



**Mwangi v Republic (Criminal Revision E148 of 2024)
[2024] KEHC 13307 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13307 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL REVISION E148 OF 2024
DKN MAGARE, J
OCTOBER 31, 2024**

BETWEEN

PETER MAINA MWANGI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This is a ruling over an application for review submitted in the form of a formal letter to the Presiding Judge and the Deputy Registrar of this court. The Applicant is seeking to review sentence to a non-custodial sentence for the remainder of the term. The Applicant stated that he was remorseful and ready to change.
2. The application is supported by the annexed affidavit of the Applicant. The probation officer filed a report stating that the non-custodial sentence is proper. His view was that though the local administration were against release, the Applicant deserves the non-custodial sentence due to the age of the Applicant who is 64 years old, a father of 5 children. The circumstances of the offence were that the Applicant was in possession of cannabis sativa for personal consumption.
3. It was confirmed that the Applicant is a repeat offender having been fined for a similar offence in Nyeri CMCR. 1385 of 2020.

Analysis

4. The issue is whether the sentence should be revised to a lesser one after taking into consideration circumstances of the case and the mitigation by the Applicant.
5. The Applicant was charged with the offence of being in possession of narcotic drugs contrary to Section 3(1) as read with Section 3(2)(a) of the *Narcotic Drugs and Psychotropic Substance Control Act* No 4 of 1994. The particulars of the offence were that on 13th February, 2024 at about 0015hrs at Gathithi



village Gaaki Sub-location in Tetu Sub-county of Nyeri County the Applicant was found in possession of narcotic drug namely cannabis sativa which was 9 rolls estimated at a street value of Kshs 450/= in his bag which was not in medical preparation form contrary to the law.

6. The charging section provides as follows: -

“A person guilty of an offence under subsection (1) shall be liable to, in respect to cannabis sativa, where the person satisfied the court that the cannabis was intended solely for his own consumption, to imprisonment for 10 years and in any other case to imprisonment for 20 years.”

7. The Court of Appeal addressed the phrase “shall be liable” in Criminal Appeal No 479 of 2007 *Daniel Kyalo Mucema v R* (2009) eKLR having regard to the meaning or construction. In so doing the court placed emphasis on Section 66(1) of the *Interpretation and General Provisions Act* (Cap 2 Laws of Kenya) which provides:

“Where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punishable by a penalty not exceeding the penalty prescribed”

8. The sentence of 3 years will otherwise be lawful as it is below 10 years. However, the court has on the record taken into consideration several factors.

9. The trial court considered the case and convicted the Applicant and sentenced him to serve 3 years imprisonment. Aggrieved, the Applicant filed for revision of the sentence only. There was no appeal filed in respect of conviction thereof.

10. In the High Court of Malaysia in *Public Prosecutor v Muhari bin Mohd Jani and another* [1996] 4 LRC 728 at 734, 735 it was stated as doth:

“The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”

11. The guidelines with regard to mitigating factors applicable in a re-hearing sentence were enunciated by the Supreme Court in a murder related trial in the case of *Francis Karioko Muruatetu & another v Republic* (2017) eKLR:

- (a) age of the offender;
- (b) being a first offender;
- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;



- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.

12. Therefore, the purpose and objectives of sentencing as stated in the Judiciary Sentencing Policy is to ensure sentence is commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. The objectives of sentencing as set out in the 2023 [Sentencing Guidelines](#) are as follows:-

- “ 1. 3.1 Sentences are imposed to meet the following objectives. There will be instances in which the objectives may conflict with each other – insofar as possible, sentences imposed should be geared towards meeting the objectives in totality.
- i. Retribution: To punish the offender for their criminal conduct in a just manner.
 - ii. Deterrence: To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.
 - iii. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.
 - iv. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender’s contribution towards meeting those needs. Community
 - v. Protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender’s criminal acts.
 - vi. Denunciation: To clearly communicate the community’s condemnation of the criminal conduct.
 - vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
 - viii. Reintegration: To facilitate the re-entry of the offender into the society”

13. The Applicant was a second offender though for minute quantities of cannabis sativa. The probation report dated 25/9/2024 also indicates that the Applicant is a 64 year old father of 5 adult children. He indicated in his mitigation that he is remorseful. The remorse, however was not apparent. No report was produced on the rehabilitation status of the Applicant. The Court is in doubt as to whether the Applicant as a second offender of the same offence has changed or will change. The correspondence



from Nyumba Kumi point to the Applicant as a bhang peddler whose clients are said to be young school children. He has however, not been charged with trafficking.

14. In the circumstances, I decline the invitation by the Probation Officer and concession by the state who favour a noncustodial sentence. A custodial sentence is a proper one for the Applicant.
15. However, on the material placed before me, the court stated to have relied on mitigation, circumstances of the offence and the fact that the Applicant was not a first offender. The court however, did not take into consideration that the first offence was more serious. The court did not thus take into consideration the entire circumstances of the offence and his age. Further, the sentence in the former offence was for 6 months or less. The court also did not have regard to the fact that the Applicant pleaded guilty to the offence at the first instance.
16. Consequently, the three year sentence is reduced to 1 year imprisonment effective 13/2/2024, the date of arrest.

Determination

17. I therefore make the following orders: -
 - a. The sentence of 3 years imprisonment is set aside and substituted with a sentence of 1-year imprisonment with effect from 13/2/2024, the date of arrest.
 - b. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 31ST DAY OF OCTOBER, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Mwakio for the State

Applicant – present

Court Assistant – Jedidah

