



REPUBLIC OF KENYA



KENYA LAW
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**Wambui v Republic (Criminal Revision E187 of 2022)
[2023] KEHC 1838 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1838 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E187 OF 2022**

FR OLEL, J

FEBRUARY 16, 2023

BETWEEN

PAUL KIRAGU WAMBUI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The petitioner was charged and convicted for the offence of stealing stock contrary to section 278 of the *Penal Code*. The petitioner was sentenced to serve seven (7) years imprisonment for the said offence. The applicant subsequently filed this revision application on November 18, 2022 seeking review of his sentence to a non-custodial one.
2. The applicant chose to rely on the affidavit supporting his application. The respondent, through prosecution counsel Mr Alex Ndiema filed submissions where they stated that the offence warranted a deterrent sentence and the sentence imposed was proper.

Analysis of law

3. I have considered the application as well as the response by the prosecution counsel. Upon receipt of the request for revision of sentence, this court directed that a probation officer's report be filed on the convict for consideration by the court. The probation officer Ms Grace Gathoni did file his report in court on December 19, 2022. The report shows that the applicant is a casual worker and would occasional work as a lorry driver and is not married. . The report recommends that he be treated as a first offender and his sentence be reviewed.



4. The powers of the High court in revision are contained in section 362 through to 366 of the *Criminal Procedure Code (cap 75)*. Section 362 specifically provides 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'.

5. What the High Court can do under its revision jurisdiction is stated under section 364 of the Criminal Procedure Code Cap 5, which states as follows: -

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High court may –

(a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;.

(b) In the case of any other order than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he had had an opportunity of being heard either personally or through an advocate in his own defence. Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.'

6. The sentence of seven (7) years imposed was within the law considering that under the penal code under section 278, the trial court could jail him for a maximum of fourteen years.

7. It has not been demonstrated that the trial magistrate committed any illegality, impropriety or mistake in sentencing the applicant.

8. I also take note of the fact that the applicant is not a first offender and has no other criminal record.

9. I am also alive to The Sentencing Policy Guidelines page 21 which provides:

' Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence. The court should bear in mind the high rates of recidivism associated with imprisonment and seek to impose a sentence which is geared towards steering the offender from crime. In particular, imprisonment of petty offenders should be avoided as



the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody. Further, short sentences are disruptive and contribute to re-offending.'

10. I also take into consideration the mitigation of the applicant in this application and the mitigating factors captured in the probation report, I find that this an an application where the courts discretion can be exercised in favour of the applicant especially when considering the sentencing guidelines and probation report.
11. I exercise my discretion and set aside the sentence of seven (7) years melted out on the applicant in Engineer SPM CR NO E1386 OF 2022 in its judgment dated October 24, 2022 and in its place sentence the applicant to serve a sentence of four (4) years to run from October 24, 2022
12. It is hereby so ordered.

DATED, DELIVERED AND SIGNED AT MACHAKOS (VIRTUALLY) THIS 16TH DAY OF FEBRUARY, 2023.

FRANCIS RAYOLA

JUDGE

In the presence of: -

Ms. Michuki for State

Applicant present

