



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION NO 2 OF 2013**

From original conviction and sentence by the Principal Magistrate at Mandera in Criminal Case 316 of 2011

**FELIX KIMATU MITISYA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON REVISION**

The applicant was charged in the lower court at Mandera Principal Magistrate’s Court with stealing in a dwelling house contrary to section 279 (b) of the Penal Code. It was alleged that the applicant stole an assortment of household goods and Kshs 10,000 all belonging to Martha Wangu Mwangi from her dwelling house in Mandera Township within Mandera County on 2<sup>nd</sup> October 2011.

The case went to full trial with the prosecution calling five witnesses. The applicant testified under oath but called no witnesses. Briefly, the applicant knew the complainant in the lower court. It is stated in evidence that they were friends and the applicant used to frequent the home of the complainant and share meals together. On the date in question, 2<sup>nd</sup> October 2013, the complainant left her house at 8.00am and went to church with Marion Wamaitha Mwangi (PW2) her sister. They left the applicant at the complainant’s house. The applicant had requested the complainant to allow him to watch television. On coming back from church the two women knocked the door but getting no response, they pushed open the door and found the applicant having left and the items specified having been stolen. They reported the matter at the Mandera Police Station at 1.00pm the same day. PC James Maina received the report and alerted PC Elias Mureithi (PW3) and PC Francis Muyonye (PW4) who were manning the Kotulo roadblock to be on the look-out for a suspect. The applicant was arrested at 3.30pm while aboard motor vehicle number KBP 252A. The TV, DVD, LG Decoder and two speakers were recovered from that vehicle. The complainant later identified them as the items stolen from her house.

The trial magistrate considered all the evidence availed to him, was convinced that the case had been proved beyond reasonable doubt and convicted the applicant. He sentenced him to six years imprisonment. The maximum sentence for stealing from a dwelling house under Section 279 (b) of the Penal Code is fourteen years imprisonment.

The applicant has moved this court asking for revision of the sentence. Specifically, he is seeking revision of the sentence from imprisonment to non custodial. He is relying on six grounds which he has termed “Grounds of Appeal.” He is also asking to be present during the revision to present further mitigation. In his grounds he states that he is satisfied with the conviction; that he has been in custody for one and half years and he regrets the offence; that he has acquired a course in tailoring and laundry while in prison; he has sat for KCPE while in prison and attained 291 points and he intends to join a secondary school; that he has also trained in adult education; that he is 25 years old and the sole provider of his elderly parents and his mother is chronically ill.

The power of revision by the High Court is given by Section 362 of the Criminal Procedure Code. It reads as follows:

***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.***

The Criminal Procedure Code or any other legislation does not provide the procedure for approaching the court for revision. Parties have been approaching the court either by letter or even formal applications. This has been recognized by courts. In **David Njogu Gachanja v Republic [2006] eKLR**, the court stated; ***“On the issue of procedure in the Criminal Procedure Code or other statutes as to how an aggrieved party can invoke the Revision jurisdiction of this court, a party may choose to come to court by whatever means and or procedure provided that it does not occasion prejudice to the Respondent.”***

My understanding of Section 362 is that a court may, *suo moto*, call the record of the lower court for purposes of revision or any party to criminal proceedings may, through a letter, seek court’s intervention on Review. The lower court, too, may seek a superior court’s intervention by way of a letter. To my mind, a formal application is not necessary given that under Section 365 of the Criminal Procedure Code no party has a right to be heard although the court has discretion under Section 365 of the Criminal Procedure Code to hear a party on revision.

I have carefully read the evidence produced in the lower court. I have also read the judgement of the lower court. The applicant was properly tried and convicted. There was ample evidence against him and the lower court properly directed itself in convicting and sentencing the applicant. Being aware of the overwhelming evidence against him, the applicant has decided to challenge the sentence only. He is asking this court to review the sentence and give him a non custodial sentence. I am not able to understand why the applicant sought to come to court to seek review orders instead of preferring an appeal against the lower court judgement. Clearly this is good case where appeal challenging the sentence, rather than review, would have been the appropriate cause of action. Under Section 364 (5) of the Criminal Procedure Code, 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.

My conclusion of the matter is that the applicant is wrongly before this court. I have considered his request to be present during the hearing of this review and I decline to grant the same. It will not serve his purpose to be present because he is wrongly before this court. In conclusion therefore, I do hereby dismiss the application for review filed on 3<sup>rd</sup> of May 2013. I make orders accordingly.

**S.N MUTUKU**

**JUDGE**

Dated, signed and delivered this 15<sup>th</sup> day of July 2013.