



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL REVISION NO 10 OF 2018

OTIENO EVANS JOHN APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. By a letter dated 8th March, 2018 OTIENO EVANS JOHN (hereinafter referred to as the “Applicant”) seeks to have the sentence passed against him on 16th February, 2018 by Honourable C. A. Ogweno, R. M. at Mombasa vide Chief Magistrate’s **Criminal Case No. 1807 of 2017, Republic- Vrs -Otieno Evans John revised.**

2. The Applicant was arraigned in court for the offence of stealing from a person contrary to section 279 (9) of the Penal code, on 22nd December, 2017. The applicant pleaded NOT GUILTY and the case proceeded for hearing whereby three (3) witnesses were called to testify in support of the prosecution’s case. After the persecution closed their case, the applicant was placed on defence and he opted to give a sworn statement and called no witness.

3. The applicant seeks to have the sentence revised on the grounds that:

- (a) He was sentenced without an option of a fine
- (b) He did not understand the meaning of mitigation.
- (c) He is a 1st offender and remorseful
- (d) He is a college student

4. In considering the application for revision, I wish to point out that section 363 of the Criminal Procedure Code provides for powers of revision by a superior subordinate court of the a finding, sentence or order recorded or passed and as to the regularity of the proceedings of the inferior court.

5. The powers of revision by the High court are donated by sections 362 and 364 of the Criminal Procedure Code.

Section 362 of the Criminal Procedure Code provides that

“The High court may call for and examine the records of any criminal proceedings before any subordinate court for purposes 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”

6. Section 364 of the same Act which also provides for powers of revision, goes on to state that;

(1) 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 –

(c) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358 and may enhance the sentence.

(b) In the case of any other order other than an order of acquittal, alter or reverse the order.

7. I have read though the proceedings and the judgment of Honourable C.A Ogweni on 6th February, 2018 vide **Mombasa Chief Magistrate's Criminal case No 1807 of 2017**, Republic Vrs Oteino Evans John so as to determine the illegality in correctness, impropriety or irregularity of the sentence that was passed therein.

8. The trial magistrate in her judgment stated as follows;

“In conclusion, I have considered the evidence and testimony tendered by the prosecution, together with that of the defence. I find that the prosecution has not proved the elements of the charge of stealing from a person as preferred against the accused person beyond any reasonable doubt. They have however proven the charge of stealing under section 268 as read with section 275 of the Penal Code. As a result, the charge against the accused person is reduced to the lesser charge of stealing. The accused is convicted accordingly under section 215 of the Criminal procedure Code, chapter 75 Laws of Kenya”

9. The trial magistrate then, after hearing the record of the applicant from the prosecution and the applicant and the applicant's mitigation, sentenced him to serve two (2) years imprisonment.

Section 268 of the Penal code provides that;

“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”

Section 275 of the Penal Code states that;

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

10. In view of these provisions, I will address each grievance raised by the applicant with regard to the sentence of the two years that was meted against him.

11. The sentence provided for in respect of the offence of stealing is three years and it has no provision of a fine. And so by the applicant being sentenced to serve two years imprisonment for the offence of stealing it is within the law.

12. As for the applicant not understating the meaning of mitigation, I find that when asked to mitigate he said;

“I have no mitigation”

Which is an indication that he understood what it means to mitigate. He ought to have raised his failure to understand what mitigation is before the trial court, but he did not.

13. It is noted that the prosecution indicated to court that the applicant had no “previous records” but the applicant himself did not inform court that he was a college student and was remorseful or sorry for what he had been convicted for.

14. I also find that the applicant in seeking for the sentence that was meted against him to be revised on the ground that he is a college student, he has attached a letter from Mombasa College of Tourism and Business studies by the Principal, Mr K.O.WANDERA, dated 3.5.2018 to show that he is undergoing a one year course in Clearing and Forwarding.

15. I therefore refer the case to probation officer for a social inquiry to be conducted and confirm the said claim.

Mention on 18.5.2018 for probation officer's report.

Ruling read, signed and dated this 4th day of May, 2018.

LADY JUSTICE D. O. CHEPKWONY

18.5.2018

Before Hon Justice D O Chepkwony

C/clerk- Beja

M/s Mutua for state

No appearance for Applicant

Mr Kioko- I have a report on sentence reviewed for the applicant which I want to present before this court.

Court – I have read through the sentence review report on the applicant by Mr Mutunga Kioko, probation officer.

I find the same favourable as against the applicant and adopt the recommendations therein.

I hence order the sentence of two years imprisonment which was meted against the applicant reviewed so that he now serves the remaining period of his sentence, being 20 months, on probation as per the provisions of section 362 as read with section 364 of the Criminal Procedure Code.

D O Chepkwony (Judge)

18.5.2018