



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL REVISION NO. 23 OF 2019**

**ELIUD KIRWA KEMBOI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the sentence passed in Criminal Case No 711 of 2019 in the Chief Magistrate's Court at Eldoret by Hon. C. Obulutsa, CM on 28 February 2018)*

**RULING ON REVISION**

[1] This is a revision application, filed by **Eliud Kirwa Kemboi**, the Applicant herein, in respect of the sentence of 18 months' imprisonment imposed on him by the Chief Magistrate's Court on **28 February 2019**. I called for the lower court file for perusal, and it confirms that the applicant was indeed charged in **Eldoret Chief Magistrate's Criminal Case No. 711 of 2019** with the offence of housebreaking and stealing contrary to **Sections 304(1)(b) and 279(b) of the Penal Code, Chapter 63 of the Laws of Kenya**. It was alleged that on **8 February 2019** at Sosiani Village in Sosiani Sublocation in Turbo Sub-County in Uasin Gishu County he broke and entered the dwelling house of **Christopher Cherogony** and stole therefrom four T-shirts, one jacket, one pair of shoes, one bag, two bedsheets and one speaker, all valued at **Kshs. 10,900/=**, the property of the said **Christopher Cherogony**.

[2] The Applicant faced an Alternative Charge of handling stolen goods contrary to **Section 322(1)** as read with **Section 322(2)** of the **Penal Code**. The particulars were that on the **8 February 2019** at Sosiani Sublocation in Turbo Sub-County within Uasin Gishu County, otherwise than in the course of stealing, he dishonestly retained one jacket, one pair of shoes, one bag, four T-shirts, one speaker and 2 bedsheets while knowing or having reasons to believe them to be stolen goods.

[3] The Applicant admitted the allegations against him and was accordingly convicted on his own plea of guilty. The learned magistrate then called for a Probation Officer's Report to enable him make a decision on the most appropriate sentence. However, the record of the proceedings of the lower court shows that same was not forthcoming after two adjournments; and that on the **28 February 2019**, the lower court proceeded to sentence the Applicant to 18 months' imprisonment on each limb of the Main Charge. Nevertheless, the record shows that there is, indeed, a Probation Report that was filed in the matter, dated **28 February 2019**, which was not favourable to the Applicant.

[4] The Court, pursuant to its supervisory mandate under **Article 165(6) and (7) of the Constitution**, is empowered to call for and examined the decisions of subordinate courts and tribunals for correctness, legality or propriety. Hence, **Section 362 of the Criminal Procedure Code** recognizes that:

**"The High court may call for and examine the records 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."**

[5] In the same vein, **Section and 364(1)(b)** of the **Criminal Procedure Code** stipulates that:

**"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 ... in the case of any other order other than an order of acquittal, alter or reverse the order."**

[6] The lower court record confirms that the Applicant was indeed charged before the lower as aforesaid; and that he pleaded guilty; and therefore his matter was disposed of in a summary manner between **15 February 2019** and **28 February 2019**; and there is no question that the plea was unequivocal and taken in accordance with the imperatives set out in **Section 207** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya** and the guidelines in the case of **Adan vs. Republic (1973) E.A. 445**. Indeed, the Applicant did not impugn the plea-taking process. His entreaty is for a reconsideration of the sentence imposed on him.

[7] In the Supporting Affidavit filed herein, the Applicant averred that the lower court had ordered for a Probation Officer's Report; and that the Probation Officer was misled by the people at home and therefore produced an inaccurate report to the effect that his life was at risk. He urged the Court to consider that he was only 21 years old at the time of his arrest and on that basis prayed that he be released to continue with his vocational training as a driver.

[8] As pointed out herein above, the lower court's decision could not have been swayed by the Probation Officer's Report because it probably had not been filed by the time the learned magistrate disposed of the matter. I say so because the record of the proceedings of the lower court clearly shows that the report had not been filed by the time the sentence of 18 months' imprisonment was imposed. The report also does not bear a court stamp to indicate the date and time of its filing. I therefore find no basis for finding that the sentence was influenced by the comments of the Probation Officer in the report dated 28 February 2019.

[9] The offence of housebreaking as envisaged by Section 304(1) of the Penal Code carries with it up to 7 years' imprisonment; while stealing from a dwelling house as defined by Section 279(b) carries up to 14 years' imprisonment; and whereas the Applicant is still in the prime of his life, the Probation Report is far from flattering. It shows that he was found in the act of stealing and was almost lynched by a mob; and that the members of the community portrayed him as a bad person and a threat to them. It was feared that if released at the time the report was prepared, his life would have been at risk. Thus, taking all these factors into account, I find no particular reason to interfere with the sentence imposed on him which was otherwise lawful.

[10] In the result, I would dismiss the application for revision dated 6 May 2019.

**Orders accordingly.**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 8<sup>TH</sup> DAY OF NOVEMBER 2019**

**OLGA SEWE**

**JUDGE**