REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL REVISION NO. E001 OF 2021

DANIEL MWANGI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From the sentence passed in Criminal Case No. E 1007 of 2020 in the Chief Magistrate's Court at Eldoret by Hon. Kiptoo, SPM on 4 March 2020)

RULING ON REVISION

[1] The applicant herein, **Daniel Mwangi**, was charged before the Chief Magistrate's Court at Eldoret, with the offence of stealing contrary to **Section 275** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. It was alleged that on the **10 December 2020,** at Eldoret Town within Uasin Gishu County, jointly with another not before the court, he stole one mobile phone, make Tecno Camon II, valued at **Kshs. 15,000/=,** the property of **Ruth Jepleting**. He was arraigned before the court on **15 December 2020,** whereupon he admitted the charge. He was thus convicted on his own plea of guilty and sentenced to 2 years' imprisonment.

[2] On **11 January 2021**, he filed the instant application for revision praying for orders that his sentence be reviewed pursuant to **Article 50(2)(p)(q)** of the **Constitution** and that he be given non-custodial sentence. The application was also hinged on **Articles 27(1) (2) (4), 22(1), 23(1) and 51(1) and (2)** of the **Constitution.** In support of the application, the applicant relied on his affidavit, sworn on **11 January 2021**. He averred therein that he was then a student and could not, by reason of his incarceration, continue with his education. He added that he is remorseful and repentant; and that he has learned hard lessons while in custody and begs for leniency.

[3] The applicant relied on the case of **Francis Karioko Muruatetu & Another vs. Republic** [2016] eKLR as well as the **Judiciary Sentencing Policy Guidelines,** to support his assertion that he ought to have been given a non-custodial sentence to enable him resume his education. He annexed several documents to his affidavit, including his Certificate of Birth and a letter from **Kapchumba Secondary School,** confirming that he was a student in the school.

[4] As is often the case with *pro se* litigants, the application, in the main, has connotations of what would be deemed a constitutional petition; for it purports to seek for a sentence review, following **the Muruatetu Case**. Consequently, it is hinged on various provisions of the Constitution, and in particular the provisions relative to the fundamental rights and freedoms enshrined in **Sections 27, 28, 29, 48 and 50** of the **Constitution.** It was nevertheless registered as a criminal revision pursuant to the Court's supervisory mandate under **Article 165(6) and (7)** of **the Constitution.** Accordingly, I will consider it in that context and bear in mind the provisions of **Section 362** of the **Criminal Procedure Code,** which recognizes that:

> **"The High court may call for and examine the records 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] In that regard, **Section and 364(1)(b)** of the **Criminal Procedure Code** stipulates that:

> **"In the case of a proceeding in 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 ... in the case of any other order other than an order of acquittal alter or reverse the order."**

[6] It is in that light that the lower court record was availed for perusal; and it confirms that the plea-taking process was otherwise proper. The applicant admitted the charge, the facts were then read over and explained to him and he admitted them to be correct. Those facts show that the applicant picked the subject phone from the complainant's pocket and handed it over to an accomplice who ran away with it; and that although the applicant was arrested, the phone was never recovered. Upon his unequivocal admission of the facts, the applicant was

convicted on own plea and accordingly sentenced. There is therefore nothing untoward in connection to the process leading up to the applicant's conviction.

[7] As regards, the sentence, the record of the lower court shows that the applicant was a first offender. He exhibited his Certificate of Birth herein to show that he was born on **5 October 2002**. Thus, as at **10 December 2020** when the offence was committed, the applicant was aged 20 years. He had no previous criminal record and in mitigation, he asked the court for forgiveness. In the premises, the custodial sentence of two years; a sentence which was in excess of half of the penalty provided for the offence with which he was charged, appears not to have been the most appropriate sentence; for **Paragraph 7.18** of the **Judiciary Sentencing Policy Guidelines,** states that:

> **"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."**

[8] Hence, the Guidelines recommend a three-step approach to sentencing thus; firstly, that the sentencing options provided by the specific statute creating the offence be ascertained; secondly, that a decision be taken as to whether a non-custodial or a custodial sentence would be the most appropriate order in the circumstances and, thirdly, if custodial sentence is the most appropriate option, the duration thereof ought to be determined, taking into account the mitigating and aggravating circumstances; examples of which are set out in the said Guidelines. Moreover, even where custodial sentence is deemed the most appropriate, the Guidelines require that care be taken to ensure even-handedness in sentencing. To this end, t*he suggestion given in* ***Paragraph 23.9*** *is that:*

> ***"The first step is for the court to establish the custodial sentence set out in the statute for that particular offence. To enable the court to factor in mitigating and aggravating circumstances/factors, the starting point shall be fifty percent of the maximum custodial sentence provided by statute for that particular offence. Having a standard starting point is geared towards actualizing the uniformity/impartiality/consistency and accountability/transparency principles set out in paragraphs 3.2 and 3.3 of these guidelines. A starting point of fifty percent provides a scale for the determination of a higher or lower sentence in light of mitigating or aggravating circumstances."***

[9] Indeed, at **Paragraph 22.12** of the **Sentencing Policy Guidelines**, it is recommended that:

> **"To pass a just sentence, it is pertinent to receive and consider relevant information. The court should, as a matter of course, request for pre-sentence reports where a person is convicted of a felony as well as in cases where the court is considering a non-custodial sentence…Whilst the recommendations made in the pre-sentence reports are not binding, the court should give reasons for departing from the recommendations."**

[10] In this instance, no pre-sentence report was called for by the lower court. Thus, it is manifest that the sentence of two years' imprisonment imposed on the applicant, who had no aggravating factors levelled against him, is excessive; granted that the penalty provided for under **Section 275** is no more than 3 years' imprisonment. That provision states that:

> **"Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years."**

[11] For the foregoing reasons, I am satisfied that there is good cause for interfering with the sentence imposed on the applicant, granted that it is clearly the result of an erroneous approach to sentencing. Accordingly, the sentence of 2 years' imprisonment imposed by the lower court is hereby set aside. Taking into account that that the applicant was a first offender and a student at the time, it is hereby ordered that he be discharged pursuant to **Section 35 (1)** of the **Penal Code**, on condition that he commits no further or other offence for a period of 12 months from the date of his release. He should accordingly be released forthwith unless otherwise lawfully held.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 4TH DAY OF FEBRUARY 2021.

OLGA SEWE

JUDGE