



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

MISC CRIMINAL APPLICATION NO. E040 OF 2021

SAMUEL MWANGI KARIUKI..... APPLICANT

VS

REPUBLIC..... RESPONDENT

RULING

Background to the case

1. The Applicant herein was charged with Stealing Stock contrary to **Section 278** of the **Penal Code**. The particulars of which are that on the night of 14th and 15th November, 2020 at Geta area in Kipipiri Sub-County within Nyandarua County, he stole one cow valued at KShs.70,000/- the property of Charles Kungu Thogo.
2. In the alternative, the Applicant was charged with handling stolen property contrary to **Section 322 (2)** of the **Penal Code** in that on the 5th Day of November, 2020 at Engineer town in Kinangop Sub-County within Nyandarua County, otherwise than in the course of stealing dishonestly retained one cow knowing or having a reason to believe it to be stolen property.
3. The Applicant was convicted on his own plea of guilty and consequently sentenced to two years imprisonment.

The application.

4. The Applicant approached this court vide a Chamber Summons filed on 1st March, 2021 in which he asks the court to review his sentence by setting it aside and substituting it with a sentence under Community Service Orders. In what he referred to as a 'Memorandum of Sentence Review' also filed on 1st March, 2021, he pleaded with the court to release him on the following grounds; that;
 - i. He as a first offender.
 - ii. That he is remorseful of his offence and has learnt to be a law abiding citizen.
 - iii. That he is from a poor family background.
 - iv. That he did not give proper mitigation during sentencing.
 - v. That he is the sole bread winner of his family and that his incarceration has placed them in a very difficult situation.
 - vi. That he promises to abide by all the conditions that the court may deem fit to give.
 - vii. That he pleaded guilty to the offence.
5. At the hearing of the application on 10th November, 2021, the Applicant pleaded with the court to set him free because he only had four months to complete his sentence. He added that he left his wife pregnant at the time of sentencing in November, 2020.
6. On the part of the Respondent, learned State Counsel, Miss Maingi submitted that at the lower court, the Probation Officers Report was unfavourable but requested that the prison confirms if the Applicant was entitled to remission. It was then conformed by one Kevin Oketch, a prison warden at Naivasha Medium prison that the Applicant was entitled to 8 months remission and was due for release on 31st March, 2022.

Determination

7. This being a revision of sentenced application, the powers to do so by this court are conferred on it by **Section 362** of the **Criminal Procedure Code** which Provides that:

“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.

Section 364 on the other hand provides for the orders that the Court can issue. It reads as follows:

“(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.

*(c) in proceedings under **Section 203** or 296 (2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.*

(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.”

8. This court has accordingly called for the original trial court record. Notably is that the Applicant pleaded guilty to the main count and thus did not waste court's time. I have noted on the other hand that the Probation Officer's Report that was presented to the court before sentencing depicted the Applicant as a bother to the community. This view was borne both by his own family members and the members of the community. What this implies is that he ought to serve a sentence that serves both to reform him and as retributive.

9. Section 278 of the **Penal Code** provides for an imprisonment term not exceeding 14 years for the offence of stealing stock. The Applicant was only sentenced to serve two (2) years imprisonment. Although he was a first offender which constitutes a mitigating factor, the fact that he is entitled to 8 months remission of sentence and will be released on 3rd March, 2022 means that he will serve far much less than the two year jail term imposed. In my considered view, the sentence was not only lenient but very reasonable.

10. Having regard to his character in the society and taking into account that retribution is one of the purposes of sentencing, it is my honest view that the Applicant should serve the entire jail term.

11. In totality, I find the application unmerited and the same is hereby dismissed.

DATED AND DELIVERED AT NAIVASHA THIS 2ND DAY OF DECEMBER, 2021.

G. W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Samuel Mwangi Kariuki - Applicant in person

2. Ms Maingi for the Respondent