



**Gekonge & 2 others v Republic (Miscellaneous Criminal Application E020 of 2023) [2023] KEHC 25864 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25864 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
MISCELLANEOUS CRIMINAL APPLICATION E020 OF 2023**

**WA OKWANY, J  
NOVEMBER 30, 2023**

**BETWEEN**

**CHARLES OGOTI GEKONGE ..... 1<sup>ST</sup> APPLICANT**

**BRIAN ORIOKI NYAMWAYA ..... 2<sup>ND</sup> APPLICANT**

**BRIAN NJUGUNA NDUATI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**THE REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicants herein were charged before Keroka Court in Keroka PMCRC No. E496 of 2022 with the offence of Being in possession of Narcotic Drugs (Bhang) contrary to Section 3 (1) as read with Section 3 (2) of the Narcotic and Psychotropic Substance Control Act No. 4 of 1994. The particulars of the offence were that on 27<sup>th</sup> July 2022 at Gotinyango Sub Location in Masaba South Sub County within Kisii County were jointly found in possession of cannabis sativa (Bhang) to wit 710 rolls with a street value of Kshs. 142,000 in contravention of the said Act.
2. They all pleaded guilty to the charge and were, on 28<sup>th</sup> July 2022, convicted and sentenced to five (5) years imprisonment.
3. The Applicants filed the instant application on 8<sup>th</sup> May 2023 seeking the revision of their sentence on the basis that they are remorseful for their actions.
4. Mr. Mwangi, Learned Counsel for the State did not oppose the application and submitted that the court may review the sentence in line with its discretion. He noted that the Applicants have been in custody since the time of their arrest.
5. Section 3 (1) as read with Section 3 (2) of the *Narcotic and Psychotropic Substance Control Act* No. 4 of 1994 stipulates as follows:



3. Penalty for possession of narcotic drugs, etc.
  - (1) Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.
  - (2) A person guilty of an offence under subsection (1) shall be liable—
    - (a) in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment to a term of not more than five years or to a fine of not more than one hundred thousand shillings;
    - (b) ....
    - (c) to, in addition to the sentences in paragraph (a) and (b) respectively, committal to appropriate court appointed treatment programme or to voluntary submission to a rehabilitation programme for a period not less than six months, where the court deems fit.
  
6. Section 362 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya), the High Court has power to satisfy itself that a decision by a subordinate court is correct, legal and proper. The said Section provides as follows: -
 

The High Court may call and examine any 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, and as to the regularity of any proceedings of any such court.
  
7. It is trite that sentencing is an exercise of discretion by a trial court and that an appellate court ought not to interfere with such sentence unless the same is manifestly excessive, harsh and severe. It is evident from the above cited section that the Narcotic Drugs and Psychotropic Substances Act does not prescribe a minimum sentence. It provides that where a convicted person in respect of cannabis, satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment to a term of not more than five years or to a fine of not more than one hundred thousand shillings.
  
8. My finding is that even though the sentence passed by the trial court was correct, legal and proper, I find that the trial court ought to have given the Applicants the option of a fine as provided for under the *Act*.
  
9. I have considered similar cases that had come before this court on Appeal or Revision in determining what would be a reasonable assessment in this case.
  
10. In the case of *Lawrence Mitelian Ngaluma vs Republic* [2017] eKLR, on appeal, this court upheld the sentence of five (5) years imprisonment that the Learned Trial Court had imposed on the appellant for conveying cannabis sativa with a street value of Kshs 360,000/=.
  
11. In the case of *William Mwanyumba Mwasaru vs Republic* [2017] eKLR, the court reduced the sentence of four (4) years to twelve (12) months where the applicant had been found in possession of cannabis sativa that had a street value of Kshs 1,000/=.
  
12. In the case of *Juma Issa Mohammed vs Republic* [2017] eKLR, the court reduced the penalty of Kshs 1,000,000/= and life imprisonment where the appellant therein had been found in possession of cannabis sativa with a street value of Kshs 160,000/= to four (4) years imprisonment.



13. In the case of *Jackson Rangasi vs Republic* [2017] eKLR, the court reduced the sentence of five (5) years to twelve (12) months where the appellant had been found in possession with cannabis sativa with a street value of Kshs 2,000/=.
14. In the case of *Beatrice Maganga vs Republic* [2016] eKLR, the court upheld a fine of Kshs 100,000/= or default sentence of two (2) years where the applicant had been found with cannabis sativa with a street value of Kshs 5,500/=.
15. It is noteworthy that the *Narcotics and Psychotropic Substances Control Act* prescribes different penalties under different sections.
16. I have considered the facts of this case and the fact that the Applicants pleaded guilty to the offence in question thereby saving this court the time and resources that it would have spent in conducting a full trial. I have also considered the value of the cannabis sativa that the Applicants were found with and the fact that they have, as at the time of this ruling, spent more than one year in prison.
17. I am certain that the period that the Applicants have spent in custody is adequate punishment for the offence that they committed. I find that the instant application is merited and I hereby allow it.
18. Consequently, I set aside the sentence of 5 years imprisonment and substitute it with the period that the Applicants have spent in jail. I therefore direct that the Applicants be set at liberty forthwith unless they are otherwise lawfully held.
19. Orders accordingly.

**RULING DATED SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023.**

**W. A. OKWANY**

**JUDGE**

