

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 82 OF 2017.

SHADRACK AKUTE.....APPLICANT.

VERSUS

REPUBLIC.....RESPONDENT.

RULING

1. The Applicant herein filed the present application by way of a Notice of Motion dated 24th May, 2017 seeking revision of sentence under Sections 137(1), 137(2A), 333(2) and 362 of the Criminal Procedure Code. The application was supported by an affidavit sworn by him.

2. The Applicant was convicted for committing the offence of theft by servant in Criminal Case 1381 of 2014 at Milimani and sentenced to serve four years imprisonment. It was alleged that he stole steel bars from his employer, China Jianse International Company worth Ksh. 1.3 Million. He submitted that upon his conviction the trial court did not take into account the period of one year and eight months that he spent in remand custody. He urged the court to review the sentence and order that his sentence shall commence from his arrest thus take into account the period spent in remand custody. He urged for either a non-custodial sentence or a community service order or granting a conditional pardon. He concluded by pledging to abide by all terms and conditions that the court would set.

3. Mr. Momanyi for the Respondent submitted that the Applicant's mitigation was considered before he was sentenced. That given that he pleaded guilty the sentence passed was commensurate with the offence. In reply, the Applicant submitted that he was only 25 years old and he had just fallen in with the wrong company.

4. In the sentencing, the trial court considered a number of factors before arriving at the sentence of four years imprisonment. This court in evaluating the propriety of the sentence must be cognizant of the words of Baroness Hale, as she then was in **Re J(A child)(Child Returned Abroad: Convention Rights)[2005]UKHL 40** that:

“If there is indeed a discretion in which various factors are relevant, the evaluation and balancing of those factors is ... a matter for the trial [magistrate]. Only if his decision is so plainly wrong that he must have given far too much weight to a particular factor is the appellate court entitled to interfere:... Too ready an interference by the appellate court, ..., risks robbing the trial [magistrate] of the discretion entrusted to him by law.”

5. Therefore, in sentencing the trial magistrate was under a duty to consider mitigating and aggravating factors. In this case, the Applicant was charged under Section 281 of the Penal Code which provides for a sentence of imprisonment of not more than seven years. Therefore, the sentence of four years was legal. The mitigating factors that were considered are; that the Applicant pleaded guilty, he was a first offender, he was relatively youthful, he was the breadwinner to his mother and grandmother and the time he had spent in remand custody. The aggravating factors in the case was that the items stolen were never recovered and the fact that the Applicant had betrayed his employer's trust. The court then found that a non-custodial sentence would not be sufficient and proceeded to sentence the Applicant to the four years imprisonment.

6. Given the period already served in remand this would mean that the Applicant will suffer a cumulative sentence of five years and seven months which in light of the mitigating factors appears excessive for a first offender convicted on his own plea of guilty.

7. To date the Applicant has spent three years and five months in custody and would, under normal conditions, be completing his sentence of four years in light of remission. Whilst this court is careful not to rob a trial court of its discretion in sentencing, finds that a balancing of the factors in this case means that a sentence of four years was harsh, more particularly because the Applicant has this far served a period of one year and seven months of the sentence.

8. In the end, I find that the application is merited. I set aside the sentence. I substitute it with an order that the Applicant has served sufficient sentence. I order that he be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED and DELIVERED this 30th day of **May, 2018.**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Applicant present in person.

2. Miss Atina for the Respondent.