



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL REVISION NO. 124 OF 2015**

**FELIX MUOKI MUTETI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON REVISION**

Felix Muoki Muteti, the Applicant herein, was charged with the offence of stealing contrary to section 275 of the Penal Code, in Criminal Case No 359 of 2015 in the Senior Resident Magistrate's Court at Tawa. The particulars of the offence were that on the 31<sup>st</sup> July 2015 at Mandani village , Usalala sub-location in Mbooni East District within Makueni County, he stole 50 kilograms of maize valued as Kshs 1,500/=, the property of Patrick Wambua Kimeu.

He was also charged with an alternative offence of handling stolen property contrary to section 322(1)(2) of the Penal Code. The particulars thereof were that on the 31<sup>st</sup> July 2015 at Mandani village , Usalala sub-location in Mbooni East District within Makueni County, otherwise that in the course of stealing, dishonestly received or retained 50 kilograms of maize valued as Kshs 1,500/=, the property of Patrick Wambua Kimeu, knowing or having reason to believe them to be stolen goods.

The Applicant was convicted on his own plea of guilty of the main count, based on the doctrine of recent possession of the stolen goods, and sentenced to three years imprisonment on 6<sup>th</sup> August 2015. He has now applied under section 362 and 364 of the Criminal Procedure Code and Article 50(2)(q) of the Constitution for a reduction of the sentence, by way of an application filed in Court on 14<sup>th</sup> September 2015. He stated that he is remorseful and repentant, and has been rehabilitated and reformed while in prison. Further, that he is the sole breadwinner in his family since he lost both of his parents.

I have considered the application by the Applicant. Article 50(2)(q) of the Constitution provides that every accused person has the right to a fair trial including the right if convicted, to appeal to, or apply for review by, a higher court as prescribed by law. Section 362 of the Criminal Procedure Code gives powers to this Court to 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.

Section 364 of the Criminal Procedure Code provides for the powers of the High Court on revision as follows in this regard:

**“(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.**

**(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.**

**(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.”**

With respect to the present application, I note that the Applicant is not disputing the correctness, legality or propriety of sentence meted on him by the subordinate Court, but is asking for a reduction of the sentence. Section 362 of the Criminal Procedure Code is therefore inapplicable to the instant application. In addition, the power of revision by this Court is curtailed under Section 364(5) of the Criminal Procedure Code, when or if no appeal has been brought against a finding, sentence or order.

These findings notwithstanding, I note that this Court is empowered to order that a term of imprisonment of less than 3 years be served by way of community service under the Community Service Orders Act (Chapter 93 of the Laws of Kenya). Section 3(1) of the Community Service Orders Act provides as follows in this regard:

**“(1) Where any person is convicted of an offence punishable with—**

**(a) imprisonment for a term not exceeding three years, with or without the option of a fine; or**

**(b) imprisonment for a term exceeding three years but for which the court determines a term of imprisonment for three years or less, with or without the option of a fine, to be appropriate, the court may, subject to this Act, make a community service order requiring the offender to perform community service.”**

The Applicant’s application for revision accordingly fails for the foregoing reasons. I however direct that a community service officer conducts an inquiry into the circumstances of the Applicant and the

Applicant's case, and to file a report in Court on the findings as to the suitability of the Applicant to perform community service within 30 days of the date of this ruling.

Orders accordingly.

**DATED AT MACHAKOS THIS 19<sup>th</sup> DAY OF JULY 2016.**

**P. NYAMWEYA**

**JUDGE**



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