

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION 62 OF 2020

JOEL WANYONYI NAMASAKA.....APPLICANT.

VERSUS

REPUBLIC.....RESPONDENT.

RULING

1. By a Chamber Summons application dated 13th February, 2020 and filed on 9th March, 2020 the Applicant seeks a prayer that his sentence be revised pursuant to **Sections 362 and 364 of the Criminal Procedure Code**. The application is supported by the Applicants affidavit sworn on 13th February, 2020. He depones that he is a young family man aged 33 years with two children and the sole breadwinner of his family. In addition, he takes care of his aged blind father. He alludes that eth three years imprisonment was harsh and excessive in the circumstances of the case. Furthermore, whilst in prison, he had learnt many skills which would guide him and mold him once he left prisons. prisons wherefrom he prays that the court substitutes the custodial sentence with a noncustodial one. Finally, it is his submission that he is remorseful and fully rehabilitated.

2. In his oral submissions in court, he reiterated the submissions contained in the supporting affidavit.

3. Ms. Ndobi for the Respondent opposed the application stating that the sentence was lawful. She submitted that one of the purposes of a sentence is deterrence. And that considering the circumstances of the case, the sentence was commensurate with the sentence. It was her view that unless for a very good and sufficient reason as was held in the case of **Ogallo vs Republic [1954] EALR 270** the court cannot fetter the judicial discretion of a trial magistrate in sentencing.

4. The applicant was charged alongside another with the offence of stealing contrary to **Section 268(1) as read with Section 275 of the Penal Code**. the particulars of the offence that on diverse dates between 15th and 31st December, 2013 at Nairobi County jointly stole cash Kshs. 373,500/= a purse, one torch and a pair of shoes all valued at Kshs. 402,950/= the property of Rodger Pearson. In the alternative he was charged with handling goods contrary to **Section 321(1) as read with Section 322(2) of the Penal Code**. it was alleged that on 8th January, 2014 at Lower Kabete Spring Valley area within Nairobi County, otherwise than in the course of stealing dishonestly received and retained cash Kshs. 65,000/= knowing it to be stolen goods, the property of Rodger Pearson.

5. Upon conclusion of the trial, the applicant and his co-accused were found guilty of the main count and convicted accordingly. He was sentenced to serve three (3) years imprisonment.

6. Under **Section 275 of the Penal Code**, any person convicted of the offence of stealing is liable to imprisonment for three (3) years". A look at the record of proceedings at the trial court shows that no record of previous convictions of the applicant was presented before the court. Hence, in sentencing him, the court ought to have treated him as a first offender. In offering his mitigation, it was submitted that he was a young man aged 32 years with a young family. His mother had just passed on, he pleaded remorse and urged for a non-custodial sentence. The court on its part observed that the offence was serious adding that both accused persons had bleached trust that the complainant had in them.

7. My view is that the learned trial magistrate failed to have regard to the fact that the applicant was a first offender and the that the value of the subject matter was not too large as to attract the maximum sentence provided in law. Therefore, the sentence imposed was not commensurate with the offence.

8. Having regard that the applicant is remorseful, and has since served close to nine months of the sentence, serves the purpose of deterrence. In the circumstances, I find that that amounts to sufficient sentence.

9. In the result, this application must succeed. I set aside the three years jail term and substitute the same with an order that the applicant be and is hereby forthwith set free unless otherwise lawfully held. It is so ordered.

DATED AND DELIVERED THIS 2ND DAY OF JUNE 2020

HON. G. NGENYE MACHARIA

JUDGE

In the presence of:

1. *Applicant in person.*

2. *Miss Akunja for the Respondent.*