



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL REVISION 064 OF 2014**

**REPUBLIC.....ODPP**

**VERSUS**

**SELINA JULIA WANZALA.....PROSECUTOR**

**RULING**

1. On 21<sup>st</sup> July 2021 the learned *Chief Magistrate J. B. Kalo* sentenced Selina Julia Wanzala to Probation Supervision for one (1) year in **Chief Magistrate’s Criminal Case Number E1734 of 2021**.
2. The Respondent was charged with the offence of **Stealing Contrary to Section 268 as read with 275 of the Penal Code**. She pleaded guilty to the charge, and the facts that the complainant has sent Kshs. 128,000/= from her Kenya Commercial Bank account to the MPESA account of the accused person inadvertently. She had intended to send the money to her daughter but mistyped one digit of her daughter’s phone number.
3. On realising the mistake she rang the accused person and implored her to return the money. Instead the accused withdrew the money and used it all.
4. Upon seeking a Probation Officer’s Report, the same was unfavourable, but the trial magistrate ignored the same and placed the accused person on probation.
5. The ODPP was aggrieved and has brought this matter for revision seeking that the court to recall the Lower Court File and revise the sentence.
6. This application is brought under **Sections 362 and 364 of the Criminal Procedure Code**. The ODPP seeks that the non-custodial sentence be revised from one (1) year probation to a non-custodial sentence.
7. The investigating officer in this case served the respondent with the application and informed her that she was required to be in court on the hearing date. She never showed up. **Section 362 of the Criminal Procedure Code;-**

**“S. 362. Power of High Court to call for records**

**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.”**

8. The issue therefore is whether in the circumstances of the case under revision, this court is to consider the correctness, legality or propriety of the sentence passed.
9. The powers of the High Court on revision are set out under **Section 364 of the Criminal Procedure Code**.

**“S. 364. Powers of High Court on revision**

**(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.”

10. The revisionary powers of this court over subordinate courts is vested by **Article 165 of the Constitution**;

**“165. High Court**

(1) There is established the High Court, which—

(a) shall consist of the number of judges prescribed by an Act of Parliament; and

(b) shall be organised and administered in the manner prescribed by an Act of Parliament.

(2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of —

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(4) Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

(5) The High Court shall not have jurisdiction in respect of matters— (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate

**to ensure the fair administration of justice.”**

11. The accused person having pleaded guilty to the offence of stealing **Contrary to Section 268 as read with 275 of the Penal Code**, was liable to imprisonment for three (3) years.

12. A probation order is provided for Under **Section 4 of the Probation of Offenders Act Cap 64 of the Laws of Kenya.**

*4. Power of court to release certain offenders on probation of good conduct.—*

*(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour: Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.*

*(2) Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.*

*(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the offender.*

*(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.*

*(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned.”*

13. The issue then for determination is the propriety of the probation order in the circumstances of this case.

14. I find light in **DPP vs Kuldip Madan & Another [2019] eKLR (Misc. Criminal Appl. No. 809 of 2018) where the court dealing with a similar issue relied on Abraham Wafula v Republic [2013] eKLR (Bungoma, HC Cr. Rev. No. 21 of 2013)** which set out the scope of such an application as this in the following words:

‘The Court in the case of **BGM HCCR Revision No 27 of 2013 Martin Maruti Kituyi vs Republic** rendered itself accordingly on the Revision jurisdiction of the High Court in the following manner:

*“[11] Under Article 50(2) (a) of the Constitution, Appeal and Revision are part of the right to fair trial in a criminal proceeding. Both are constitutional processes for enforcement of legal relief. Except, the court must consider an Appeal as a matter of right whilst Revision under Article 165 (6) and (7) of the Constitution is a matter for the discretion of the court. In the new constitutional structure, Revision is a constitutional relief only that sections 362 to 367 of the CPC are merely the statutory expression of, and the procedural prescriptions attending the remedy of Revision. Therefore, the very nature of Revision as a discretionary remedy explains the policy underpinnings of section 364 (5) of the CPC; that Revision should not be a substitute for an Appeal whatsoever or insisted upon by a party who has not filed an Appeal where one was provided for. Revision primarily serves to put right instances where a finding, sentence, order or proceedings of a lower court are tainted by incorrectness, impropriety, illegality or irregularity. Those words are key pillars that define the Revision jurisdiction. Broadly put, whenever the integrity of any proceeding is put to question, the Revision jurisdiction of the High Court comes into play and may disturb the decision of the lower court purely in the best interest of justice.*

*[12] Having said that, section 364(5) of the CPC is not intended to preclude the High Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of Appeal which he did not utilize, and is not intended at all to derogate from the wide powers conferred by Article 165 (6) and (7) of the Constitution, and section 362 and section 364 of the CPC. This should explain what the word “insistence” in section 364 (5) entails. It should be understood that the Revision jurisdiction of the court can be set in motion by the court **suo moto**, even on information provided by the aggrieved party who had the right of Appeal but did not Appeal. On this explication of those sections see the cases of R v Ajit Singh [1957] E.A 822 and Walome v R [1981] KLR 497.*

*[13] The exercise or not of the discretion of the court should, therefore, depend on the circumstances of each case, and the nature of the things the court is being asked to probe and put right. Those which are clearly illegal as to constitute a breach of fundamental rights or freedoms guaranteed by the Constitution should ordinarily attract the exercise of Revision jurisdiction of the court unless they are matters which the court feels should be left for a claim for damages. But where the aggrieved party is proposing an Appeal from his pleadings, then the court should hesitate to exercise the discretion under Revision jurisdiction. In making this proposition, I*

am well aware of section 364 (1) (a) of the CPC which allows the High Court in a Revision cause to exercise the powers conferred on it as an Appellate Court in sections 354, 357 and 358 of the CPC. Except, it must be understood that those powers will only come to bear after the court is satisfied that the case is fit for the exercise of discretion under Revision jurisdiction. On that basis, there should be no room to read a contradiction in what I have said.”

20. In R. v. Ajit Singh s/o Vir Singh [1957] E.A. 822 it was observed as follows:-

“In that case the Court clarified the situation in which the revision jurisdiction might be exercised even when the matter arising was one in which appeal lay (p.824 – Rudd, Ag. C.J.):

“We are of opinion that sub-s.(5) is not intended to preclude the Supreme Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of appeal. We do not think this sub-section is intended to derogate from the wide powers conferred by s.361 and s.363 (1). To hold that sub-s. (5) has that effect would mean that this court is powerless to disturb a finding, sentence or order which is manifestly incorrect... merely because the aggrieved party, who might well be an ignorant person, has not exercised a right of appeal but has asked for revision and thus brought the matter to the notice of the court. In our judgment the court can in its discretion, act suo motu (sic) even where the matter has been brought to its notice by an aggrieved party who had a right of appeal.”

15. In light of the above I find that the trial magistrate failed to consider the recommendations of Probation and After Care Services. The investigations found that the accused had lied about her social economic status only for the purposes of gaining the court’s undeserved sympathy.

16. The trial magistrate ignored the impact of the offence on the victim of the offence. The trial magistrate while exercising this discretion to sentence, neglected to consider the purpose of sentencing, the manner in which the offence was committed.

17. I have made reference to the Sentencing Policy Guidelines which recognise that sentencing is perhaps one of the most intricate aspects of the administration of trial justice. It acknowledges that sentencing impacts not just the individual offender but also the community, and indeed the entire justice system. They also seek to enhance the participation of the victim, and generally infuse restorative justice values in the sentencing process. Significantly, they champion the national value of inclusivity by promoting community involvement through use of non-custodial sentences in suitable cases.

18. The Guidelines also state also point out that the; sentencing process, which entails the exercise of judicial discretion, must be in accord with the Constitution, as embodied in the Judiciary’s overall mandate of ensuring access to justice for all. These guidelines are in recognition of the fact that while judicial discretion remains sacrosanct, and a necessary tool, it needs to be guided and applied in alignment with recognised principles; particularly fairness, non-arbitrariness in decision-making, clarity and certainty of decisions. The guidelines are, therefore, an important reference tool for judges and magistrates that will enable them to be more accountable for their sentencing decisions

19. Making reference to the Guidelines helps us to give sentencing the solemnity it deserves.

20. The learned trial magistrate took into consideration the situation of the accused person but failed to consider the situation of the victim of the deliberate acts of the accused person of taking what was not hers and refusing to return the same. A balanced sentence would have taken into consideration this and whether restorative justice was not an issue here.

21. This is foreseen by the **Penal Code** which provides for it under **section 31** which states. Compensation

**“Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to or in substitution for any other punishment.**

22. The complainant herein was injured by the callous actions of the respondent. The Victim Impact Statement clearly demonstrates the kind of injury the complainant suffered. This the trial magistrate ought to have considered.

23. Having considered a non-custodial sentence the trial court was also obligated in all fairness to consider how the accused person would return the money. The court also needed to consider the deterrence effect of the sentence. So many times innocent Kenya’s are thrown into untold suffering when money meant for emergencies is taken away by unscrupulous heartless persons like the accused person herein.

24. Her mitigation was found to have been false by the Social Inquiry Report. But the court proceeded to rely on the same.

25. The propriety of the sentence in the question is undermined by all the foregoing.

26. The respondent was served but chose not to come to court.

27. In the circumstances, the probation order is revoked, and substituted with a fine of Kshs. 150,000/=, of which Kshs. 128,000/= to be compensation to the victim of crime. In default of payment the accused to serve one (1) year imprisonment. Sentence to run from the date of arrest.

28. Warrant of arrest to issue against the respondent to be executed through the ODPP Nakuru.

**DATED, SIGNED AND DELIVERED VIA ZOOM THIS 18<sup>TH</sup> DAY OF JUNE, 2021**

**MUMBUA T. MATHEKA**

**JUDGE**

Court Assistant Edna

DPP Ms Murunga

Respondent N/A