



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**REVISION CASE NO. 1 OF 2014**

**JOASH AMBUNDO ..... APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

**Joash Ambundo** alias **Soup** was convicted of theft contrary to Section 275 of the Penal Code on his own plea of guilty, in Kakamega Chief Magistrate's Court Criminal Case No. 2824 of 2013. He was sentenced to serve two (2) years imprisonment on 27/12/2013.

He has now applied to this court by letter dated 24<sup>th</sup> January 2014, for revision of sentence. He stated that he was arrested and charged with theft of a motor-cycle battery valued at Kshs.3,000/=. That he is remorseful and reformed. That he is ready to serve a sentence on probation or C.S.O. (Community Service Order). That he is married with four children who depend on him.

When the matter came up before court, he stated that he was the only son, and asked the court to reduce the sentence.

Learned Prosecuting Counsel Mr. Ngetich, opposed the request. Counsel submitted that the sentence of two (2) years imprisonment was lawful as the maximum sentence for theft under Section 275 of the Penal Code (Cap. 63) was three (3) years imprisonment. Counsel submitted that the mitigation of the convict was considered by the trial court before sentencing. That the small value of the battery was immaterial.

This court has jurisdiction to review sentence. The broad parameters for the revision jurisdiction of this court in criminal matters are enumerated under Section 362 of the Criminal Procedure Code (Cap. 75). See also the case of ***Juma Shabani –vs- R. [1963] EA 184.***

Sentencing is the discretion of the trial court. A higher court will be slow to interfere with the exercise of that discretion unless it is exercised unlawfully or done on wrong principle.

From the facts of the case, the motor cycle battery was not recovered. The charge sheet stated that its value was kshs.3,000/=. The convict was a first offender. He pleaded guilty to the charge. When asked for his mitigation, he chose to keep quiet. He did not demonstrate any remorse for the offence. The sentence was pronounced on 27/12/13.

The convict did not give the magistrate an opportunity to consider his mitigation, as he elected to say nothing in mitigation. The sentence is lawful. Though that be the case, in my view, the sentence of 2 years imprisonment for a first offender was harsh and excessive, taking into account that the maximum sentence is 3 years imprisonment.

The learned trial magistrate should in my view have considered that the convict pleaded guilty without wasting the court's time. He was a first offender. The stolen item was also of low value. It was a motor cycle battery worth only Kshs.3,000/=. Therefore a sentence of two thirds the maximum sentence was not called for. In those circumstances, in my view, a review of the sentence is called for.

Though the convict is now asking for a non-custodial sentence, in my view, the offence and

circumstances do not justify a non-custodial sentence.

To conclude, I exercise this court's discretion under Section 362 of the Criminal Procedure Code (Cap. 75) and review the sentence meted by the learned magistrate. I set aside the sentence imposed by the learned magistrate and order that he will now serve a sentence of one (1) year imprisonment, from the date on which he was sentenced by the trial court.

*Dated and delivered at Kakamega this 8<sup>th</sup> day of May, 2014*

**George Dulu**

**J U D G E**