trial court failed to take into consideration that the accused was the complainant's son and further that it did not call for a probation report. Ms. Lokorio further stated that the four (4) years sentence meted out to the applicant was harsh.

**B. Analysis of the Law**

5. The powers of the High court in revision are contained in Section 362 through to 366 of the Criminal Procedure Code (cap.75). Section 362 specifically provides as follows: -

***“362. 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”.***

6. The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.
7. In cases of common assault, or any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, section 176 of the Criminal Procedure Code allows the Court to promote reconciliation, encourage and facilitate the settlement, in an amicable way, of proceedings, on terms of payment of compensation or other terms approved by the Court. See **Medardo v. R** (2004) 2 KLR 433 and **Shen Zhangua v R, High Court at Nairobi Miscellaneous Criminal Application 396 of 2006**.
8. Alternative forms of dispute resolution including reconciliation are recognized under **Article 159 (2) (c) of the Constitution** which provides that: -

***“In exercising judicial authority, the courts and tribunals shall be guided by the following principles—***

*(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)”*

9. The **Criminal Procedure Code** under **Section 176** provides:

*“In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.”*

10. Section 176 of the Code allows reconciliation to be promoted in minor offences of personal nature but does not apply to a felony. A felony is under the Kenyan law is an offence where the sentence of imprisonment does not exceed three (3) years.

11. The offence of stock theft under Section 278 of the Penal Code provides for maximum sentence of fourteen (14) years imprisonment. It follows that the offence is not a felony and that the provisions of Section 176 of the Criminal Procedure Code are not applicable.

12. The magistrate did not give due consideration to the applicability of Section 176 to the offence the accused was charged with. However, even if the court had done so, it would have found that the law was not applicable.

13. Section 278 of the Penal Code provides for the offence of stealing stock. The sentence provided is a term of imprisonment not exceeding fourteen (14) years.

14. The sentence of four (4) years imposed by the magistrate was indeed quite lenient.

15. However, the trial court in sentencing ought to have taken into consideration the facts and circumstances of the case including the fact that the complainant in the case had indicated her intention to reconcile with the applicant and that she was the mother of the applicant. This is an obligation of the trial court to take into consideration all relevant factors in meting out sentence.

16. It is important to note that the respondent did not oppose this application. I have considered all the foregoing factors and I reach a conclusion that it is appropriate to set aside the sentence of four (4) years imprisonment imposed on the applicant and grant non-custodial sentence subject to suitability.

17. I find this application merited and allow it on the following terms: -

*a) That the sentence of four (4) years imprisonment by the trial court is hereby set aside.*

*b) That the applicant is hereby referred for a probation report to be filed within seven (7) days.*

18. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 29<sup>TH</sup> DAY OF JANUARY, 2020.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Muriuki for R. Njeru for Accused**

**Applicant present**