Imbukane v Republic (Criminal Miscellaneous Application E063 of 2024) [2025] KEHC 17596 (KLR) (27 November 2025) (Ruling)

Neutral citation: [2025] KEHC 17596 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL MISCELLANEOUS APPLICATION E063 OF 2024

JN KAMAU, J

NOVEMBER 27, 2025

BETWEEN

JUSTUS IMBUKANE .... APPLICANT

AND

REPUBLIC .... RESPONDENT

RULING

Introduction

1. The Applicant herein was charged with the offence of stealing contrary to Section 268 as read with Section 275 of the Penal Code. He was convicted on his own plea of guilty and sentenced to five (5) years imprisonment.

2. On 15th May 2024, he filed a Notice of Motion application dated 13th May 2024 seeking a review of his sentence. He prayed for a non-custodial sentence (probation/community service order) pursuant to Section 4(1) and (2) of the Probation Offenders Act Cap 64 (Laws of Kenya). He further urged this court to consider Section 150 of the Criminal Procedure Code.

3. He expressed remorse for having committed the offence. He averred that he had undergone rehabilitative program while in prison and had, therefore, undergone tremendous change becoming a useful Kenyan. He sought the leniency of court and requested that the court reduce his sentence to a more manageable one.

4. He attached copies of his Certificates in his undated Written Submissions that were filed on 25th March 2025. The Respondent's Written Submissions were dated 9th April 2025 and filed on 11th April 2025. The Ruling herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. The Applicant submitted that he was a first offender and had spent two (2) years in prison, a period he believed was sufficient to meet the requirements of punishment, deterrence and rehabilitation. He explained that the period had transformed him into a person who no longer posed any threat to the community or public.

6. He pointed out that he had undergone rehabilitation courses and had attained certificate in KCPE, Theology and Rodi Kenya where he was able to make soap, chapati (sic), mandazi (sic) and had knowledge in agriculture. He was confident that he could do business without interfering with anybody and also to encourage the community.

7. He asserted that at the time of the offence, he was ignorant of the rule of law and as a layman, he was not conversant with the consequences of the said crime. He added that he was a young man when he was arrested and had not done any constructive development at the time he was arrested. He promised to never engage in any criminal activity. He argued that if he continued with his incarceration, he would waste most of his life in jail and would not do any good to himself and the community.

8. He pleaded with court to consider the issue of congestion in prisons and seek solutions in enrolling offenders with less than three (3) years' sentence to serve on community-based services. In this regard, he relied on Paragraph 2.4.1 of the Sentencing Policy Guidelines. He cited the case of Jonathan Mutinda vs Republic[2004]eKLR where the High Court held that the trial court in sentencing a petty traffic offender to life imprisonment should have considered other remedies like community services instead of resorting to a custodial sentence.

9. On its part, the Respondent submitted that the penalty for the offence of stealing was found under Section 275 of the Penal Code which provided for imprisonment for three (3) years. It pointed out that Article 165(6) of *the Constitution* of Kenya empowered the court to review a decision by the subordinate court. In this regard, it relied on the case of Joseph Nduvi Mbuvi vs Republic[2019]eKLR where it was held that the revisionary jurisdiction of the High Court was to enable the High Court in appropriate cases, whether during the pendency of the proceedings in the subordinate courts or at the conclusion of the proceedings, to correct the manifest of the irregularities and give appropriate directions.

10. It conceded that the sentence meted out by the Trial Court was illegal as the maximum custodial sentence provided for was three (3) years. It averred that the sentence was harsh and excessive.

11. It was trite that sentencing was at the discretion of the trial court and an appellate court could only interfere with the sentence under very specific circumstances. This position was emphasised by the Court of Appeal in Benard Kimani Gacheru vs Republic [2002] eKLR.

12. Be that as it may, the power of the court to exercise revisionary jurisdiction is provided for under Section 362 of the Criminal Procedure Code (Cap 75) Laws of Kenya which states that:-

> "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."

13. In the present case, the Applicant pleaded guilty to the offence of stealing contrary to Section 268 as read with Section 275 of the Penal Code Cap 63 (Laws of Kenya). Section 275 of the Penal Code sets out the penalty for stealing 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."

14. The Trial Court sentenced him to five (5) years imprisonment. To the mind of this court, this was excessive in the circumstances and illegal as the law provided for a maximum of three (3) years imprisonment. However, bearing in mind that he was a habitual offender as per the Trial Court's proceedings, this court found and held that the maximum sentence of three (3) years was adequate in the circumstances of the case.

15. This court noted that the Trial Court had found that he was not suitable for non-custodial sentence as he was under Probation when he still committed the crime. It was also reported that he was a threat to the family members and the community.

16. He was sentenced on 9th September 2022. Assuming the Trial Court meted out against him the maximum penalty period of three (3) years as was provided in Section 275 of the Penal Code and no remission was given by the Prisons, he would have been released on 9th September 2025. Taking into account the remission period of one third (1/3) of his sentence, he could have completed his sentence on 9th September 2024. It was, therefore, evident that whichever way one looked at it, he had since completed his sentence. There was, therefore, no need to consider the merits or otherwise of his application of a non-custodial sentence.

Disposition

17. For the foregoing reasons, the upshot of this court's decision was that although the Applicant's application dated 13th May 2024 and filed on 15th May 2024 seeking a non-custodial sentence was not merited, it was evident that the sentence of five (5) years imprisonment that was meted out against the Applicant herein was unlawful, illegal and had no legal basis. Accordingly, the said sentence of five (5) years be and is hereby set aside and/or vacated and is hereby substituted with a sentence of three (3) years imprisonment.

18. As the Applicant had since completed his sentence, it is hereby directed that he be and is hereby released from custody forthwith unless he be held for any other lawful cause.

19. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF NOVEMBER 2025

J. KAMAU

JUDGE