



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

(STEALING BY SERVANT)

CRIMINAL REV. NO. 149 OF 2018

(CORAM: R.E. ABURILI – J.)

IDD WANGA MUSUNGUAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an application for revision of the sentence dated 8.8.2018 passed in Criminal Case No. 306 of 2017 in Magistrate's Court at Bondo, Before Hon. Wasike - RM)

RULING ON REVISION OF SENTENCE

1. The Convict/Applicant is **Mr. Idd Wanga Musungu**. He was convicted and sentenced to serve Prison sentence of 8 months imprisonment on 8.8.2018 by Hon. Wasike for the offence of **Stealing by Servant contrary to Section 281 of the Penal Code**.
2. This was after he pleaded not guilty and he underwent a full trial wherein the Court found that the Prosecution had proved his guilt beyond reasonable doubt.
3. The Applicant/Convict was given an opportunity to mitigate wherein he stated that he had a wife and children who depended on him and he pleaded for leniency from the Court.
4. There is no record of previous conviction or involvement in crime.
5. The Convict has not appealed against the conviction and sentence. He has approached this Court seeking for review of his sentence by his application filed on 15.8.2018. He claims to be a first offender and that he suffers from Tuberculosis which has persisted for the last 1½ years. That he has a young family and that he is their sole breadwinner. That his TB condition endangers his fellow inmates. He prays for a non-custodial sentence.
6. On 31.8.2018 this Court ordered for a Sentence Review Report to be filed by the Probation Officer, Siaya County. I also ordered for submission of the Trial Court record which has been availed to me and which I have perused.
7. The property that got lost and which came into the custody and care of the convict by virtue of his employment belonged to Alicia Bakers and Confectioners. It was valued at KShs.580,402/-.
8. The convict was a Salesman and it appears the lost money was as a result of failure to account for the proceeds of sale of Confectionary products from the Complainant's Bakery. The Convict committed himself in writing to pay up the money and was allowed to continue working and pay up the same but he defaulted.
9. In His defence, he claimed that he had not been paid his salary for about 5 months. He claims he was locked up in cells and told to sign some documents and that he was told he owed money to the Complainant.
10. The Forensic Auditor clearly stated that he audited accounts of the Complainant and found a shortage. This was before arrest of the Convict.
11. The Convict claimed he had a grudge with the Accountant but there was nothing to demonstrate such grudge.

12. I find that he was soundly convicted and lawfully sentenced to serve the 8 (eight) months imprisonment which in my view is a very lenient sentence, considering the value of the money lost which is in excess of half a million Kenya Shillings and which is not mean cash.
13. This Court ordered for a Sentence Review Report which was duly filed by the Probation Officer, Siaya County, Mr. John **Oyare Oyieko**, on 17.9.2018.
14. According to the Probation Office, the Convict is aged 33 years and married with 4 children. He denies stealing the money and claims the Customers he supplied bread to, were supposed to pay money directly into the Complainant's bank account and that he does not understand why he was arraigned in Court.
16. He is said to be a responsible person who was educating his siblings up to University. He is said to have good ties with the Community.
17. The Victim of the crime is said to have generally forgiven the Convict but wanted the case to take its own course for the Accused to appreciate the law governing private property. The convict applicant pleads for a non-custodial sentence.
18. The Probation Officer recommends guidance and counselling and initiation of reconciliation with his Uncle and Aunts. It would appear the convict has issues with his relatives back home. The probation officer recommends Probation.
19. I have considered all the above and the fact that the conviction of the Applicant was sound and the sentence meted out on him lawful and lenient.
20. The Convict is however, contradictory in his statements as to the circumstances under which the offence was committed. He may be a responsible person but he ought not to steal in order to educate his siblings or to take good care of his family. He should learn to appreciate that as an employee he must respect his employer's property and not employ self-help mechanisms to pay himself where the employer delays to pay him a salary.
21. There are very good Labour Laws in this country that protect him from unfair Labour practices. If he was not paid a salary for 5 months he should have lodged a formal Complaint to the Labour Office or to the Employment and Labour Relations Court for legal intervention and not engage in converting his employer's money into his salary.
21. There should be no excuse for stealing. One should eat his own sweat and seek redress where they are wronged, not through breach of the law.
22. Nonetheless, this Court appreciate the plea that the Convict has Tuberculosis which requires intensive treatment and which is a highly infectious disease.
23. His halfhearted remorse is also considered as he appears to maintain his innocence. This may be informed by his claim in the lower court that he had not been paid his salary for 5 months and therefore the presumed justification for not remitting the proceeds of sale of his employer's confectionaries.
24. In the Spirit and letter of prison decongestion policy employed by the judiciary, and as the sentence meted out is short; taking into account the sentiments of the complainant who says he has forgiven the convict; and considering the fact that the convict, **Idd Wanga Musungu** is suffering from a highly infectious disease being Tuberculosis as can be evidenced from his persistent cough while in court, I hereby revise the 8 months imprisonment meted out on the applicant/convict herein and substitute it with a suspended sentence of 8 months taking into account the period already served. The convict shall accordingly not be found to engage in any criminal activity for the period of suspended sentence breach of which he shall be arrested and sent to prison to serve the remainder of the custodial sentence
25. Accordingly, unless otherwise lawfully held, the convict **Idd Wanga Musungu** is hereby ordered released from prison with immediate effect and directed to first be taken to Hospital for Treatment for Tuberculosis and be released on proper prescribed medication to avoid the spread of the Tuberculosis to other persons.
26. The applicant/convict is also guided and implored by this court to be a law abiding citizen and eke an honest living and respect private property.
27. Orders accordingly.

Dated, signed and delivered at Siaya this 18th day of October, 2018.

R.E.ABURILI

JUDGE

In the presence of:

Idd Wanga Musungu: Applicant in person

Mr Okachi: Senior Principal Prosecution Counsel

