



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 417 OF 2012

ELKANA JOHN NYANGUTERESPONDENT

VERSUS

REPUBLIC.....APPLICANT

RULING

1. This is an application for review of the sentence passed by Hon. Munyi (Senior Resident Magistrate) on 18th April 2012 in **Cm Cr. Case No. 21 of 2012 Nairobi Rep V Elkana John Nyangute and another.**
2. In the foregoing case the applicant and another were tried for the offence of breaking into a building and committing a felony contrary to **Section 306(a)** of the **Penal Code**. It had been alleged that on diverse dates between 30th day of September 2008 and 31st day of December, 2008 at Jos Hansen and Sochne East Africa Limited's stores in Nairobi area, the applicant, jointly with others not before the court broke and entered into a building namely Jos Hansen and Sochne Stores and stole 56,250 doses of cotecxin drugs valued at Kshs 11,135,520 the property of Ms Jos Hansen and Sochne East Africa Limited.
3. The applicant and his co-accused denied the offence. At the close of the trial in which the prosecution called ten witnesses and the applicant testified without oath and without calling any witnesses, the applicant was convicted as charged and sentenced to serve five years imprisonment.
4. The grounds of this application as are to be found on the face of the letter written on his behalf by M. A. Abongo Advocate are that the sentence imposed upon the applicant was harsh and excessive and did not give him the option of paying a fine. It was also averred that the learned magistrate did not consider the applicant's mitigation before passing sentence.
5. From this application it appears that the appellant has abandoned his right of appeal and chosen to approach the court by way of review. Having chosen this approach the way of appeal is no longer open to him. In my view however, he would have been better off coming to court by way of appeal, which would give him wider room to ventilate other grounds. It would also give him the choice to prosecute the appeal on both conviction and sentence, or to contest the sentence only.
6. Having elected to come by way of Review he has placed himself in the straight jacket defined by **Section 362** of the **Criminal Procedure Code** which provides that:

“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.” (*emphasis mine*)

7. The applicant must therefore satisfy the court of the incorrectness, illegality, or impropriety of the sentence which this court is being called upon to review, or as to the irregularity of the proceedings leading thereto.
8. I have called for and reviewed the proceedings and the evidence which led to the conviction that birthed the sentence complained about and I am unable to find anything which could justify the application of **Section 362** of the **Criminal Procedure Code** in this case. The drugs which were stolen and which form the subject matter of this case belonged to Jos Hansen Pharmaceuticals.
9. The prosecution called ten witnesses to prove their case. **PW1, PW2, PW3** and **PW4** worked for Jos Hansen Pharmaceuticals as Finance Manager, Credit Controller, Assistant and Sales Representative respectively. They all testified that boxes containing thousands of batches of anti-malaria drugs called cotecxin which were due for replacement by the supplier were placed together in a store to await collection.
10. Sometimes in December 2008 when an auditor from Delloitte Company came to take stock, it was found that several boxes containing a total of 56,240 dozen batches were missing. The police were informed and following investigation the applicant and another were arrested and some of the boxes recovered from them. They were subsequently charged, tried and convicted.
11. The applicant was a guard employed by the firm of K K Security guards and deployed to guard the ware house where drugs were stored. Investigations revealed that access into the said store was gained through the roof. More important was the fact that the applicant was found hawking some of the drugs in Huruma.
12. Ms Abongo’s submissions on behalf of the applicant did not contest the conviction entered against him. It was urged on the applicant’s behalf that he has served one year and four months out of the sentence imposed upon him. Further that he has undergone various kinds of courses including bible courses and resource oriented development initiatives. I am pleased in this regard. The court was also told that he has learnt his lesson and that therefore his sentence should be reviewed to enable him to reunite with his children who have been left destitute in his absence.
13. **Section 306** of the **Penal Code** under which he was tried and convicted, prescribes a sentence of up to seven years upon conviction. The applicant was sentence to four years imprisonment. In my humble opinion this sentence cannot be said to be harsh or excessive in view of the value of the goods which were stolen, which was placed at Kshs 11,135,520.
14. For the foregoing reasons I decline to interfere with the sentence imposed upon the applicant by the trial court and dismiss the application.

SIGNED DATED and **DELIVERED** in open court this **28th** day of **November 2013**.

L. A. ACHODE

JUDGE