

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION No. 711 OF 2018

DENIS MACHARIA MAINA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant here seeks review of the custodial sentence of two years imprisonment to a more lenient sentence preferably non-custodial or a fine of Kshs. 50,000/-. He argues that the sentence was punitive and excessive bearing in mind the nature of the offence. In the supporting affidavit he further pleads that he has a school going child and his wife was finding it difficult to provide for the basic needs. Further, that his parents were aging and sickly and relied on him for their upkeep. That he had been in custody for a period of two months before the conviction.

2. Ms. Akunja for the Respondent in opposing the application submitted that she had perused the original record and noted that the pre-sentencing report was not in the Applicant's favour and that his family was not ready to accept him back. She therefore urged that the Applicant should serve the sentence imposed.

3. The court has accordingly called for the trial court record. The Applicant was arraigned in court on 17th January, 2018 whereupon he pleaded not guilty. However, he changed his plea on 16th February, 2018 to that of guilty and was consequently sentenced on 5th March, 2018 to serve two years imprisonment. Before his sentencing he had spent 42 days in remand custody. Whilst referring to the pre-sentencing report the trial noted that the Applicant "required more than a custodial sentence". The court is not sure what sentence amounts to more than a custodial sentence except the death sentence.

4. The Applicant was charged with entering into a dwelling house with intent to steal contrary to Section 305(1) of the Penal Code. The offence carries a maximum sentence of seven years imprisonment. The record shows that the Applicant was a first offender, he pleaded guilty and there was negligible harm or damage caused during the commission of the offence, factors which would have mitigated for a more lenient sentence. There existed no aggravating factor to warrant a heft penalty, save that he lied to the probation officer about his antecedents by indicating that his parents were deceased. On the contrary, when they were contacted they indicated that they wanted the Applicant to be punished. They therefore did not wish for the Applicant to be granted a non-custodial sentence.

5. All the circumstances crystalized together show that the sentence of two years imprisonment was manifestly harsh as the maximum penalty is three years imprisonment. However, the Applicant is not a candidate for a non-custodial sentence owing to the information in the pre-sentencing report. Accordingly, I set aside the two years jail term and substitute it with a one year jail term. The sentence shall be reduced by forty two days being the period the Applicant was in remand custody prior to his conviction. It is so ordered.

DATED and DELIVERED this 20th day of **November, 2018**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant present in person.*

2. *Miss Atina for the Respondent.*