



**Mwapita v Republic (Criminal Revision E459 of 2025)
[2026] KEHC 4055 (KLR) (19 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 4055 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL REVISION E459 OF 2025
WM KAGENDO., J
MARCH 19, 2026**

BETWEEN

OMAR MWINYI MWAPITA APPLICANT

AND

THE REPUBLIC RESPONDENT

RULING

1. The Applicant seeks revision of the custodial sentence of four (4) years imposed upon conviction for the offence of stealing by servant contrary to section 281 of the Penal Code. In his undated affidavit, he contends that the trial took approximately four years from June 2021 to 11th July 2025, and that the period allegedly spent in custody was not taken into account during sentencing.
2. Learned prosecution counsel, Mr. Sirima, opposed the application through submissions dated 2nd March 2026. He argued that the application is misconceived, as the Applicant had a right of appeal which he expressly admits he did not pursue. Counsel further submitted that the sentence imposed is lawful and not excessive, given that section 281 of the Penal Code provides for a maximum sentence of seven (7) years.
3. The Court further notes that the Applicant has previously filed multiple revision applications, namely HCCR Rev. Nos. E362 of 2025, E473 of 2025, and E207 of 2025. In HCCR Rev. No. E362 of 2025, the Court found the Applicant unsuitable for sentence review, particularly on account of his failure to make restitution to his employer despite being afforded an opportunity to do so.

Analysis and Determination

4. The scope and purpose of revision jurisdiction are well settled. In *Martin Mavuti Kituyi v Republic* HCCR Revision No. 27 of 2013, the Court held that revision is a discretionary remedy intended to correct errors, illegalities, or irregularities in proceedings, and is not a substitute for an appeal. Section



364(5) of the Criminal Procedure Code expressly discourages its invocation where a party has failed to exercise the right of appeal.

5. The Applicant herein expressly acknowledges that he did not file an appeal. No sufficient justification has been advanced for bypassing the appellate process. This alone renders the present application an abuse of the court process.
6. Upon perusal of the lower court record, it is evident that the Applicant was arrested on 29th March 2021 and released on bond on 27th November 2022. Judgment was subsequently delivered on 1st July 2025. The assertion that he remained in continuous remand custody throughout the trial period is therefore factually incorrect and misleading. In total, the Applicant spent approximately one (1) year and eight (8) months in pre-trial custody, and an additional five (5) months post-conviction by the time of filing this application—bringing the total period in custody to approximately two (2) years and three (3) months.
7. The Court is satisfied that the trial court properly applied section 333(2) of the Criminal Procedure Code. There is no evidence of illegality, impropriety, or irregularity in the proceedings or sentencing to warrant the exercise of this Court’s revisionary jurisdiction.
8. Although the Pre-Sentence Report dated 18th December 2025 recommends consideration of a non-custodial sentence based on family circumstances, health concerns, and rehabilitation prospects, such recommendations are not binding on the Court. Sentencing remains a matter of judicial discretion, as affirmed in *Bernard Kimani Gacheru v Republic*, Cr. App. No. 188 of 2000.
9. Importantly, this Court cannot ignore the Applicant’s conduct. He was previously afforded an opportunity to make restitution to the complainant but failed to do so. Further, his repeated filing of multiple revision applications, coupled with misleading assertions regarding his period in custody, demonstrates a pattern of dishonesty and an attempt to improperly invoke the Court’s discretion.
10. In the circumstances, the Court finds no basis to interfere with the sentence imposed by the trial court. The application for revision is devoid of merit and constitutes an abuse of the court process.

Disposition

11. The application for revision is hereby dismissed. It is so ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 19TH DAY OF MARCH 2026.**

W. K. MICHENI JUDGE

In the presence of:

Applicant In Person

Ms Cherop For The State Beboru Court Assistant

SIGNED BY/FOR:

HON. LADY JUSTICE WENDY MICHENI

THE JUDICIARY OF KENYA.

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