

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
MISC. CRIMINAL APPLICATION CASE NO. E046 OF 2025

TITUS KYALO MUSILI.....
APPLICANT

VS

REPUBLIC.....

....RESPONDENT

(Being revision application against the sentences of hon. X. Baraka (RM) in Criminal Case No. E 302 of 2024 delivered on 21-2-25 and Criminal Case No.E298 of 2024 delivered on 28-2-2025 by X. Baraka (RM) in Wajir law courts).

RULING

1. The applicant was charged before the Principal Magistrate's' Court at Wajir with the offense of shop breaking and stealing contrary to section 306 (a) of the Penal Code. The particulars of the offence were that on the night of 29.09.2024 at Wagberi location in Wajir East Sub County within Wajir County he broke and entered the shop of Samira Kunow Hassan and stole therein one smart phone make Itel A50 black in colour worth Kes. 13,000/- the property of Samira Kunow Hassan.

2. Having denied the charge, he was tried and consequently convicted. On 21.02.2025, he was sentenced to 3 years' imprisonment. The court further directed that the time spent in remand custody amounting to 3 months 2 days be tabulated and deducted.

3. Besides, he faced a separate charge in criminal case number E298 of 2024 for the offence of shop breaking and stealing contrary to section 306(a) of the Penal Code. The particulars were that on 07.11.2024 at Hodhan location in Wajir East Sub County within Wajir County, he broke and entered the shop of Abdisirat Ibrahim and stole therein (1) one thermos (2), radio cassette (3) 18 litres of cooking oil (4) 1 Kg of beans (5) 1kg of irish potatoes (7) 1kg of rice (8) one packet of milk powder (9) body lotion (10)5 kgs of wheat flour (11) 2 kgs of maize flour (12) 5kgs of muthokoyi (13) 1 kg of omo (14) nine packets of milk (15) one packet of tea bag (16) a fridge guard (17) assorted soft drinks all valued at Kes. 12,680/- the property of Abdisirat Ibrahim.

4. He also faced an alternative charge of handling stolen goods contrary to section 322(1) and (2) of the Penal Code. The particulars were that on the night of 07.11.2024 at Madina location in Wajir East Sub County within Wajir County he dishonestly retained 1(one) thermos, (2), radio cassette (3) 18 litres of cooking oil (4) 1 Kg of beans (5) 1kg of irish potatoes (7) 1kg of rice (8) one packet of milk powder (9) body lotion (10)5 kgs of wheat flour (11) 2 kgs of maize flour (12) 5kgs of muthokoyi (13) 1 kg of omo (14) nine packets of milk (15) one packet of tea bag (16) a fridge guard (17) assorted soft drinks all valued at Kes. 12,680/- the property of Abdisirat Ibrahim.

5. He was tried and consequently convicted of the main charge and on 28.02.2025, he was sentenced to 3 years' imprisonment. The

jail term was to run consecutively with criminal case number E298 or 2024.

6. The applicant has since filed an application herein urging this court to revise his sentence downwards. He stated that he was not given an opportunity to mitigate and further, he has no pending appeal. That he is a father of one child and the sole bread winner of his family and that his incarceration has caused the family untold pain. He was categorical he did not seek to appeal against his conviction and sentence but simply, a review of the sentence.
7. At the hearing of the application, the applicant urged that his application be allowed as prayed while the learned prosecutor opposed the same by urging that the sentence meted out against the applicant was not only appropriate but also lenient.
8. I have considered the application and the oral submissions by both parties. The main issue for determination is *whether this Honourable Court has jurisdiction to determine the application herein and issue the orders sought.*
9. Noting that the offences herein were perpetrated in different transactions, the trial court directed that the sentences herein run consecutively.
10. Section 14 of the Criminal Procedure Code provides as follows: -

(1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

11. In the case of **Peter Mbugua Kabui vs Republic [2016] eKLR**, the Court of Appeal stated as follows:

“As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

12. Further **Sentencing Policy Guidelines** provide as follows: -

“7.13 - Where the offence emanates from a single transaction the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims the sentences should run consecutively”.

13. The Court of Appeal defined the phrase '*same transaction rule*' in the case of **Republic vs Saidi Nsabuga S/O Juma & Another [1941] EACA** and revisited it again in **Nathan vs Republic [1965] EA 777** where it stated as follows: -

“If a series of acts are so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, or by relation of cause and effect as to constitute one transaction, then the offences constituted by these series of acts are committed in the course of the same transaction.”

14. In the instant case, it is clear that the applicant was charged with similar charges committed at different times and therefore the imposition of a consecutive sentence was appropriate.

15. The law governing revision in a criminal case is captured under Section 362 and 364 of the CPC. Section 362 and 364 which provides as follows;

“362. Power of High Court to call for records

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.

364. Powers of High Court on revision

(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 sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(c) in proceedings under section 203 or 296(2) of the Panel Code (Cap. 63), the Prevention of Terrorism Act (Cap. 59B), the Narcotic Drugs and Psychotropic Substances (Control) Act (Cap. 245), the Prevention of Organized Crimes Act (Cap. 59), the Proceeds of Crime and Anti-Money Laundering Act (Cap. 59A), the Sexual Offences Act (Cap. 63A) and the Counter-Trafficking in Persons Act (Cap. 61), where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had

an opportunity of being heard either personally or by 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.

(1) 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 lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

16. It is clear from the above provisions that an application for review of sentence can be entertained only for purposes of the court satisfying itself as to the correctness, legality or propriety of the proceedings. Section 364(5) of the CPC is emphatic that no application for revision should be entertained where an appeal lies from a sentence or order. This position was espoused in

Criminal Revision number 194 of 2023 Kisii High court in the case of **Barongo Siany Atembe vs Republic.**

17. In the instant case, the court is being asked to exercise mercy and therefore reduce the sentence. There is no revision application nor appeal filed challenging the legality or otherwise propriety of the sentence imposed. It is trite that sentencing is at the discretion of the court. An appellate court can only interfere if the same is illegal, excessive or imposed after taking into account wrong principles.

18. In the instant case, I do not see any good reason persuasive enough to interfere with the legal sentences imposed. In any event, the sentence imposed is lenient. To that extent the application is dismissed for lack of merit.

Dated, signed and delivered in open court this 17th day of February 2026

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J. N. ONYIEGO
JUDGE