



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT HOMA BAY**  
**CRIMINAL REVISION NO. 63 OF 2015**  
**IN THE MATTER**  
**NDHIWA SENIOR RESIDENT MAGISTRATE'S COURT**  
**CRIMINAL CASE NO. 149 OF 2015**  
**AND IN THE MATTER**  
**BETWEEN**  
**REPUBLIC.....PROSECUTOR**  
**AND**  
**ALPHONSE OYOO ONYIMBA.....ACCUSED**

**RULING**

1. This is an application for revision brought by the complainant, M-Kopa Limited through the letter dated 6<sup>th</sup> July 2015 seeking review of the sentence imposed on the respondent on the grounds that the learned magistrate did not take into account material factors in imposing the sentence.
2. In the subordinate court the respondent pleaded guilty to one count of obtaining telecommunication services dishonestly contrary to **section 28** of the *Kenya Information and Communication Act (Chapter 411A of the Laws of Kenya)*. The particulars of the charge were that on 21<sup>st</sup> January 2015 at Sangore Village, Ndhiwa District within Homa Bay County, he dishonestly obtained M-Kopa Solar home system services S. No. \*\*\*\*\* provided by M-Kopa Ltd, a company authorized to provide telecommunications services with intent to avoid payment of standard charges of Kshs. 17, 599/- applicable to avoid the said M-Kopa services. After he had pleaded guilty, the learned magistrate ordered that the accused be given back the machine on condition that he pays back monthly instalments failing which he would be apprehended.
3. The applicant contends that the conditional discharge was not warranted as the court did not take into account the statutory penalty prescribed by the *Act* and the prevalence of the offence in the area. Mr Oluoch, the learned Senior Assistant Director of Public Prosecutions, also supported the applicant's position on the ground that sentence imposed on the accused bore no relation to the penalty prescribed by the *Act*. The penalty prescribed by the *Act* is a fine not exceeding one million shillings, or to imprisonment for a term not exceeding five years or to both.

4. In my view the conditional discharge may have been too lenient bearing in mind the nature of the offence and the punishment prescribed. However, I must also bear in mind that a conditional discharge is a lawful sentence prescribed under **section 35** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. Furthermore, under **section 12** of the *Criminal Procedure Code*, the court may pass a lawful sentence combining any of the sentences which by law it is authorized to impose.

5. As this is an application for review, the jurisdiction of the court is clearly circumscribed by **section 362** of the *Criminal Procedure Act* which provides as follows;

*The High Court may call for and examine the record 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.*

6. The imposition of a sentence by the subordinate court is an exercise of discretion. Unless the sentence imposed is illegal or irregular, the High Court cannot intervene to vary the sentence on that ground that it would have been appropriate to impose a different sentence in the circumstances in exercise of its revision jurisdiction under **section 362** of the *Criminal Procedure Act*.

7. I therefore reject the application the application for review.

8. A copy of this ruling to be supplied to the Office of the Director of Public Prosecutions, Homa Bay.

**DATED at HOMA BAY this 19<sup>th</sup> day of October 2015.**

**D.S. MAJANJA**

**JUDGE**

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.