

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL REVISION CASE NO. E321 OF 2024**

**JOSPHAT GITAU GITHINJI .....APPLICANT**

**VERSUS**

**REPUBLIC.....**

**.....RESPONDENT**

**RULING:**

1. This is a ruling in respect of an application for review of sentence vide a Notice of Motion application dated 15<sup>th</sup> October,2024.
2. In this application, the applicant, JOSPHAT GITAU GITHINJI is seeking the sentence meted out against him be revised and he be considered for a non -custodial sentence for the remainder of the sentence through application of **Section 3** of the **Community Service Order Act**.
3. This application is premised on the grounds set out on its face and further supported by the affidavit sworn by the Applicant on even date. According to the Applicant, he is a first offender and highly remorseful of the offence he was charged with, hence the reason he pleaded guilty in the first instance to save on court's precious time.
4. The Applicant avers that he is a young energetic man who is building a foundation for himself and his family's future. He is a bread winner for his family and his aging mother who are entitled to the rights of care, food, medical

attention and education. The applicant contends that he has been rehabilitated and reformed.

5. The Respondent through state counsel, Mr Mwakio is not opposed to the application and he left the determination thereof to the court.
6. The court called for a social inquiry to be conducted on the applicant by the Probation/Community Service Officer and a sentence review report filed. A sentence Review report was filed on 4<sup>th</sup> December, 2025 for the court's consideration.

**DETERMINATION:**

7. Having read through the application alongside the grounds upon which the same is prescribed, and listened to the prosecution's counsel's oral response, I have read through the Sentence Review report filed on 4<sup>th</sup> December, 2025 by the Probation and After Care Services Department, I find that the revisionary powers of the High Court as provided for under **Article 165(b) and 7 of the Constitution, 2010, Section 362-364** both of the **Criminal Procedure Code, Section 3(2)** of the **Community Service Order Act** and **Section 4(2)** of the **Probation Offenders Act** in seeking for the custodial sentence that was meted against him to be revised to a non-custodial sentence.
8. What then arises for determination is:
  - a) *Whether the court revisionary jurisdiction has properly been invoked?*
  - b) *Whether the application has merit.*

9. With regard to the issue of jurisdiction of the court to hear and determine the application for revision, the Applicant has as of right opted to apply for a review of the sentence that was meted against him instead of appealing against the same. This is a right accorded to a convict pursuant to the **Constitution** under **Article 50(2)(q)** that:

***“(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”***

10. And in calling for a review of the impugned sentence, the Applicant has relied on the provisions under **Article 165(b)** and **(7)** of the Constitution which grants the High Court power to exercise Supervisory jurisdiction over orders or Judgement from the magistrate’s court or any body with authority to exercise judicial function on the following terms;

11. **Article 165(b)** provides that:

***“(6) 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.***

**Article 165(7)** provides that:

***(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any***

***direction it considers appropriate to ensure the fair administration of justice.”***

12. The High Court then derives the revisionary jurisdiction in Criminal cases from the provisions of **Section 362** and **364** of the **Criminal Procedure Code**. **Section 362** provides 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. **Section 364** states:

***‘(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, the Prevention of Terrorism***

**Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, 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 sub Section 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 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."*

14. In the instant case, the Applicant challenged the sentences that were imposed against her by the trial court and seeks that the custodial sentences be set aside and substituted with a non-custodial sentence for the remainder of the sentence pursuant to the provision of **Section 3(2)** of the **Community Service Order** and for **Section 4(2)** of the **Probation Offenders Act Chapter 64**.

15. I have perused the original record of proceedings in Murang'a **HCCR No. E697 of 2024, Republic vs JOSEPHAT GITAU GITHINJI** and established that the Applicant was charged with offences of Burglary contrary to **Section 304(2)** and stealing contrary to **Section 279(b)** of the Penal code.

16. The facts of the case were that:

*'On the night of 8<sup>th</sup> and 9<sup>th</sup> September, 2024 at Rutene Shopping Centre in Kigetueini Location within Murang'a County, the Applicant broke and entered*

*the Hotel Kitchen of LUCY WANGUI MUTAHI through the window and stole therein two sufurias worth 500/= and Kshs 850/=, two thermos flasks worth Kshs 700/= and Kshs 500/=, three cups worth Kshs 150/= each, one kitchen knife worth Kshs 250/-, 1 kg wheat flour worth 85/=, ½ cabbage worth Kshs 20/=, 8 tomatoes WORTH Kshs 20/= and ½ kg of sugar worth Kshs 60/= all summing up to Kshs 3,635/=."*

17. The Applicant was arraigned before the trial court on 10<sup>th</sup> September, 2024 and on 23<sup>rd</sup> September, 2024, he pleaded guilty to the said charge whereby he was convicted on his own plea of Guilt and subsequently sentenced as follows (verbatim)

*"In the first count - 2 years imprisonment.*

*In the second limb - 2 years imprisonment.*

*Sentences to run consecutively and Right of Appeal in 14 days."*

18. A reading of the charge sheet and proceedings of the trial court shows that the Applicant was convicted and sentenced to serve two (2) years imprisonment for each offence in the charge, which the court ordered run consecutively hence bringing the total imprisonment term to four (4) years.

19. It will be appreciated that the penalty for the offence of burglary is provided for under **Section 304(b)** of the **Penal Code** as '**imprisonment for ten years.**'

20. The penalty for stealing is provided for under **Section 279** of the Penal code being imprisonment for fourteen years.
21. It will be seen that while the law under **Section 14** of the **Criminal Procedure Code** gives the trial court the discretion to order for sentences where an accused has been convicted of several offences at one trial to run either consecutively or concurrently, it is now trite that a proper and standard practice in Kenya for the court to order for the sentences to run concurrently, where it finds the two or a series of offences were convicted at the same time in a single time transaction, what is otherwise referred to as '*same transaction rule*' (see **Section 2.3.21 and 7.13** of the **Judiciary Sentencing Policy Guidelines**)
22. In the instant case, it is clear from the charge sheet that the burglary and stealing were convicted in the course of the same transaction and or activity. Therefore, the trial court ought to have ordered for sentences metered against the applicant for each limb in the charge to run concurrently so as to avoid an injustice resulting for an excessive sentence.
23. The next issue is whether the non-custodial sentence that was imposed against the applicant should be revised to a non-custodial sentence for the remainder period of the sentence that he is currently serving. It is the Applicant's case that he has served some amount of time on the four (4) years custodial sentenced and thus seeks

to have the remaining period reviewed to a non-custodial sentence or Community Service Order.

24. The court referred the applicant for a social inquiry and a report was sent back confirming that the convict, his family members, victim's family, local administrator and neighbours had been interviewed on his background, past records and character by the Probation officer. According to the Probation Officer. In this sentence review report filed on 4<sup>th</sup> December, 2025 the applicant had already served one year, two months in jail.

25. His family members, neighbours and local administrators are reported to have said that he is a 1<sup>st</sup> offender and they all committed to work with the Probation Officer in ensuring that the Applicant adheres with any court order or condition.

26. The Probation Officer thus recommended that the applicant was fit to serve on Community service order at Kiambaa Chief's office.

27. **Section 3 (2) of Community Service Order** provides that:

***“(a) Community service shall comprise unpaid public work within a community, for the benefit of that community, for a period not exceeding the term of imprisonment for which the court would have sentenced the offender.***

***(b) For the purposes of this Act, public work shall include but not be limited to—***

***(i) construction or maintenance of public roads or roads of access;***

***(ii) afforestation works;***

- (iii) environmental conservation and enhancement works;**
- (iv) projects for water conservation, management or distribution and supply;**
- (v) maintenance work in public schools, hospitals and other public social service amenities;**
- (vi) work of any nature in a foster home or orphanage;**
- (vii) rendering specialist or professional services in the community and for the benefit of the community, and the nature or type of public work shall, in any particular case.”**

28. I have considered the Applicant's mitigation and taken into account the report and recommendation in the sentence review report by the Probation Officer, the value of goods he stole and the period of sentence imposed against him alongside other intervening circumstances as highlighted from the sentence review report. I find that the period the Applicant has served in jail is sufficient enough for one to be rehabilitated and reformed.

29. In the result, the Notice of Motion application dated 15<sup>th</sup> October, 2024 is hereby allowed.

30. Accordingly:

- a) ***The custodial sentence imposed against the Applicant on 23<sup>rd</sup> September, 2024 is hereby reviewed and substituted with a non-custodial sentence.***
- b) ***The Applicant to serve the remainder of his sentence on Community Service at Kiambaa Chief's Office for a period of one (1) year.***

- c) ***The applicant to adhere to any condition that will be set by the Community Service officer and SupervisorP.***
- d) ***Failure to comply with the terms of the said order will render the same be lifted and applicant will be arraigned before this court for an order to be made for her to serve the remainder of the sentence in custody.***

31. It is so ordered.

**DATED, SIGNED AND DELIVERED THIS 15<sup>TH</sup> DAY OF APRIL, 2026.**

**HON. D. CHEPKWONY  
JUDGE**