



REPUBLIC OF KENYA



**Mbinya v Republic (Criminal Revision E280 of 2023)
[2024] KEHC 17190 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 17190 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL REVISION E280 OF 2023**

TM MATHEKA, J

JULY 30, 2024

BETWEEN

FAITH MBINYA APPLICANT

AND

THE REPUBLIC RESPONDENT

JUDGMENT

Judgment On Revision

1. The applicant Faith Mbinya was charged with being in possession of cannabis sativa contrary to section 3(1) as read with sub-section 3(2) of the Narcotic and Psychotropic Substances Control [Act No. 4 of 1994](#). Particulars being that on the 8th day of June 2023 at about 2100hrs at Kimeeni market, Kimeeni sub-location, Kalawa location in Mbooni East sub-county within Makueni county was found in possession of cannabis sativa (bhang) 27 rolls of 10 grams valued at Kshs.1350/= which were not in medical preparation.
2. She pleaded guilty to the charge and the facts on 20/6/2023. She was convicted on her own plea of guilty.
3. The prosecution told the court that the accused was not a first offender because on 5/5/2023 she had been charged with a similar offence, pleaded guilty, was convicted and sentenced to a fine of Ksh. 10,000/= in default to serve one-month imprisonment.
4. The trial court considered the fact and sentenced her to two years' imprisonment. Her mitigation which the court considered was that "I have children; I will not repeat the offence."
5. She then filed this application on 10/11/2023 tilting it "Application for mitigation and Revision of Sentence".



6. On the 1st paragraph she says that “I am a 1st offender and humbly plead for leniency having learnt a lesson the hard way”.
7. She submits that she is the sole parent, bread winner of her children – and is fearful of their welfare now that she is in prison custody. She submits further that this court can find that the evidence is insufficient – against her or quash the conviction and grant her a non-custodial sentence.
8. The issue for determination is whether this application is tenable.
9. In preparation for its determination I sought a sentence review report.
10. It is not in dispute that the applicant was charged with possession of bhang twice in a span of two months.
11. The local administration presents her as hardworking but fault her for selling drugs – she has been running a muguka kiosk and added bhang to her menu. “she is described as a stubborn dealer of the narcotic”.
12. It is also not in doubt that she has minor children who depend on her.
13. The report filed on 5/6/2024 indicated that the children are no longer in school and have refused to return to school despite the chief’s intervention.
14. On reading this in the report I had to point out the following:
15. The PACS officer is an authorized officer as per the *Children Act*.

“ authorised officer” includes a police officer, a chief, a children’s officer, a probation officer, prison officer, a registered medical practitioner, a labour officer, a teacher, or any other officer authorized by the Secretary or under any other written law for the purposes of this Act
16. That as an authorized officer the chief and now the PACS officer ought to have taken the corrective measures necessary having a Protection and Care opened to enable the DCs carry out its mandate. Section 144 of the *Children Act* guides as follows: that a child is in need of care and protection includes a child:
 - (e) whose parent or guardian has been detained, held in custody or imprisoned or is in remand,
 - (ff) who for any other reason, is, in the opinion of an authorized officer, vulnerable to harm or abuse;
17. The mother to these children was arrested. Police Officers are authorised officers under the Act. The police officers who arrested her were under an obligation to ensure that the children who became children in need of care and protection were protected, their welfare safe guarded when their mother was arrested. This obligation requires Police Officers to inquire whether the minor children have someone to take care of them and to bring this to the attention of the children officer or the chief who is an authorized officer.
18. The PACs officer was under obligation to take necessary action including to speak to the children or refer the DCs to the home to check on the welfare of the children.
19. The *Children Act* 2022 does not envisage a vacuum or gap in the chain link when it comes to the rights and welfare of the children – where the immediate family is not available for children in need of care and protection – the state is required by law to step in – in this case the state were the police officers who arrested the accused, the area chief in whose jurisdiction the children were, and the PACs officer who



- heard about the children from the accused. The court also – when it heard the accused’s mitigation ought to have questioned further about the welfare of the children and proceeded to secure the same.
20. This child justice system will only work when we, each justice agency do our part, which includes referrals and working as a team..
 21. Be that as it may be I sought a Children Officer’s Report on the Children.
 22. Other than speaking to the Chief and the children the Children Officer did not speak to the sister of the accused, who would offer alternative parental care for the children in the absence of the accused
 23. I have considered the report.
 24. It is noteworthy that the applicant is content to sell drugs to other people’s children but is concerned about the welfare of her own children. Does she wonder how the parents of the children or young persons who are her customers for bhang and mogoka feel when their children cannot work or go to school – so that she can make quick money? Even her own son does not approve of what his mother is doing.
 25. As the adults in this house that is our Nation we are bound by our collective contract, *the Constitution*, to do the right things, to raise our children right, to respect and uphold the rule of law. They have been watching us do all the things we tell them not to do, to theirs and our detriment, and I dare say it is no wonder the Gen Z are protesting, with the Alpha Generation right behind them.
 26. When it comes to children the adults in this ‘house’ have parental responsibility to do right by all the children.
 27. The applicant deserves the punishment she got, and more.
 28. Her children do not deserve what she is doing to them through the consequences of her actions.
 29. Having said that, the record will show that she has spent 1 year in prison. As a single parent, her children have been reduced to a child headed home. It does not mean that her children will provide an escape route from the consequences of her actions.
 30. She has an opportunity to change and find something different to do to raise her children other than selling drugs.
 31. The applicant must commit to stop the activities that led to her arrest and conviction and imprisonment.
 32. Under the supervision of the Probation Officer Makueni she will be placed on Probation Supervision for 12 months. She will be made aware of the harm caused by drug abuse. PACs will add her to their community point persons against abuse of drugs.
 33. During that period, she will be under the watch of the local administration as well.
 34. Should she violate this order in any way she will be liable to the setting aside of the order and its substitution with a term of imprisonment?
 35. Probation Order to issue accordingly

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF JULY, 2024.

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

JUDGE



THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

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