



**Njoki v Republic (Criminal Revision E175 of 2024)  
[2024] KEHC 14117 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14117 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL REVISION E175 OF 2024  
DKN MAGARE, J  
NOVEMBER 14, 2024**

**BETWEEN**

**PETER NJOGU NJOKI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This is a ruling over an application that is in the form of a formal letter to the Presiding Judge and the Deputy Registrar of this Court, seeking to review sentence to a lenient one. The grounds are that the Applicant is remorseful and ready to change. He is also the sole bread winner of his family.
2. The issue is whether the sentence should be revised to a lessor one. The Applicant was charged with the offence of stealing a motor cycle contrary to Section 268(1) as read with Section 278A of the [Penal Code](#). The first section under which the Applicant was charged reads as follows:
  268. (1)A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.
  - (2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say
    - a. an intent permanently to deprive the general or special owner of the thing of it; an intent to use the thing as a pledge or security;
    - b. an intent to part with it on a condition as to its return which the person taking or
    - c. converting it may be unable to perform; an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion; in the case of money, an intent to use it at the will of the person who takes



or converts it, although he may intend afterwards to repay the amount to the owner; and “special owner” includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

- (3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.
  - (4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.
  - (5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.
3. The particulars of the offence were that on 8/11/2023 at about 0600hrs at Wamuti Stores in Nyeri Township of Nyeri County the Applicant jointly with another not before court stole motor cycle Registration No. KMFS 462N valued at Ksh. 157,260, property of Wamuti Distributors.
  4. The trial court considered the case and convicted the Applicant and sentenced him to serve 3 years imprisonment. Aggrieved, the Applicant filed for revision of the sentence only. There was no appeal or revision on conviction.
  5. The revisionary powers permit this Court to 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. Section 362 of the [Criminal Procedure Code](#) 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.
  6. In a revision of this nature, the main question to be considered is satisfying High Court as to the correctness, legality or propriety of any finding, sentence or order recorded or passed. This will be to render substantial justice and to confirm whether such an order made by the lower court should be interfered with in the interest of justice. In the High Court of Malaysia in *Public Prosecutor v Mubari bin Mohd Jani and Another* [1996] 4 LRC 728 at 734, 735 it was stated as doth:

“The powers of the High Court in revision are amply provided under section 325 of the *Criminal Procedure Code* subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial



discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case.”

7. Sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the ends of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. The objectives of sentencing as set out in the 2023 [Sentencing Guidelines](#) are as follows: -

- “ 1. 3.1 Sentences are imposed to meet the following objectives. There will be instances in which the objectives may conflict with each other – insofar as possible, sentences imposed should be geared towards meeting the objectives in totality.
- i. Retribution: To punish the offender for their criminal conduct in a just manner.
  - ii. Deterrence: To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.
  - iii. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.
  - iv. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender’s contribution towards meeting those needs. Community
  - v. Protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender’s criminal acts.
  - vi. Denunciation: To clearly communicate the community’s condemnation of the criminal conduct.
  - vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
  - viii. Reintegration: To facilitate the re-entry of the offender into the society”

8. In my evaluation and bearing in mind the probation report dated 14/12/2023, I note the Applicant was also a first offender. It is clear that the Applicant is 30 years of age and is remorseful. The Court notes however that the Applicant, though alleged not to be a family and responsible man, has attempted 3 abortive marriages from which he has a child in each, but whom he does not provide for.

9. The relevant sentence is permitted under Section 278A of the [Penal Code](#) as doth:

“If the thing stolen is a motor vehicle within the meaning of the *Traffic Act*, the offender is liable to imprisonment for 7 years.”



10. The Applicant stole a motor cycle and was sentenced to 3 years imprisonment. The powers of this court on revision are spelt out under Section 364 of the Criminal Procedure Code. The powers are same as those regarding appeals, under Section 354 of the Act. At section 354(2)(ii), the court;

“May alter the finding, maintaining the sentence, or with or without altering the finding, reduce or increase the sentence.”
11. And at sub-article (iii), the court may; “with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence.”
12. This court appreciates that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. The Court of Appeal, on its part, in [Bernard Kimani Gacheru v Republic](#) [2002] eKLR restated that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”
13. The Applicant has the duty to show that in passing the sentence, the sentencing court took into account an irrelevant 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. In the case of *Shadrack Kipkoech Kogo v R. Eldoret Criminal Appeal No.253 of 2003* the Court of Appeal stated 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 irrelevant 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)”
14. There is nothing on the record showing the manner in which the trial court can be said to have acted on the wrong principles or overlooked material matters in sentencing. The Court of Appeal in the case of *Ogolla s/o Owuor v Republic*, [1954] EACA 270, pronounced itself on this issue as follows: -

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”
15. This Court must be careful not to unnecessarily interfere with the sentencing decision of the trial court. In [Hillary Kipkirui Mutai v Republic](#) [2022] eKLR, the court opined as follows:
  9. Sentencing is an important aspect of the administration of justice. Noting that sentencing is based on a judicial officer’s discretion, this Court must be careful not to interfere with such a decision, unless it is demonstrated that the sentence was manifestly excessive, was illegal, improper or founded based on misrepresentation of material facts.



16. In the circumstances of this case, I uphold the sentence of 3 years imprisonment. As a matter of fact the sentence was completely lenient given the circumstances of the case. It is in no way excessive.
17. The only aspect left out is failure to have regard to section 333(2) of the *Criminal Procedure Code*, which obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial of the case. It is important to note that taking into consideration the period spent in custody is not a general phrase but is a mathematical exercise. It is not a general surmise or conjecture. The Court of Appeal addressed the court's obligation to take into account the period that they had spent in custody during sentencing in the oft quoted case of *Abamad Abolfathi Mohammed & Another v Republic* [2018] eKLR where it held that:-

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *Criminal Procedure Code*. By dint of section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the *Criminal Procedure Code* was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012.”

18. The Court of Appeal addressed the same obligation in the case of *Bethwel Wilson Kibor v Republic* [2009] eKLR:

“By proviso to Section 333(2) of the *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”



19. Failure to take into consideration the period spent in custody impacts on the overall period of detention and may result in an excessive punishment that is not proportional to the offence committed. This is succinctly postulated in the [Judiciary Sentencing Policy Guidelines](#):

“The proviso to section 333(2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

20. In the circumstances, the 3 years sentence shall start from 2/12/2023, the date of arrest. Otherwise the bulk of the application is dismissed.

### **Determination**

21. I therefore make the following orders: -
- a. The application for review of sentence is dismissed.
  - b. The sentence is upheld save that the imprisonment for 3 years shall start from 2/12/2023, the date of arrest.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

Mr. Mwakio for the State

Pro se Applicant – present

Court Assistant – Jedidah

**M. D. KIZITO, J.**

