



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL REVISION CASE NO. 4 OF 2019

ALI NAJIB.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. By way of Notice of Motion, the Applicant seeks orders thus:

- That the Applicant prays that a review be made as the Court deems fit in the circumstances.
- That the Honourable Court be pleased to invoke **Section 304(1)(b)** and **279(b)** of the **Penal Code**.

2. The Application is supported by an affidavit deposed by the Applicant where he avers that he was convicted on **31st December, 2018** and sentenced to serve **two (2) years imprisonment**. Therefore, he sought review on grounds that the sentence imposed was harsh and he was a first offender.

3. In response, the learned State Counsel **Mamba Vincent** opposed the Application arguing that the Applicant had not demonstrated that he had reformed within the short time he has been in custody.

4. The Applicant was charged with **Stealing** contrary to **Section 268** as read with **Section 275** of the **Penal Code** which provides thus:

“268. (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—

(a) an intent permanently to deprive the general or special owner of the thing of it;

(b) an intent to use the thing as a pledge or security;

(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner; and “special owner” includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts

the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.

(4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the

owner, and believes on reasonable grounds that the owner cannot be discovered.

(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.

275. Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.”

5. He is satisfied with the conviction but argues that the sentence was harsh. At this point in time I must interrogate if the sentence meted out was correct or legal.

6. Principles of interfering with sentence were slated in the case of **Bernard Kimani Gacheru vs. Republic Criminal Appeal No. 188 of 2000** where the Court of Appeal stated thus:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

7. Considering the offence the Applicant committed the sentence meted out which was within the law cannot be stated to have been manifestly harsh.

8. Therefore, the Application lacks merit. Accordingly, it is dismissed.

9. It is so ordered.

Dated, Signed and Delivered at Kitui this 12th day of June, 2019.

L. N. MUTENDE

JUDGE