REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CRIMINAL REVISION NUMBER **E046** OF 2025

JOSEPH MEMIA……..……..……APPLICANT

-VERSUS-

REPUBLIC……...RESPONDENT

(Being revision of sentence in the Chief Magistrate's Court at Thika (Hon. E. Kithinji RM) in criminal case number E079 of 2024 dated 23-04-2025)

RULING

In this application, the applicant has prayed that this court reviews sentence imposed on him by the trial court on 23-04-2025. The applicant faced two counts before the trial court as follows;

> *Count 1- Conspiracy to commit a felony contrary to Section 393 of the Penal Code particulars being that on 8th day of December, 2023 at around 1400 hours in Thika town within Kiambu County jointly with others not before court conspired to steal motor vehicle, registration number KCN 979R Mazda Demio black in colour, valued at Ksh. 500,000.00 property of Boniface Wanjala.*
>
> *Count 2- Stealing contrary to Section 268 as read with Section 275 of the Penal Code particulars being that on 8th day of December, 2023 at around 1400 hours in Thika town within Kiambu County jointly with others not before court, he stole a motor vehicle, registration number KCN 979R Mazda Demio black in colour, valued at Ksh. 500,000.00 property of Boniface Wanjala.*

He pleaded not guilty when he was arraigned on 8-01-2024 but after several appearances, he decided to change his plea on 19-03-2025. After he admitted the facts as read by the prosecuting counsel, the court convicted him on its own plea of guilty. The court sentenced him to serve jail term of four years for the first count and three years for the second count and ordered that the sentences shall run concurrently from the date of his arrest.

The grounds upon which the applicant seeks review of the sentence are that he is remorseful, he has reformed and that the sentences were severe. He pleads that he be given a non-custodial sentence or a conditional discharge under Section 35(1) of the Penal Code.

The application was opposed by the respondent through grounds of opposition dated 31st July 2025. The respondent states that the there are no sufficient grounds for review since the applicant has not shown that the sentences were unconstitutional or unlawful. It adds that the applicant's mitigation was considered by the trial court before sentencing not forgetting that he lied to the court that he had tried to settle with the complainant. The respondent avers that the trial court was actually very lenient with the applicant considering the aggravating factors and the punishment provided for in the Penal Code.

I have considered the application, the said respondent's grounds of opposition and the submissions of the parties dated 13th July 2025 and 31st July 2025 respectively. I note that the offence of conspiracy to commit a felony attracts a maximum jail term of four years while that of stealing attracts 3 years.

It is true as submitted by the respondent that the applicant has not challenged the legality or constitutionality of the sentences. It is also true that the trial court

considered the applicant's mitigation. But this does not preclude this court from looking into the legality of the sentences if any is manifested.

In my opinion the High Court has jurisdiction to review sentences where it appears to it that some facts or circumstances were not considered while at the same time being cautious not to interfere with the discretionary powers of the trial court on sentencing simply because it would have handed down a different sentence. In ***Ahamad Abolfathi Mohammed & another v Republic [2018] KECA 743 (KLR),*** the Court of Appeal held that;

> *'As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In* ***Bernard Kimani Gacheru v. Republic, Cr App No. 188 of 2000*** *this Court stated thus:*
>
> > ***It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.***
> >
> > *(See also* ***Wanjema v. Republic*** ***[1971] E.A 493).'***

I have noted from the facts which the applicant admitted that the circumstances under which the offence of stealing was committed, which facts the applicant admitted, constituted a serious act of deceit where the applicant presented himself as a different person. I have also considered that the applicant's submissions that the court should consider that there is a civil judgment against him in favour of the complainant in Thika Small Claims Court case number E344 of 2024. I have not had sight of the said file but there is a copy of the judgment in this court's file showing that on 6-03-2025, a judgment was entered against applicant in favour of the complainant in this matter for a sum of Kshs 450,000.00. I note from the judgment that the applicant participated in the proceedings before the Small Claims Court and the complainant had told the court that he had tried to have amicable settlement with the applicant but the applicant kept taking him in circles. In these circumstances, it is notable that there was an attempt to settle and therefore it is not entirely true that the applicant lied about attempted settlement.

I am aware that civil cases are meant to compensate a party injured by acts of the another while criminal cases aim at punishing for an offence against the public but there is nothing wrong with parties negotiating settlement even where criminal acts are involved as much as the criminal case is initiated by the state on behalf of the public. The two jurisdictions though different have some areas of convergence which cannot be ignored.

The trial court meted the maximum sentence provided for an offence of stealing. Whereas there is nothing wrong with a court imposing a maximum sentence, it is important to consider that the mitigating factor presented by the applicant as shown above in addition to the fact that applicant pleaded guilty although after some several appearances were relevant points of consideration.

It is also important to consider that the applicant was a first offender as there were no records produced of his past criminal conduct or conviction or conflict with the law.

The proceedings do not show that the court considered the above attendant mitigating factors and one can only assume that it did. Other than meting the sentences, the only recorded consideration is that the applicant lied that he had tried to settle the matter with the complaint. I therefore doubt that the mitigating factors were given the attention they deserved.

I do understand that the trial court has discretion on sentencing but unless there are serious aggravating factors, maximum sentence would though lawful appear severe in circumstances of this case. I am guided by the holding of the Court of Appeal in ***Charo Ngumbao Gugudu v Republic [2011] KECA 387 (KLR)*** thus;

> *'From the foregoing, it is clear that maximum sentence under that section was life imprisonment with or without corporal punishment. It has long been a principle of sentencing that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged.'*

Having said the above and taking factors stated therein into consideration, I form the opinion that a jail term of two years for the second count would be appropriate.

Section 393 of the Penal Code provides that;

> *'Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Kenya would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and is liable, if no other*

punishment is provided, to imprisonment for seven years, or, if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to that lesser punishment.'

My understanding of the last part of the above provision is that where the maximum punishment for the offence the accused person is said to have conspired to commit is less than seven years, then the accused is liable for the lesser punishment. In this case, the applicant was accused of conspiracy to commit offence of stealing. The maximum sentence for stealing as provided in Section 275 of the Penal Code is three years which means that the applicant was liable to be sentenced to maximum of three years for the first count. In this regard I do believe that the sentence of four years was excessive as it was higher than the punishment provided by the law.

Having said the above and applying purposive interpretation of Section 393 of the Penal Code, it would be against the spirit of that Section to sentence the applicant to a term longer than what I have meted for count two. It is my finding the right thing to do in the circumstances is to sentence the applicant to two years for the first count.

The conclusion of the above is that this application succeeds to the extent that the sentence of the trial court dated 23-04-2025 is hereby set aside and substituted for the following;

1. The applicant is sentenced to serve two years in jail in the first count.

2. The applicant is sentenced to two years in jail for the second count.

3. The sentences aforesaid shall run concurrently.

4. The terms shall run from the date the applicant was arrested.
5. In view of the above orders and since the applicant was arrested on 5-01-2024 meaning that the two years have lapsed, he shall be released forthwith unless otherwise lawfully held

Dated signed and delivered at Nairobi this **30th** day of **April** 2026.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of the applicant in person and Miss Torosi for the respondent.