



REPUBLIC OF KENYA



KENYA LAW
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**Maina v Republic (Criminal Revision E011 of 2023)
[2023] KEHC 2567 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2567 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E011 OF 2023
GL NZIOKA, J
MARCH 24, 2023**

BETWEEN

HASSAN KAMAU MAINA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the Senior Principal Magistrate's Court at Engineer charged vide Criminal Case. No. E1397 of 2022, with the offence of being in possession of Narcotics Drugs contrary to section 4 as read with section 4 (a) (ii) of the *Narcotic Drugs and Psychotropic Substances Control Amendment Act* No. 4 of 2022. The particulars of the charge are as per the charge sheet.
2. He pleaded guilty, was convicted and sentenced to pay a fine of Kshs. 100,000 or in default to serve a term of three (3) years imprisonment.
3. He now seeks for a review of the sentence vide an application filed on January 30, 2023. The application is supported his affidavit and a document labelled "mitigation grounds of revision" where he avers that he is a first offender. That he is remorseful, rehabilitated, has learnt to be a law abiding citizen. That he has acquired farming skills as part of his rehabilitation and will use the skills he has learnt to cater for his family. Further, that he has no pending appeal and is only applying for review of sentence and that the court considers the time he spent in custody.
4. The Respondent has not responded to the application despite being granted an opportunity to do so and therefore the application is unopposed.
5. The pre-sentence report dated; November 9, 2022 and filed in the trial court indicates that, the applicant is 40 years old and the 7th born out of ten (10) siblings. That both his parents are deceased. He is married and has four (4) children all in primary school. That he dropped out of secondary school in form 3 due to financial constraints and was working as a casual worker before his arrest.



6. That admits to having used bhang. Further he is remorseful and has learnt his lesson while in custody and seeks for leniency. His brother describes him as a hardworking person. However, the area local authority states that he has been implicated in possession of bhang but his behavior was salvageable if given a last chance. The Probation officer recommends that the applicant be sentenced to a non-custodial sentence under community service order for a period of five (5) months.
7. In considering the application, I note that the revisionary power of the High Court is provided for under sections 362 of the [Criminal Procedure Code](#) which states as follows:

“The High Court may 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.”
8. However, the section should be read together with section 364 of the [Code](#) which provides as follow: -
 - “(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.”
9. It is therefore clear from the above provisions that, the court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. Thus, the objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be invoked where the decision under challenge is; grossly onerous, there is no compliance with the provisions of the law, or the finding re-ordered are based on no evidence, or material evidence is ignored or judicial discretion is exercised arbitrarily or perversely.



10. In the instant matter, the applicant was convicted of the offence under section 4 (a) (ii) of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, which states as follows: -

4. Any person who trafficks in, or has in his or her possession any narcotic drug or psychotropic substance or any substance represented or held out by him or her to be a narcotic drug or psychotropic substance, shall be guilty of an offence and liable—

(a) in respect of any narcotic drug or psychotropic substance—

(ii) where the person is in possession of more than 100 grams, to a fine of not less than fifty million shilling or three times the market value of the narcotic psychotropic substance, whichever is greater, or to imprisonment for a term of fifty years, or to both such fine and imprisonment,

11. Pursuant to the aforesaid the fine imposed is lawful and legal. However, after considering the fact that the applicant pleaded guilty and saved court's time and that, he is a first offender and further the pre-sentence report is favorable, I find this is a suitable case for review and I make the following orders: -

- a. He shall serve a custodial sentence of six (6) months with effect from the date of conviction that is October 24, 2022 without remission.
- b. He shall then serve a sentence of six (6) months on community service order at a place to be identified by the in charge Probation Department and records thereof to be filed in court.
- c. In case the applicant will breach the community service order he shall finish the remaining sentence in custody.

12. It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 24TH DAY OF MARCH, 2023

GRACE L. NZIOKA

JUDGE

In the presence of:

Appellant present in person, in court virtually

Mr. Atika for the Respondent

Ms Ogutu: Court Assistant

