



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION NO. 403 OF 2020**

**YARE DIDA.....APPLICANT**

**-versus-**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The applicant herein was convicted and sentenced in two separate and distinct cases i.e. **Isiolo Criminal Case No. 41 of 2019** and **Isiolo Criminal case No. 42 of 2019** with the offence of **Stealing contrary to section 275 of the Penal Code**.

2. In **Isiolo Criminal Case No. 41 of 2019** the particulars of the offence were;

**On the 20<sup>th</sup> Day of November 2019 at Manyatta Father, in Merti Sub- County of Isiolo County within Eastern Region stole Kshs. 1,000/= from a Butchery belonging to Imbosan Adan.**

3. The applicant pleaded guilty to the offence. The trial court sentenced him to 3 years' imprisonment noting that the applicant was not a first time offender as he had been previously sentenced to One year's imprisonment for the offence of **Stealing Contrary to Section 275 of the Penal Code** in **Criminal Case No. 357 of 2017**.

4. In **Isiolo Criminal Case No. 42 of 2019** the particulars of the offence were;

**On the 9<sup>th</sup> day of October 2019 at Metri Police station stole a pair of open shoes valued at Kshs. 650/= the property of Godwin Khalasya.**

5. The applicant pleaded guilty to the offence. The trial court sentenced him to 3 years' imprisonment also noting that the applicant was not a first time offender as he had been previously sentenced to 1 year's imprisonment for the offence of **Stealing Contrary to Section 275 of the Penal Code** in **Criminal Case No. 357 of 2017**.

6. Vide notice of motion dated 16<sup>th</sup> June 2020 brought under the provisions of **Section 362 and 364 of the Criminal Procedure Code** the applicant sought to revise the sentences imposed in **Isiolo Criminal case No. 41 and 42 of 2019**. He averred that the sentences were excessive in the circumstances. That due to the corona virus pandemic and in accordance with the NCAJ Guidelines he prayed this court to commute the sentences to the Period already served in order to decongest the prison.

7. The Respondent opposed the application stating that the sentences imposed by the trial court was proper.

**Analysis and Determination**

8. **Section 362 of the Criminal Procedure Code Cap 75 (Laws of Kenya)** provides as follows: -

**“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purposes of satisfying itself as to correctness, legality or propriety (emphasis court) of any finding, sentence or order recorded or passed, and as to the regularity (emphasis court) of any proceedings of any such court.”**

9. What the High Court can do under its revision jurisdiction is stated under Section 364 of the Criminal Procedure Code Cap 5, as follows: -

**“(1) in the case of a proceeding in a 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 –**

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;.

(b) in the case of any other order than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he had had an opportunity of being heard either personally or through an advocate in his own defence. Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a Subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”

10. Section 275 of the Penal Code provides the penalty 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.**

11. The Learned Trial Magistrate did not impose an illegal sentence. Despite the fact that the maximum penalty was imposed, the sentences were not excessive as the applicant was not a first offender and deterrent appealed to trial court on the basis of the circumstances of the case. The trial court exercised its discretion judiciously in imposing sentenced of three (3) years imprisonment in both offences. Accordingly, the sentences were legal, proper, and commensurate to the offence.

12. I would have left it at that but I find it proper to analyse the request in light of the Sentencing guideline and determine whether the circumstances of the offence will warrant a non-custodial sentence. **Paragraph 7.18 of the Judiciary Sentencing Policy Guidelines** provides;

**“Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence. The court should bear in mind the high rates of recidivism associated with imprisonment and seek to impose a sentence which is geared towards steering the offender from crime...”**

13. It bears repeating that the applicant is not a first offender as he had previous conviction of stealing contrary to Section 275 of the Penal code. He is a repeat offender; not once but on two other times. Incidentally, all relate to theft contrary to section 275 of the Penal Code. In the circumstances, this is a fit case for a custodial sentence to act as a deterrent.

14. It should be noted that Corona Virus Disease pandemic is not per se a guarantee of release of prisoners. Other circumstances should be established to warrant release of the offender. None exists here. I therefore find that the notice of motion dated 16<sup>th</sup> June 2020 by the applicant to be without merit and is dismissed.

**Dated, signed and delivered at Meru this 29<sup>th</sup> day of September, 2020**

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**F. GIKONYO**

**JUDGE**

**Representation**

Brenda Nandwa for respondent

Applicant – present