



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maina v Republic (Criminal Revision E050 of 2025)  
[2025] KEHC 14976 (KLR) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14976 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL REVISION E050 OF 2025  
DKN MAGARE, J  
OCTOBER 23, 2025**

**BETWEEN**

**JOSEPH WAMBUGU MAINA ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The application arose from a decision of the Chief Magistrate Hon. E. G. Nderitu in Nyeri criminal Case No. 1401 of 2020. The appellant was charged with two counts of stealing contrary to Section 268(1) as read with 275 of the Penal Code.
2. The particulars of the first count were that on 05.07.2020, at Kiganjo area, Nyeri Central Sub-county within Nyeri County, jointly with another before court, stole Ksh.100,000/= from phone number 0725XXXXXX56, property of Mary Nyambura Matuto.
3. The particulars of the second count were that on 05.07.2020, at Kanuna area, Nyeri Central Sub-county within Nyeri County jointly with another before court, stole Ksh.14,000/= from phone number 0727XXXXXX02, property of Winrose Wairimu Ndirangu.
4. The court heard the case and convicted the applicant of the two counts. There was no appeal on the conviction. Subsequent upon conviction the court heard mitigation from the applicant and proceeded to sentence him immediately. There is no consideration of the presentence report. The applicant mitigated that he had a daughter for whom he was a sole bread winner. The court immediately sentenced the applicant to a Ksh. 50,000/= fine, in default 12 months imprisonment for count one. In count two he was sentenced to a fine of Ksh. 10,000/= in default 6 months imprisonment. He was also ordered to pay an additional Ksh. 114,000/= as compensation to the two complainants, in default 24 months imprisonment. The refund to the complainant was to be made to court.



5. The applicant then moved this court that the order of restitution was double punishment, making the sentence harsh and excessive.
6. When the matter came up, the applicant was absent. The state however conceded the application. They stated that the said amount should be dealt with in a civil process.

### **Analysis**

7. The powers of the High Court in revision are contained in Section 362 through to 366 of the Criminal Procedure Code. Section 362 of the Act 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”.

8. What the High Court can do under its revision jurisdiction is stated under Section 364 of the Criminal Procedure Code, which states as follows:

- (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High court may –
  - (a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;
  - (b) In the case of any other order than an order of acquittal, alter or reverse the order.
- (2) No order under this section shall be made to the prejudiced of an accused person unless he had had an opportunity of being heard either personally or through an advocate in his own defence. Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
- (3) Where the sentence dealt with under this section has been passed by a Subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- (5) When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”

9. The revisionary power of this court also serves the supervisory role and the court is empowered by Article 165(6) of *the Constitution* of Kenya to review a decision by a subordinate court. Article 165(6), the relevant provision, is as doth:

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.



10. The Applicant was charged with an offence whose sentence is 3 years. Section 275 of the Penal Code, which, provides for the General punishment for theft provides as follows:

Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.

11. The extra punishment meted out was near maximum for the two counts for those offences with maximum harm and maximum effect. The 2023 Sentencing Guidelines provides as follows, in regard to sentencing:

2.6.1 Compensation orders are particularly desirable as they fuse restorative and retributive justice. Payment of compensation is a punishment to the offender, but it also gives the offender an opportunity to take responsibility for their conduct and remedy the harm caused.

2.6.2 The court is mandated to make a compensation order in addition or in substitution for any punishment. However, the court cannot make a compensation order in substitution of an offence that attracts a mandatory minimum custodial sentence. An order of compensation takes effect on the expiry of the time limited for an appeal, and where an appeal is lodged, on confirmation of the conviction and order.

2.6.4 The sum to be paid by the offender to the injured party is such sum as the court considers could justly be recovered as damages were civil proceedings to be brought by the injured party against the offender in respect of the civil liability concerned.

2.6.5 The court is mandated to make compensation orders with respect to costs incurred by the victim during treatment as a result of the harm caused by the offender. It can also require the convicted person to compensate the victim for costs incurred in relation to the proceedings including repairs of any damage. To ascertain the proper compensation, the court shall request for evidence of the said costs.

12. An order for compensation cannot override the punishment provided under the penal code. It must be made in a way that allows the complainant to make good his loss. However, while meting out punishment, it must be in the rarest of cases that both compensation and fine or custodial sentence are given. The means to pay these should as much as possible be ascertained so that it does not disproportionately increase the general effect or the totality of sentence. In this case the court took one peculiar circumstance that the money stolen was from hapless and elderly women who were unlikely to file suit for compensation. Luckily, the Applicant paid the same, pronto.

13. Totality of sentence was addressed in the Sentencing Guidelines 2.3.30 as follows:

In relation to fines imposed for non-imprisonable offences, the court should start by determining the fine appropriate for each individual offence based on the seriousness of the offence and the financial circumstances of the offender insofar as they are known, or appear, to the court. The court should then add up the fines together and then consider if the total is just and proportionate.

14. The total fine in this case adds to 174,000/=, inclusive of compensation. It cannot be said to be disproportionate. Unfortunately, the learned trial magistrate did not have the probation and after care services provide a pre-sentence report, to enable the court consider all alternatives to imprisonment, with imprisonment being the last resort. In the case of Republic v Irungu alias Jowie & another [2024] KEHC 2533 (KLR), G L. Nzioka, J posited as follows:



10. To address these questions, it is important to consider the several recognized principles of sentencing that serve to make punishment reasonable and rational. Many of these principles are consistent with human rights law standards and elementary goals or rationales of sentences.
  11. Thus the recognized principles of sentencing are principles of; justice, peace and humanity. Similarly, other major principles are: minimum intervention, equality, proportionality, sufficiency, imprisonment as last resort and cost effectiveness of sentence.
  12. The principle of minimum intervention wishes for the use of the least disturbing and least severe sanction possible, given the circumstances of the offence and the offender, and the intended aims of the sentencing system.
15. In this case therefore the court failed to consider the other interventions available. However, compensation is provided for. Section 175 of the Criminal Procedure Code provides for compensation of victims in the following terms:
- (1) A court which-
    - (a) on convicting a person of an offence, imposes a fine, or a sentence of which a fine forms part;  
or
    - (b) on appeal, revision or otherwise, confirms such a sentence, may, when passing judgment, order the whole or any part of the fine recovered to be applied in defraying expenses properly incurred in the prosecution of the offence.
  - (2) A court which-
    - (a) convicts a person of an offence or, on appeal, revision or otherwise, confirms the conviction; and
    - (b) finds, on the facts proven in the case, that the convicted person has, by virtue of the act constituting the offence, a civil liability to the complainant or another person (in either case referred to in this section as the "injured party"), may order the convicted person to pay to the injured party such sum as it considers could justly be recovered as damages in civil proceedings brought by the injured party against the convicted person in respect of the civil liability concerned.
  - (3) No order shall be made under subsection (2)-
    - (a) so as to require payment of an amount that exceeds the amount that the court making the order is authorised by law to award or confirm as damages in civil proceedings; or
    - (b) in any case where, by reason of-
      - (i) the complexity of evidentiary matters affecting the quantum of damages;
      - (ii) the insufficiency of evidence before it in relation to such damages or their quantum.
      - (iii) the provisions of the *Limitation of Actions Act* (Cap. 22); or
      - (iv) any other circumstances, the court considers that such an order would unduly prejudice the rights of the convicted person in respect of the civil liability.



- (4) No order under this section shall take effect—
- (a) before the expiry of the time limited for appeal against the conviction or sentence in respect of which the order was made; or
  - (b) while any such conviction or sentence is the subject of appeal, unless and until the conviction or sentence, and the order, are confirmed by the court determining the appeal.
- (5) A court determining an appeal referred to in subsection (4) shall affirm, quash or vary an order under this section, as justice requires.
- (6) An order under this section that has taken effect is enforceable in the same manner as a judgment in civil proceedings for the amount awarded by the order.
- (7) An award by order under this section in respect of a civil liability is, to the extent of the amount awarded, a defence in any subsequent proceedings instituted in respect of that liability.
16. Compensation may be ordered under section 175(1) of the Criminal Procedure Code. However, it must not be imposed as an additional punishment unless the court has considered the nature of the offence, the means of the offender, and whether such an order would amount to double punishment having regard to totality of sentence. It is also supposed to be a fraction or whole of the fine and not totally an addition over and above the maximum sentence.
17. The net effect is that the order for compensation may make an award excessive, but must be considered wholesomely. The same is already paid to the complainant and cannot be ordered to be restituted.
18. The last aspect is compliance with Section 333(2) of the Criminal Procedure Code. The court is obligated to pronounce itself in strict compliance of the said section. Section 333(2) of the Criminal Procedure Code provides as doth:
- “Subject to the provisions of Section 38 of the Penal Code, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under sub section (1) has prior, to such sentence shall take account of the period spent in custody.”
19. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody. The Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR stated as follows as regards time spent in custody:
- “The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and



still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19<sup>th</sup> June 2012.”

20. The Judiciary Sentencing Policy Guidelines, 2023, which are persuasive provide as follows:

The proviso to Section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.

21. The trial court, though it made reference to the period spent in custody, did not in fact apply it by deducting the same from the overall prison term. The record shows that the Applicant was arrested on 06.10.2020 and convicted on 17.12.2024. He was first arraigned on 07.10.2020 in CMCR No. 1454 of 2020, which was later consolidated with CMCR No. 1401 of 2020, the latter being designated as the lead file on 17.11.2020. The Applicant remained in custody after taking plea until 02.11.2020, when he was released on bond, thus totaling to 29 days in custody.

22. However, it is noted that the fine and the compensation imposed by the trial court have already been paid to the complainants. Consequently, this matter now stands as one of academic interest only, and the application for review is dismissed as it serves no practical or useful purpose.

### **Order**

23. In the circumstances, the court makes the following order: -

- a. The application for revision is dismissed for lack of merit.
- b. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 23<sup>RD</sup> DAY OF OCTOBER, 2025.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

No appearance for the Applicant

Mr. Kimani for the Respondent

Court Assistant – Michael

