



REPUBLIC OF KENYA



**Masia v Republic (Criminal Revision E007 of 2025)
[2025] KEHC 9835 (KLR) (4 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9835 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL REVISION E007 OF 2025**

WM MUSYOKA, J

JULY 4, 2025

BETWEEN

BONFACE MASIA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant herein was convicted. in Busia CMCCR No. E167 of 2025, on his own plea of guilty, to a charge of theft, contrary to Section 268(1), as read with Section 275, of the *Penal Code*, Cap 63, Laws of Kenya. He was sentenced to serve two years imprisonment.
2. He was aggrieved, hence the application herein for revision. The revision was sought vide a letter dated 7th April 2025. The concern is that the trial court handed down a custodial sentence, despite the plea of guilty and the mitigating circumstances.
3. Revision is provided for under section 362 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya. It addresses the correctness, legality and propriety of any finding or sentence, made or passed by a court, and the regularity of the proceedings conducted by that court, leading up to that finding or sentence.
4. The finding, the subject of these revision proceedings, is the sentence that the trial court passed. The proceedings are the sentencing hearing, following the plea of guilty. The issue is not with the regularity of the proceedings as such, or the finding of guilty, but the sentence passed, of imprisonment, instead of the court considering custodial measures.
5. The question that I should be addressing is whether the sentence passed was correct, legal or proper.
6. The sentence prescribed for simple theft, being what the applicant was charged with, is imprisonment. There is jurisdiction to consider other sentences besides the imprisonment, which include fine, discharge, committal to probation, community service, among others. The imposition of



- imprisonment, being the punishment prescribed, under the provisions under which the applicant was charged, would have been correct, legal and proper. The trial court imposed what is prescribed. The sentence, as discussed above, was proper, legal and correct.
7. Should the trial court have considered the non-custodial alternatives of fine, probation, community service, discharge, etc? These were available, and could have been considered. However, sentencing is at the discretion of the court. Anyone complaining about a sentence imposed by a court, is obliged to demonstrate that discretion to impose that sentence, was not used properly. I am not persuaded that it has not been demonstrated that there was improper exercise of discretion.
 8. The concern appears to be that the plea of guilty should have counted as a motivator for being considered for non-custodial measures. That is true. A plea of guilty counts in exercise of leniency. It suggests contrition, and it is also reward for not wasting judicial time in conduct of a full trial. However, exercise of leniency does not also mean that the accused be given a non-custodial sentence automatically. All is at the discretion of the sentencing court, based on many variables, including the prevalence of the offence, at the given time, dependent on what the trial court gauges, from the pleas taken before him, over a period. The fact of imposition of a custodial sentence is not indicative of leniency not being exercised. The trial court could have considered imposing a long sentence in jail, or a shorter one, depending on the circumstances.
 9. There was mitigation, in terms of the applicant being young, having a young family, among others. The trial court noted those. However, there mere existence of mitigating factors does not mean an automatic imposition of a non-custodial order. A custodial sentence can still be awarded, despite the mitigating circumstances, upon the trial court considering everything else. The trial court, in the instant case, did not record what it considered. However, that of itself, although it is not desirable, does not mean that the trial court did not consider what ought to have been considered.
 10. The accused person does not acquire a right to be considered for non-custodial treatment, upon his pleading guilty to a charge. Sentencing always remains at the discretion of the court.
 11. I am not persuaded that the sentence passed was incorrect, or illegal, or improper, or that the proceedings leading up to it were irregular.
 12. Furthermore, revision is not available, as a remedy, where the challenge is about how discretion has been exercised. Revision addresses issues around process, where there is illegality, irregularity, impropriety and incorrectness. It is more about situations of exercise of a power which does not exist; or following a procedure that has not been prescribed; or elementary mistakes or lapses. It is in the same league with review in the civil process. Where the issue is around discretion, the proper way to challenge the same would be by way of appeal, for that would go into merit.
 13. The application for revision has no merit. It is hereby dismissed. Orders accordingly.

DELIVERED, DATED AND SIGNED, IN OPEN COURT, AT BUSIA, ON THIS 4TH DAY OF JULY 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Ipapu, instructed by Ipapu P Jackah & Company, Advocates for the Applicant.

