



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI LAW COURTS CRIMINAL DIVISION**

**HCCR REV E069 OF 2021**

**KENNEDY CHALO SHIKUKU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. By a chamber summons application filed in court on 18<sup>th</sup> March 2021, the applicant has moved the court seeking for orders as here below reproduced;

- a. That pursuant to provisions of sections 362 and 364 of the criminal Procedure Code, this honourable court be pleased to exercise its powers on revision and allow this application;
- b. That the honourable court be pleased to grant an order directing sentences imposed on him by Hon. Boko (SPOM) be computed retrospectively from the time of *arrest/plea or be substituted with the period served in custody for the interest of justice*;
- c. That the application is supported by the annexed affidavit of KENNEDY CHALO SHIKUKU among other grounds to be addressed during hearing of this application.

2. The application is supported by an affidavit sworn by the applicant in which he deposes that, he has been convicted over the offence of; handling suspected stolen goods contrary to section 322(2) of the Penal Code and sentenced to serve five (5) years imprisonment. That, the sentence is harsh and excessive in that, he is a first offender and a young man aged 29 years. Further, the dictates of; section 333(2) of Criminal Procedure Code provides that, the sentence shall take into account the period spent in custody, which herein cumulatively adds up to a period of two years.

3. He further states that, he is a guardian of his deceased brother's son, who is "subsisting" in poverty since his incarceration. Moreover, since the incarceration, he has suffered a lot, learnt his lessons the hard way, and therefore, prays that this court be lenient on him by invoking the policy directions on sentencing guidelines at paragraph 8.2, in tandem with enabling provisions of the constitution. Finally, he avers that, he is remorseful before this court and society for his actions and is fully rehabilitated, having learnt the value of hard work, honesty and integrity in one's life and he undertakes to "eschew" any criminal act in future.

4. However, the application was opposed by the Respondent based on the grounds of opposition dated 25<sup>th</sup> June 2021, reproduced here below verbally:

- a. That the application lacks merit and is misconceived in law,
- b. That the trial magistrate acted within the law and there was no illegality in passing the sentence against the Applicant
- c. That the applicant has not demonstrated that there was an error or irregularity or illegality apparent on record.
- d. That the application is an abuse of the court process and should be dismissed accordingly.

5. The application was canvassed by the applicant through oral address to the court, wherein, he reiterated the averments in the affidavit in support of the application. The Respondent, on its part filed brief submissions and highlighted the same to the court. In a nutshell, the

Respondent submitted that, the applicant has not met the threshold of; section 362 of Criminal procedure code as he has not demonstrated that, there is an error apparent on record in regard to the correctness, legality or propriety of the findings, sentence or order made by the trial court. Furthermore, the trial court exercised judicial discretion, being guided by the principles and objectives of sentencing in particular, the issue of proportionality and deterrence. Finally, the trial court did not consider the period the applicant spent in custody as indicated in the handwritten record.

6. I have considered the application in the light of materials placed before the court and I find that, the applicant was charged vide Criminal Case number 2079 of 2017, alongside two others with the offence of; breaking into a building and committing a felony contrary to section 306(a) of the Penal Code, in count one and an alternative count of handling suspected stolen goods contrary to section 322(1) of the Penal Code. He was tried and sentenced to aforesaid period of five (5) years imprisonment. The applicant avers that the period he was in custody was not considered. However, I note from the lower court record of 30<sup>th</sup> July 2019, when he was sentenced that, the learned trial Magistrate stated as follows:

“I have also however considered the fact that they (accused’s) are not first offenders and also the years they have spent in custody. I therefore sentence him to serve five (5) years imprisonment each, that is A1 and A3 for the main charge. A1 will serve five (5) years with hard labour for this offence of handling stolen goods (alternative charge contrary to section 322(2) of the Penal Code.)”

7. It suffices to note that, the applicant herein was the 1<sup>st</sup> accused in the trial court. From the aforesaid, I find that the trial court, did take into account the period in which the applicant was in custody while deciding on the sentence to mete out, therefore, on that reason alone, the application lacks merit. Therefore, section 333(2) of criminal procedure code was considered. Be that as it were, it is noteworthy that, the provisions under which the applicant has anchored his application, being section 362 of 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”

8. The key requirements of the aforesaid provisions require the applicant to satisfy the court that the sentence impugned does not pass the test for parameters of; correctness, legality and propriety. The sentence herein is legal and lawful. In fact, all that the applicant avers is that, it is excessive and harsh. That averment can only be a ground of appeal, not revision as envisaged under section 362 of Criminal Procedure Code.

9. The upshot of the aforesaid is that, I find that the application has no merit and I dismiss it or strike it out due to want of jurisdiction.

It is so ordered.

**DATED DELIVERED VIRTUALLY AND SIGNED ON THIS 13<sup>TH</sup> DAY OF OCTOBER, 2021**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of;

Applicant in person

Ms. Kibathi for the Respondent

Edwin Ombuna – Court Assistant