



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL DIVISION

CRIMINAL REVISION NO. 137 OF 2019

LESIT, J

MICHAEL JEREMIAH OKUTHO.....RESPONDENT

VERSUS

REPUBLIC.....APPLICANT

RULING

1. The Applicant who has approached this court by way of a Notice of Motion filed under a Certificate of Urgency on 2nd May, 2019 and accompanied by a Supporting Affidavit also filed on 2nd May, 2019. The application was brought under **Articles 49(h)** and **24** of the Constitution and **Section 362** of the Criminal Procedure Code. The application is for revision of the decision by the **Chief Magistrate's Court, Makadara**, in **Cr. Case No. 263 of 2019** delivered on 5th February, 2019. The appellant was sentenced to serve 2 years' imprisonment and has served one year so far.

2. The prayers on the Notice of Motion are as follows:

- a) **That I am the above inmate at Nairobi Remand & Allocation Maximum Security Prisons serving custodial sentence of Two (2) years.**
- b) **That I was found guilty of the offence of stealing contrary to section 268 as read with section 275 of the Penal Code.**
- c) **That I beseech the Hon. Judge to find it prudent and review my custodial sentence from two (2) years to a non-custodial sentence with the option of an affordable fine.**
- d) **That this application is supported with sworn affidavit attached below.**

3. The application has not been opposed by the State. Ms. Nyauncho, learned Counsel for the Prosecution submitted that the State was not opposed to the application for revision as the Applicant had been in custody serving sentence for a year, that he had pleaded guilty to the offence thus saving court precious time, was a first offender and, in the circumstances, he must have learnt his lesson.

4. I have considered the application. The jurisdiction invoked is strange save for the revision provision of **section 362** of the **Criminal Procedure code**. The Applicants argument is that he had pleaded guilty to the offence, that he had also returned the stolen phone to the police for restitution to the owner and therefore the sentence was harsh. He says that he is remorseful for the offence.

5. The Applicant has also pleaded personal circumstances that he had a young family of a wife and three children who wholly depended on him as he was the sole bread winner. He said that he as remorseful for the offence.

6. I have considered what the State submitted and that it is not opposed to the application for revision. I have also considered the sentiments by the Applicant. I also noted that the Applicant did not file an appeal against the decision of the lower court. He is therefore not having a second 'bite in the cherry'.

7. The Applicant faced one count of stealing contrary to **section 268** as read with **275** of the **Penal Code**. He stole a phone. He pleaded guilty and was sentenced to two years imprisonment without the option of a fine. The State concedes he may have he may have restituted the stolen phone.

8. When considering sentence, the court should be guided by the Sentencing Policy Guidelines [SPG]. The Policy requires the court to consider the mitigation of the accused person and the statement from the victim if any. It should also consider the accused past record, his antecedents, his attitude to the offence and whether he is remorseful for the offence. The SPG also require the court to give reasons for arriving at particular sentencing decision in writing, in order to show how the sentence was arrived at. The court should also consider the facts considered, and the legal provisions applied.

9. I have considered the court was informed the previous record of the Applicant from the police, that the Applicant was a first offender, and that he returned the phone to the police for restitution to the owner. The court received Applicants mitigation which was short thus:

‘I pray for a non-custodial sentence so that I can help my family’.

10. I have also noted the courts response and ruling on sentence where it ruled thus:

‘I have considered the mitigation by the Accused. Giving him a non-custodial sentence in my opinion would be like rewarding him for the offence of stealing.

I hereby sentence him to two (2) years imprisonment to run from 22nd January, 2019’

11. I find that the learned trial magistrate did not comply with the guidance given in the SPG which emphasizes that a no-custodial sentence should be considered as the first option in sentencing where the offence is not serious, where the accused has pleaded guilty and shown remorse and where he is a first offender. The Applicant deserved to be considered for a non-custodial sentence, in addition to the facts I have outlined, for the added fact that the stolen item was recovered and restituted to the owner.

12. The remark by the learned trial magistrate that giving a non-custodial sentence is like rewarding an offence is very unfortunate indeed. If that is the case, no convicted person will ever deserve a non-custodial sentence. That will also render useless the very objectives for which the SPG were made.

13. The Applicant has almost served the entire sentence taking into account the remission period. **The appropriate order to make then in this case is that his Sentence is reduced to period already served.**

14. **Those are my orders.**

DELIVERED IN NAIROBI THIS 4TH DAY OF FEBRUARY, 2020.

LESIT, J

JUDGE