



REPUBLIC OF KENYA



**Murai v Republic (Criminal Revision E040 of 2023)
[2023] KEHC 24699 (KLR) (13 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 24699 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E040 OF 2023
GL NZIOKA, J
SEPTEMBER 13, 2023**

BETWEEN

JAMES KAMAU MURAI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the Senior Principal Magistrate's Court at Engineer charged *vide* Criminal Case No 3010 of 2021, in seven (7) counts with the offences of Burglary contrary to section 304(1) as read with section 279(b) of the [Penal Code](#) (Cap63) Laws of Kenya, and an eighth count of handling stolen goods contrary to section 322(1) of the [Penal Code](#). The particulars of each charge are as per the charge sheet.
2. The applicant pleaded guilty to seven (7) counts and was convicted and sentenced to serve one (1) year imprisonment on each count and the sentences ordered to run consecutively.
3. However, by an application filed in court on March 8, 2023 the applicant is seeking that the sentences be converted into non-custodial one subject to a pre-sentence report by the Probation department.
4. The application is supported by the averments in his Affidavit and a document labelled "memorandum of revision" where he avers that he pleaded guilty, is a first offender, remorseful and has learnt to be a law-abiding citizen. That, he did not give proper mitigation during sentencing. Further, he has a young family that requires him to cater for their needs including paying rent and therefore his imprisonment has left them in a difficult situation.
5. He further avers that, the court do take into account the period of five (5) months he spent in custody as per section 333 (2) of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya.
6. The Respondent did not file any response to the application.



7. The Probation department filed a pre-sentence report dated; May 17, 2023, which indicates that the applicant's parent are peasant farmers and live at Njabini. That, he is 20 years old, and fourth (4th) born out of six (6) siblings. He is not married.
8. That, he completed his primary education in 2009 and obtained 350 out of 500 marks in his KCPE but did not proceed to secondary education due financial constraints. He then did a welding and fabrication course and was employed as a welder but was later hired by his aunt to manage a play station prior to his arrest.
9. Further he is remorseful and seeks for leniency stating it was his first time to be in conflict with the law. Furthermore his family members visits him regularly while in Prison and are willing to support his rehabilitation. That, the family and the community described him as hardworking and honest while Ms Mugure, the Assistant Chief of Kambe Sub Location stated the community is safe for his landing.
10. In addition, the complainant is said to have been initially bitter but has cooled down after recovering her stolen items and is not opposed to a non-custodial sentence, hoping the appellant has been rehabilitated during his imprisonment
11. The Prison authority stated that the applicant is well behaved and disciplined. That he is deployed to the building sector and has sat and passed carpentry (TVT Grade 3) test and is waiting to sit for the Government Grade Test in November. The Prison Authority recommend his release on a non-custodial with supervision. That the applicant stated he is willing to sit for the examination if released. The Probation Officer, Kamau M. Joel, recommends community service for twelve (12) months at Njabini Primary School.
12. I have considered the application note that, it invokes the law that governs the revisionary power of the High Court under sections 362 of the [Criminal Procedure Code](#) (herein "the Code"), which states 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.”

13. However, that section should be read together with section 364 of the Code which states: -

“(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 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.”

14. Pursuant to the afore provisions it is clear that, the court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. Thus, 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.
15. Be that as it were, to revert back to the matter herein, the applicant was convicted of offences under section 304 (1) of the Penal Code which states: -

- (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 years.

Whereas section 279 (b) of the Penal Code provides that: -

If the theft is committed under any of the circumstances following, that is to say
—

- (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; the offender is liable to imprisonment for fourteen years.

16. However, I note that the offences occurred at night and thus the correct section the applicant was to be charged under section 304 (1) (b) as read with 304 (2) of the Penal Code. Section 304 (2) which states that: -

If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.



17. Furthermore in count(s) 1, 2, 3, and 7, the applicant is stated to have broke into various building being a hotel and butchery, agrovot, and a mitumba shop, all which are not dwelling houses and therefore should have been charged with an offence under section 306 of the Penal Code that provides: -

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; or
- (b) breaks out of the same having committed any felony therein, is guilty of a felony and is liable to imprisonment for seven years.

18. Be that as it were, the sentences meted out are legal and lawful. The court can therefore only intervene under Community Service Order (CSO). The subject provisions thereof states that:

- (1) Where any person is convicted of an offence punishable with—
 - (a) imprisonment for a term not exceeding three years, with or without the option of a fine; or
 - (b) imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate, the court may, subject to this Act, make a community service order requiring the offender to perform community service.

19. In this matter the offences were committed in August 2021. The applicant was arraigned in court on September 2, 2021. He has been in custody for almost two (2) years. At the time of the offence, he was were nineteen (19) years old. He is a first offender. He pleaded guilty. The order for the sentence to run consecutively made the sentence harsh in the circumstances. Therefore I order that, the applicant serves three and a half (3 ½) years on each count and sentence to run concurrently. As he has already served two (2) years, I order the applicant do serve a further twelve (12) months under Community Service Order Act. The order herein shall apply to all the accused in the lower court case.

20. It is so ordered

DATED, DELIVERED AND SIGNED THIS 13TH DAY OF SEPTEMBER 2023.

GRACE L. NZIOKA

JUDGE

In the presence of:

The applicant present, virtually

Mr. Atika for the respondent

Ms. Ogutu: court assistant

