REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

REVISION NO.27 OF 2012

(From original conviction and sentence by Hon. F. Kyambia, SRM, in CM CR. No.2944 of 2009)

MARTIN MARUTI KITUYI ============== APPLICANT

Versus

REPUBLIC ============== RESPONDENT

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JUDGMENT

The charge

[1] The Appellant was arrested on 3/12/2009 and charged in court on 7/12/2009 with burglary contrary to section 304 (2) and stealing contrary to section 279 (b) of the Penal code. Particulars of the offence were that:

> **MARTIN MARUTI KITUYI: On the 25th day of November, 2009 at Chepkatui Village, Bisunu Location in Sirisia District within western Province; broke and entered the dwelling house of Jane Naliaka with intent to steal therein and did steal therein Ksh.100/=; a mobile phone make motorrola C123; a jembe; a hammer; 48 kgs of beans; 40 kgs of groundnuts and a purse all valued at Ksh.14,650/= the property of the said Jane Naliaka Mututa.**

[2] Count II: Stealing contrary to section 275 of the Penal Code. Particulars of the offence were that:

> **Martin Maruti Kituyi: On the 26th day of November, 2009 at Chepkutui village; Bisunu Location in Sirisia District within Western Province; stole eight pieces of timber valued at Ksh.1050/= the property of Lona Bwabi.**

[3] The accused pleaded not guilty and the case proceeded to full hearing. Ultimately, the Appellant was on 2/6/2011 found guilty on both counts. He was sentenced to 5 years and 3 years imprisonment for the offence of burglary and stealing on count 5, respectively, and to serve 5 years imprisonment on count II.The sentences were to run concurrently.

Revision Application

[5] Being aggrieved by the said conviction and sentence the Applicant applied for review of sentence on 10/10/2012. The application for Revision does not say much except that, *"he*

requests the court to take remedial action over the custodial sentence herein." The reason for applying for review of sentence according to the affidavit in support of the Revision application is to enable him access better medical service. He has prayed for lenient sentence due to his deteriorating health. During the hearing of the "Appeal", the Applicant told the court that he was not told why he had been arrested and that the items allegedly found in his possession were planted on him. He asked the court to consider his written submissions.

Submissions by the Applicant

[6] The Applicant filed written submissions on 18/3/2013 after he had been provided with proceedings of the trial court through an order of this court made on 16/10/2012. In those submissions he urges:

1. That there was no evidence whatsoever that was adduced in support of the offences of burglary and stealing.
2. That the trial magistrate did not consider the violations of his constitutional rights by the police when they held him in custody from 27/11/2009 – 7/12/2009 without producing him in court.
3. That the evidence provided by the prosecution was characterized by contradictions.
4. That there was no proof of ownership of the alleged recovered items.
5. That the trial magistrate did not analyze the evidence adduced by both the Applicant's and Prosecution's witnesses in making his decision.

Submissions by the Prosecution

[7] Mrs Leting represented the State and submitted that:

a) The evidence tendered is more in support of a charge of handling stolen property than stealing and burglary.

b) That the Applicant had not been charged with handling stolen property.

c. The conviction is therefore improper as the evidence did not support the charges.

[8] For those reasons, she conceded to the "Appeal".

DETERMINATION BY THE COURT

[9] The Applicant filed an application for Revision of sentence passed on him by F. Kyambia SRM in BGM CMC CR. No.2944 of 2009 on 2/6/2011. The application entitled **"JUDICIARY SENTENCE REVIEW"** was filed on 10/10/2012. The court then invited the Applicant and the Prosecution to be heard on the Revision application. It also ordered for the typed and certified proceedings to be availed to both the Applicant and the Prosecution. This was out of abundance of care to obviate an adverse order being made without providing the person convicted an opportunity to be heard. That exercise of discretion by the court was in answer to the legal principle ordained under section 364(2) of the CPC.

[10] I am, however, perturbed by two things. One, the provisions of section 364 (5) of the CPC that:

364 (5) When an Appeal lies from a finding, sentence or order, and no Appeal is brought, no proceeding by way of Revision shall be entertained at the insistence of the party who could have Appealed.

Second, the provisions of section 364 (1) of the CPC which vests in the court in a Revision application same powers the court has on an Appeal under sections 354, 357 and 358. The court may also enhance sentence in a Revision application.

[11] Under Article 50(2) (q) of the Constitution, Appeal and Revision are part of the right to fair trial in a criminal proceeding. Both are constitutional processes for enforcement of legal relief. Except, the court must consider an Appeal as a matter of right whilst Revision under Article 165 (6) and (7) of the Constitution is a matter for the discretion of the court. In the new constitutional structure, Revision is a constitutional relief only that sections 362 to 367 of the CPC are merely the statutory expression of, and the procedural prescriptions attending the remedy of Revision. Therefore, the very nature of Revision as a discretionary remedy explains the policy underpinnings of section 364 (5) of the CPC; that Revision should not be a substitute for an Appeal whatsoever or insisted upon by a party who has not filed an Appeal where one was provided for. Revision primarily serves to put right instances where a finding, sentence, order or proceedings of a lower court are tainted by incorrectness, impropriety, illegality or irregularity. Those words are key pillars that define the Revision jurisdiction. Broadly put, whenever the integrity of any proceeding is put to question, the Revision jurisdiction of the High Court comes into play and may disturb the decision of the lower court purely in the best interest of justice.

[12] Having said that, section 364(5) of the CPC is not intended to preclude the High Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of Appeal which he did not utilize, and is not intended at all to derogate from the wide powers conferred by Article 165 (6) and (7) of the Constitution, and section 362 and section 364 of the CPC. This should explain what the word “insistence” in section 364 (5) entails. It should be understood that the Revision jurisdiction of the court can be set in motion by the court *suo motu*, even on information provided by the aggrieved party who had the right of Appeal but did not Appeal. On this explication of those sections see the cases of **R v Ajit Singh [1957] E.A 822** and **Walome v R [1981] KLR 497.**

[13] The exercise or not of the discretion of the court should, therefore, depend on the circumstances of each case, and the nature of the things the court is being asked to probe and put right. Those which are clearly illegal as to constitute a breach of fundamental rights or freedoms guaranteed by the Constitution should ordinarily attract the exercise of Revision jurisdiction of the court unless they are matters which the court feels should be left for a claim for damages. But where the aggrieved party is proposing an Appeal from his pleadings, then the court should hesitate to exercise the discretion under Revision jurisdiction. In making this proposition, I am well aware of section 364 (1) (a) of the CPC which allows the High Court in a Revision cause to exercise the powers conferred on it as an Appellate Court in sections 354, 357 and 358 of the CPC. Except, it must be understood that those powers will only come to bear after the court is satisfied that the case is fit for the exercise of discretion under Revision jurisdiction. On that basis, there should be no room to read a contradiction in what I have said.

DO I EXERCISE MY DISCRETION?

[14] It had been said time and again, that, exercise of discretion should be judicious upon defined legal bounds and principles. First of all, the Prosecution has conceded the Revision application on the ground that the evidence adduced did not support the offences with which the Applicant had been charged i.e. Burglary and Stealing. Instead, the evidence supported a charge of Handling Stolen Property. The Applicant was not charged with the offence of Handling Stolen Property even as an alternative charge. Thus, according to the prosecution, the conviction was not safe and should be set aside.

[15] I note that the Applicant in his submissions is proposing an Appeal and arguments put forth in those submissions are apt for an Appeal. But the insistence that the matter be disposed of in the Revision comes from the prosecution upon the reasons they have advanced above. Those grounds by the prosecution are quite plausible for Revision as they attack the probity and propriety of the entire proceedings, conviction and sentence. In the circumstances I find a legal reason to depart from the provisions of section 364(5) of the CPC. I, therefore, think this is a proper case where I should satisfy myself of the correctness, propriety, legality or regularity of the

proceedings by the trial court.

[16] My view and decision is that the evidence adduced did not support the charge.The failure by the trial magistrate to realize this variance between the evidence adduced and the charges for which the Applicant was indicted was a grave error that impinged on the correctness,legality and propriety of the conviction and the ensuing sentence. Had that been detected before the close of the case, section 214 of the CPC should have offered a legal reprieve to the trial magistrate and the prosecution, and it could have been in order for the Prosecution to have applied or the trial court to have ordered for substitution or addition of a new charge of Handling Stolen Property. Variance between the evidence and the charge is a grave matter which calls upon the court to engage due process in dealing with the issue. That is why the law has placed sufficient emphasis on the matter when it arises in the strictness of the procedure in section 214 (1) of the CPC; that the accused should be called upon to plead to the new charge. At Appeal stage, I do not think it is possible to comply with section 214 (1) of the CPC, and it should not be lost also that the offence of handling stolen property is not a lesser charge. As the conviction herein was on a charge which was not supported by evidence, it is an improper conviction and a nullity. Consequently, the Applicant herein should not continue to suffer the sentence imposed upon him in the circumstances.

[17] I hereby set aside the conviction and sentence imposed on the Applicant in all the counts. He is accordingly set to liberty forthwith unless otherwise lawfully held.

Dated, signed and delivered in open court at Bungoma this 25th day of July, 2013

F. GIKONYO

<u>JUDGE</u>

In the presence of:

Mr. Kamau for State

CA: Khisa

Applicant in person present

COURT: Ruling delivered in open court.

F. GIKONYO

<u>JUDGE</u>