



**Nyambura v Republic (Miscellaneous Application E691 of 2022)
[2023] KEHC 3296 (KLR) (17 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3296 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS APPLICATION E691 OF 2022
SM MOHOCHI, J
APRIL 17, 2023**

BETWEEN

LEVIS KAMAU NYAMBURA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This application has been placed before me for revision in exercise of powers conferred on this court by section 362 of the [Criminal Procedure Code](#) which provides thus: -

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purposes 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.”
2. The applicant was convicted as accused person number 1, in count one for the offence of house breaking contrary to section 304 (1) b and stealing contrary to section 279 (b) of the [penal code](#). he now moves the court for revision of a sentence adding that he was not offered an option of fine as part of a sentence.
3. The law and policy of law in sentencing is that, where the law provides for a fine or imprisonment or both, unless the court for good reasons considers it appropriate to impose both fine and imprisonment,



the accused person should be given an option of a fine first. Mwera J (as he then was) in *Annis Mubidin Nur vs Republic*, High Court Criminal Appeal No 98 of 2001, held that:

“... unless circumstances obtain which irresistibly [impede] a trial Court from imposing a fine first where the law provides for a fine in default of a prison term, the option of a fine must be visited first. This is a sound and tested principle in the art of sentencing ...”

4. In this case, the trial court imposed, *inter alia*, imprisonment for a term of two years to run concurrently.
5. The law in which the applicant was convicted and sentenced is section 304 (2) that provides that: -
 - “(1) Any person who - (a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or (b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven (7) years.
 - (2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten (10) years.”
6. That Section 279 of the [Penal Code](#) provides; If the theft is committed under any of the circumstances following, that is to say -
 - a. if the thing is stolen from the person of another;
 - b. if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house;
 - c. if the thing is stolen from any kind of vessel or vehicle or place of deposit used for the conveyance or custody of goods in transit from one place to another;
 - d. if the thing stolen is attached to or forms part of a railway;
 - e. if the thing is stolen from a vessel which is in distress or wrecked or stranded;
 - f. if the thing is stolen from a public office in which it is deposited or kept;
 - g. if the offender, in order to commit the offence, opens any locked room, box, vehicle or other receptacle, by means of a key or other instrument, the offender is liable to imprisonment for fourteen (14) years.
7. The trial court proceedings reveal that the applicant had two previous criminal convictions where in Nakuru Chief Magistrate’s Court Criminal Case no 2694 of 2021, he was fined Ksh 5,000/- in default six (6) months imprisonment for cultivating cannabis and in Nakuru Chief Magistrate’s Court Criminal Case no E031 of 2021 he was placed on probation for a term of three (3) years for stealing that were considered as circumstances impeding the imposition of fine.
8. See *Ogolla S/o Owuor v R* {1954} EACA 270 on when the Court will interfere with discretion of trial court in sentencing, that: -

“The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors. This was further echoed in the dictum of the cases in



R v Shershowsky {1912} CCA TLR 263 as emphasized in Shadrack Kipkoech Kogo v R Criminal Appeal No 253 of 2003 thus “Sentence is essentially an exercise of discretion by the trial Court and for this Court to interfere it must be shown that in passing the sentence, the sentencing Court took into account an irrelevance factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered.” (See also *Sayeka v R* {1989} KLR 306)

9. Owing to the foregoing, it is important for this Court to consider its jurisdiction as was held in the case of *Samuel Kamau Macharia Vs KCB & 2 others*, Civil application No 2 of 2011

“A court’s jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

10. Article 50(2) of the *Constitution* provides: -

“Every accused person has the right to a fair trial, which includes the right-

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by the law.”

11. Article 165(6) of the *constitution* empowers the High Court to exercise supervisory jurisdiction over subordinate courts. The *Criminal Procedure Code* is the statute that expounds on this jurisdiction. Section 362 of the *Criminal Procedure* provides: -

“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 subordinate court.”

12. Section 364 of the *penal code* empowers the High Court to exercise its revisionary powers ... conferred to it as a Court of Appeal by sections 354, 357 and 358 and may enhance sentence.

13. In the case of *Prosecutor vs Stephen Lesinko* [2018] eKLR Nyakundi J outlined the principles which will guide a court when examining the issues pertaining to section 362 of the *Criminal Procedure Code* as follows: -

- "a. Where the material evidence on the parties is not considered; and
- b. Where the judicial discretion is exercised arbitrarily or perversely if Where the decision is grossly erroneous;
- c. Where there is no compliance with the provisions of the law;
- d. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;
- e. the lower court ignores facts and tries the accused of lesser offence.”

14. This court has considered the application and the ground therein, and finds no legal basis to interfere with the sentence, in light of the trial court’s conviction and sentence on own plea of guilty on the August 28, 2022.

15. The application is hereby dismissed for want of merit.



SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAKURU ON THIS 17TH APRIL, 2023.

MOHOCHI S.M

JUDGE

