



**Kungu v Republic (Criminal Revision E019 of 2024)
[2024] KEHC 10431 (KLR) (22 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10431 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL REVISION E019 OF 2024
FN MUCHEMI, J
AUGUST 22, 2024**

BETWEEN

PAUL KIMANI KUNGU APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. The application for determination is dated 9th January 2024 in which the applicant seeks to have the sentence imposed on him in Gatundu CM Criminal Case No. E977 of 2023 reviewed.
2. The applicant was convicted by Gatundu Chief Magistrate, in Criminal Case No. E977 of 2023 with the offence of being in possession of cannabis sativa (bhang) contrary to Section 3(1) as read with section 3(2) of the *Narcotics Drugs and Psychotropic Substances Control Act* No. 3 of 1994 and was sentenced to 32 months of imprisonment.
3. The applicant avers that he did not lodge an appeal to the High Court. The applicant further states that he is a young man with a wife and children who are on the verge of being evicted from their rental house. The applicant seeks review of his sentence and urges this court to give him a lenient sentence according to the circumstances of the case. He further urges the court to impose a non custodial sentence or a conditional discharge under Section 35(1) of the *Criminal Procedure Code*, suspended sentence or both.
4. The respondent states that the applicant was charged with the offence of being in possession of cannabis sativa (bhang) where he pleaded guilty and was sentenced to 32 months imprisonment.
5. The respondent states that the record shows that on December 19, 2023, the applicant gave his mitigation and said that the bhang was for his own consumption. Further that he is a farmer and the



sole breadwinner of his family. He said that his parents are sickly and he has many of children who depend on him. The trial court deferred sentencing awaiting a social inquiry report.

6. On January 3, 2024, the trial court stated that it had seen the social enquiry report where it had been recorded that the applicant has been a bhang peddler and sells to under age children. The respondent further states that the trial court went further to note that the bhang menace has been a big issue within the jurisdiction of the court where minors of tender years were exposed to bhang and ended up hooked to drugs. Thus, the trial court deemed it fit to pass a deterrent sentence also considering that the amount of bhang in the possession of the applicant was quite substantial.
7. The respondent states that the trial court directed that the sentence do run from December 17, 2023 when the applicant was arrested and therefore the time spent in custody was considered. Thus, it is evident that the mitigation of the applicant and the social enquiry report were well considered by the trial court.
8. The respondent further states that both mitigating and aggravating circumstances were considered but the aggravating circumstances outweighed the mitigating circumstances hence the sentence by the trial court. The respondent further argues that the sentence passed by the trial court was proper and legal as it considered the aggravating and mitigating circumstances, the social enquiry report and the time spent in custody.
9. Directions were issued that the application be canvassed by way of written submissions and from the record only the respondent complied by filing her submissions on July 30, 2024.

The Respondent's Submissions

10. The respondent reiterates the content of her supporting affidavit and submitted that the sentence passed by the trial court was proper and legal and urged the court to uphold the sentence.

The Law

11. This court is empowered by Article 165(6) of the *Constitution* of Kenya to review a decision by a subordinate court. Article 165(6) provides:-

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.

12. The applicant has come to this Honourable court by way of review provided for under Article 50 of the *Constitution*. It provides:-

(2) Every accused person has the right to a fair trial, which includes the right:-

(q) If convicted, to appeal to, or apply for review by a higher court as prescribed by law.

13. In the case of *Samuel Kamau Macharia vs KCB & 2 Others*, Civil Application No. 2 of 2011, it was stated:-

“A court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

14. The applicant herein was convicted for the offence of being in possession of cannabis sativa (bhang) contrary to Section 3(1) as read with Section 3(2) of the *Narcotics Drugs and Psychotropic Substances*



Control Act No. 3 of 1994. The applicant pleaded guilty to the offence and was sentenced to 32 months imprisonment.

15. The penalty for the offence of being in possession of cannabis sativa under Section 3(2) of the Narcotics Drugs and Psychotropic Substances Control Act is a prison term not exceeding five (5) years or a fine not exceeding one hundred thousand shillings (Kshs. 100,000/-) or both. Thus it is evident that the trial magistrate imposed a fair and just sentence and within the law. The sentence imposed was less severe sentence in line with Article 50(2)(1) of the Constitution:-

Every accused person has the right to a fair trial, which includes the right-

To the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.

16. The trial court had the discretion to impose the maximum sentence in the event that the circumstances of the case called for it. However, the trial magistrate gave a less severe and reasonable sentence. The applicant did not say that the sentence was manifestly harsh and excessive, or that the sentence was illegal or improper or that the trial court acted on the wrong principles or omitted relevant factors or took into account irrelevant factors in sentencing, or that the proceeding was irregular or in violation of his right or fundamental freedom.
17. The applicant was convicted and sentenced on January 3, 2024 thus he has spent about 8 months in prison since his conviction and
18. sentencing. The only mitigating factor on record is that the applicant is a young man who has left behind a young wife and children whom he says are on the verge of being evicted from their rental house. These grounds are not sufficient to warrant interference of the trial court with the sentence. The sentence given by the lower court was fair and just legal and in the circumstances ought to be upheld.
19. Consequently, I find no merit in this application and I dismiss it accordingly.
20. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 22ND DAY OF AUGUST 2024.

F. MCHEMI

JUDGE

