



**Mungai v Republic (Miscellaneous Criminal Application
E035 of 2022) [2023] KEHC 4057 (KLR) (2 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4057 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
MISCELLANEOUS CRIMINAL APPLICATION E035 OF 2022**

GL NZIOKA, J

MAY 2, 2023

BETWEEN

JOHN MUNGAI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. On July 1, 2021, the applicant was arraigned before the Chief Magistrate's court at Naivasha, charged vide criminal case No E1059 of 2021, with the offence of breaking into a building with intent to steal contrary to section 306(a) of the *Penal Code*. The particulars of the charge are as per the charge sheet.
2. He pleaded guilty to the charge, was convicted and sentenced to serve seven (7) years imprisonment. On June 6, 2022, he filed the subject notice of motion application herein seeking for sentence review. That, the sentence be reduced and/or be converted to a non-custodial one.
3. The application is supported by his affidavit in which he avers that, he is a first offender, remorseful and has learnt to be a law abiding citizen. That he comes from a poor family background and would like to go and cater for the family and build the nation.
4. The application was disposed of through filing of submissions. In submissions dated January 10, 2023, the applicant reiterates the averments in the affidavit in support of the application, save to add that, he is thirty-one (3)1 years old and that the time he has been in custody has taught him the consequences of crime. Furthermore, although he offered mitigation before sentence, the trial court indicated that it is bound by the minimum sentence provided for the offence.
5. However, the respondent filed submissions dated January 23, 2023 and argued that the sentence meted out is lawful and in line with the provisions of section 304 of the *Penal Code*.



6. The respondent referred to the case of *MMI v Republic* [2022] eKLR where it was observed that a court exercising appellate jurisdiction should not interfere with the discretion of the trial court in sentencing unless the sentence is “shockingly or disturbingly inappropriate”.
7. Further reference was made to the *Judiciary Sentencing Guidelines* which lists the objective of sentencing to include; retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation.
8. The respondent further submitted that, the offence the applicant was charged with is rampant and therefore the sentence meted out is in line with the afore objectives and that a lenient sentence will encourage others to commit similar offence. Finally, that the applicant has not been in custody for long.
9. I have considered the application and I find that, the power of the court to deal with this matter is revisionary jurisdiction provided for under section 362 of the *Criminal Procedure Code*, which states:

“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.”
10. However, the aforesaid provisions should be read together with section 364 of the Code which states:

“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 sections 354, 357 and 358, and may enhance the sentence;
 - (b) in the case of any other order other 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 has had an opportunity of being heard either personally or by 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 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.”
11. In light of the aforesaid the court will only review a sentence if it is either incorrect, illegal or improper. The objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be invoked where the decision under challenge is; grossly onerous, there is



no compliance with the provisions of the law, or the finding re-ordered are based on no evidence, or material evidence is ignored or judicial discretion is exercised arbitrarily or perversely.

12. In the instant case, the offence the applicant was convicted of an offence under section 306(a) of [Penal Code](#) which states:

“Any person who—

- (a) breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein;

is guilty of a felony and is liable to imprisonment for seven years.

13. It therefore follows that, the sentence is lawful and legal. However, having been a first offender and taking into account the fact that he pleaded guilty to the charges and did not waste court’s time, the sentence is rather harsh.
14. However, before reviewing the sentence, I note that, before the same was meted out, the trial court requested for a pre-sentence report and a report to that effect dated September 9, 2021, was filed. It was not positive. In that, regard, I find the release of the applicant on a non-custodial sentence now is not tenable.
15. Be that as it may, to award him an opportunity to reform I direct that, he should serve a custodial sentence for two years, with effect from October 6, 2021 to October 6, 2023, and then re-apply for review of sentence for the court to consider whether the circumstances have changed to consider the decision on review of sentence. For now, the application for review is declined.

DATED, DELIVERED AND SIGNED ON THIS 2ND DAY OF MAY, 2023.

GRACE L. NZIOKA

JUDGE

In the presence of:-

Applicant in court/ virtually

Mr. Atika for the Respondent

Ms Ogutu Court assistant

