



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CRIMINAL REVISION NO. 3 OF 2014

JOSEPH WAWERU.....APPELLANT

VS

REPUBLIC.....PROSECUTOR

(Appeal from the original conviction and sentence in Criminal Case Number 247 of 2010

in the Senior Principal Magistrate's Court at Kerugoya – HON. TERESIA NGUGI (S.P.M)

JUDGMENT

(Criminal Law Practice and procedure –Revision –Grounds basis for a revision to be invoked by a High court –Whether excessive of a sentence can be ground to invoke such powers)

The applicant herein was tried and convicted for nine various counts of stealing by Servant contrary to **Section 281** of the **Penal Code**. The applicant was an employee of Tescom Sacco and while in the course of his employment and on several occasions stole money belonging to his employer (Tescom Sacco) which monies came into his possession by virtue of his employment. A look at the charge sheet shows the nine occasions spanning a period between 18th October 2008 to 11th April, 2009 where he stole over kshs 736,925/-. He was tried and convicted in each of the nine counts. The applicant did not appeal against either the conviction or the sentence.

The applicant has brought a notice of motion to this court under **Section 362** of the **Criminal Procedure Code** invoking this court's power to revise the sentence meted out against him claiming among other reasons that the sentence is excessive and without an option of fine. He has also urged the court to note that he is remorseful and willing to compensate the complainant and that he is asthmatic and owing to his ill health this court should revise the sentence on account of leniency.

The applicant herein was charged with an offence of stealing under **Section 281** of the **Penal Code** which states:

“If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employment, he is liable to imprisonment for 7 years.”

The applicant herein was sentenced for 3 years in jail in each count with the sentences running concurrently. This sentence is now the subject of this application for revision.

The power to revise a decision of the subordinate court by the High Court is donated by **Section 362** of the **Criminal Procedure Code** which the applicant has invoked in his application. This court in addition

is given supervisory powers under **Article 165(6)** of the Constitution over the subordinate court and **Article 165(7)** provides as follows:-

“ For purposes of clauses (6) , the High Court may call for the record of any proceedings before any subordinate court or person, body or person, body or authority.....and may make any order or give any direction it considers appropriate to ensure the fair administration of justice”

This court therefore pursuant to this section has power to call for any proceedings before a subordinate court and give directions or orders as it may consider appropriate for fair administration of justice. Further **Section 362 of Criminal Procedure Code** provides;

“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”.

This court has called for certified of the proceedings and the judgment meted out against the applicant herein. The applicant is not aggrieved by the conviction by the trial court that is why he chose not to appeal against the same. I have looked at the proceedings of the subordinate court. There is nothing irregular in the proceedings and the applicant has not faulted the trial magistrate for any irregularity in the proceedings. There is no basis therefore for this court to invoke its powers of revision under the law cited on the grounds of irregularity in the proceedings.

This court now turns its attention on the sentence given against the applicant for the offence committed under **Section 281 of the Penal Code**. The applicant contends that the sentence is too severe or harsh given the circumstances and the circumstances given in this application are given as ill health, the fact that he is a first offender and readiness to refund the stolen amount. I do not wish to go to the merits of these grounds because for me these grounds are not sufficient to invoke this court's power to revise a subordinate court's decision, nevertheless I find it incredible for the applicant to say he is ready to refund the stolen money and yet he has not made any effort to refund any cent from the amount stolen from the time he was charged in court on 1st March,2010. But perhaps more important is to make a finding on whether a severity or gravity of a sentence can be a ground for revision under **Section 362 Criminal Procedure Code**.

The applicant was sentenced to 3 years for each of the counts he was charged with and the sentence was to run con currently. The law (**Section 281**) gives the punishment of stealing by servant as 7 years in prison which for me is the maximum. The option of fine is not provided for under **Section 281**. The legality of the sentence metted out has not been challenged because obviously the subordinate court was lenient given that he was found guilty. Further more the exercise of the subordinate's court discretion has not been faulted on the ground of its proprietary. It is now settled that this court can only interfere with trial court's discretion where the sentence imposed is against legal principles or relevant factors were not considered or normally where the sentence is manifestly excessive.

In the case of **REPUBLIC -VS- JAGANI & ANOTHER (2001) KLR 590** Hon. Justice Hayanga observed in part that **“ This court (meaning the High Court) must be satisfied that there exists to a sufficient extent circumstances entitling it to vary order or decision of the court below . Is it shown that it acted upon a wrong principle? Over looked material factors or that sentence was too excessive in the circumstances.”**

I am persuaded by the reasoning of this decision and find no basis to depart from it. The applicant was granted a chance to mitigate which he did and the same was properly considered by the subordinate court.

It is also my finding on the basis of the observations made that the gravity /severity of a sentence should be a ground for appeal rather than revision. In any event the applicant can still pursue this option because a right of appeal against a conviction or a sentence is a fundamental right and may not be

denied. However by choosing to come to this court for revision, of his sentence for me was a wrong option.

The end result therefore is that this court finds no merit in the application for revision dated 28th May, 2014 and it is disallowed.

R.K. LIMO

JUDGE

DATED AND SIGNED AND DELIVERED AT KERUGOYA THIS 15TH OCTOBER 2014 in the presence of:

The Appellant

Mr Sitati for state

Mr Gori Advocate for the Appellant

Martin Court Clerk