



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL DIVISION

CRIMINAL REVISION NO. 522OF 2020

LESIT, J

HAMISI ERIC JOSEPH.....RESPONDENT

VERSUS

REPUBLIC.....APPLICANT

(Being an appeal from the original conviction and sentence by Hon. E. Riany (M/s) SPM dated 27th June, 2019 in Milimani Chief Magistrate Criminal Case No. 1497 of 2018)

RULING ON REVISION

1. The Applicant **HAMISI ERIC JOSEPH** has come by way of a Notice of Motion dated June 3, 2019. He has involved **section 362** and **section 364** of the **Criminal Procedure Code**, **Article 49** of the **Constitution**, the **Judicature Act, Cap. 8** and the **High Court (Practice and Procedure) Rules 3(1)(2)** and **(3)** and **Rule 6**. In essence he seeks, two prayers one, to have the proceedings before the magistrate's court re-called and two, to have this court exercise its discretion and review the Applicant's sentence.

2. The grounds for the applicant are eight as follows:

- 1) That the Applicant was charged with three (3) counts of breaking into a building contrary to section 306(a) of the Penal Code and sentenced to 3 years imprisonment.**
- 2) That the Applicant is Asthmatic, a chronic illness he is battling.**
- 3) That given the COVID 19 pandemic, the Applicant is at great risk of contracting the virus.**
- 4) That the Applicant is a family man who is married and have children who depend on him.**
- 5) That the Applicant is the sole bread winner of his family and extended family.**
- 6) That despite mitigating circumstances, the Applicant was not subjected to probation to guide the court in reaching a just sentence.**
- 7) That continued stay of the Applicant in custody will have negative impact on his young family as they are the sole bread winner.**
- 8) That it is only fair and just this Honourable court grants a non-custodial sentence as a form of punishment in which the applicants are highly remorseful.**

3. The Applicant has also sworn an affidavit in support of his application in which he restates the grounds in support of the application.

4. Mr. Ayuo argued the application on behalf of the Applicant. In his submissions counsel urged that they were seeking a non-custodial sentence including a fine or probation order on the basis of two facts. One, that the Applicant was jailed for 3 years and has since served one year. Secondly, based on the Applicant's medical report dated April 3, 2020 which shows he has chest complications.

5. Ms. Nyauncho, learned Prosecution Counsel did not oppose the application stating that the Applicant was on and off decongestants.

Counsel however urged that the sentence should be reduced to 2 years on each count.

6. I called for a Probation Report and a very detailed one was filed by Mr. Andrew Kanyutu, Probation Officer. I have considered it. The officer found the Applicant suitable for non-custodial sentence based on the Applicant's remorsefulness for this offence, family support and the fact two of the three complainants had since forgiven him for the offence.

7. I have considered this application, submissions by both counsels and the facts of the case. The record of the proceedings shows that the Applicant was found guilty of three counts of **Breaking into a building and committing a felony** contrary to **section 306 (a)** of the **Penal Code**. In each count he was alleged to have broken into a hotel room and stolen one laptop of varying cost from each room.

8. The Applicant has invoked section the powers of this court under **section 362** and **section 364** of the **Criminal Procedure Code**. Under **Section 362** "the High Court may call for and examine the record of any criminal proceedings before a subordinate court ..." The purpose of the exercise of that power is for the court to satisfy itself of the correctness, legality and propriety of any finding, sentence or order recorded or passed.

9. Under **section 364** the Power of the High Court on revision is explained. Under the two sections the court carries out the exercise of this jurisdiction in a somewhat summary procedure and it is not necessary for any of the parties to be heard, unless the court allows them a hearing.

10. **Article 165 (6) (7)** gives the High Court supervisory jurisdiction over the subordinate courts and persons, bodies of authority exercising a judicial or quasi – judicial function "*but not over a superior court*". In exercise of that power may call for the record of any proceedings before any such subordinate court, person body or authority.

11. The Applicant did not demonstrate what in his view needed correction, review or revision from the record of the magistrate court. What he has argued is that his sentence should be reduced because he has served one year's imprisonment out of the total nine ordered and because of his medical condition. The medical condition can be managed by prison medical facility and there was proof from his documents that he is receiving the necessary assistance.

12. Regarding sentence, he got off with a minimal penalty. The penalty for **Breaking into a building and committing a felony** contrary to **section 306 (a)** of the **Penal Code is seven years' imprisonment**. The Appellant was sentenced to a total of nine years' imprisonment, three in each count. However, the sentences were ordered to run concurrently, reducing the sentence by two thirds. The sentence was itself legal and correct in nature, and cannot be disturbed on grounds of illegality, mistake or impropriety.

13. Even if his case were to be considered under Community Service Orders Act, it will not entitle the Appellant any remedy. The reason being that the cases normally considered for Community Service Orders are penal offences whose punishment does not exceed three years. The offence the Appellant faced prescribed for a sentence of seven years.

14. Conversely, the Appellant was sentenced on the 27th June, 2019. He cannot be said to have served a substantive part of his sentence.

15. I have come to the conclusion that the Applicant's application has no merit. Consequently, the application is dismissed.

DELIVERED THROUGH TEAMS AT NAIROBI THIS 13th DAY OF JULY, 2020.

LESIT, J.

JUDGE