



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL REVISION NO. E023 OF 2020

HILLARY ETIANG'A BARASA..... APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. In his undated Notice of Motion filed on 8th September 2020, the applicant, *Hillary Etiang'a Barasa* approached this court seeking review of his sentence handed down by the trial court in Chief Magistrate's Court Kibera Criminal Case No. 287 of 2020.

2. In the application and in his supporting affidavit, the applicant prayed for reduction of his sentence or its substitution with a non custodial sentence on grounds that he was a first offender and the sole breadwinner for his family. He also claimed that he was remorseful.

At the hearing, he prosecuted his application by way of oral submissions in which he re-iterated the depositions in his supporting affidavit.

3. The application was not contested by the state. Learned prosecuting counsel *Mr. Mutuma* in his submissions observed that on the strength of the Supreme Court's decision in *Francis Karioko Muruatetu & 5 Others V Republic, [2017] eKLR*, the court was seized of power to review sentences but in doing so, the views of the victim should be taken into account.

4. Having considered the application and the parties' oral submissions, I find that the only issue which arises for my determination is whether the applicant has met the threshold set under *section 362* of the *Criminal Procedure Code* to warrant review of his sentence in the exercise of this court's revisional jurisdiction. I say this because my take is that this application invokes the general revisional jurisdiction of the High Court and not the special jurisdiction created by the Supreme Court in the *Francis Karioko Muruatetu & 5 Others V Republic case, [supra]*.

5. The jurisdiction under the *Muruatetu case* in my understanding is limited to applications for resentencing in which the applicant was convicted and sentenced in offences for which the law prescribed a minimum mandatory sentence which the Supreme Court held was unconstitutional as it denied the trial court discretion in sentencing. Though the *Muruatetu case* was concerned with the death penalty, the principle established in the case applies to all other cases in which the law provides for a minimum mandatory sentence.

6. In the instant case, the applicant was convicted of the offence of stealing contrary to *Section 268 (1)* as read with *Section 275* of the *Penal Code* which does not carry a minimum mandatory sentence. The punishment allowed by the law for theft is a maximum of three years' imprisonment which gives the trial court unfettered discretion in determining the appropriate sentence to impose on the person convicted of the offence depending on the facts and circumstances of each case.

For the above reasons, I find that the *Muruatetu* decision is not applicable in this case.

7. Having found that the application invokes the revisional jurisdiction of this court, it is important to outline what that jurisdiction entails. A reading of *Section 362* of the *Criminal Procedure Code* reveals that though the High Court has wide powers to review and revise decisions of the lower court, that power is not unlimited. The revisional jurisdiction of the court can only be exercised to correct a mistake, illegality or impropriety in any finding, sentence or order recorded or passed by the lower court or any irregularity in the proceedings leading to the impugned finding, order or sentence.

8. In this case, the applicant was charged and convicted on his own plea of guilty with the offence of stealing contrary to *Section 268 (1)* as read with *Section 275* of the *Penal Code*. The particulars of the offence alleged that on 23rd April 2018 at Kangemi area in Nairobi County, he unlawfully transferred KShs.25,000 via Mpesa from *Zacharia Githutu Kanyi's* cell phone number 0726xxxxxx to number 0748xxxxx without his consent.

9. The trial court's record shows that on conviction, the applicant was sentenced to pay a fine of KShs.100,000 in default to serve three years

imprisonment. *Section 28 (2)* of the *Penal Code* which prescribes default sentences depending on the amount of fine imposed clearly states that if the fine exceeds KShs.50,000, the default sentence should be 12 months imprisonment. In the premises, it is obvious that the trial court erred in imposing a default sentence which contravened the clear provisions of *Section 28 (2)* of the *Penal Code*. In imposing such a sentence, the trial court committed an error of law which this court is duty bound to correct by revising the sentence to align it to with the law.

10. Having taken all relevant factors into consideration including the fact that the applicant was a first offender, I hereby set aside the sentence of the trial court and substitute it with a sentence of KShs.100,000 in default to serve six months' imprisonment.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JUNE 2021.

C. W. GITHUA

JUDGE

In the presence of:

The applicant

No appearance for the respondent

Ms Karwitha: Court Assistant