



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

MISCELLANEOUS CRIMINAL APPLICATION NO. E135 OF 2021

PATRICK KATHURI KIHARA....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. The application before the court is the Applicant's Chamber Summons filed on the 29th June, 2021 by which the Applicant seeks a review of the sentence imposed by the trial court. The same is supported by an undated affidavit sworn by the Applicant and filed on even date.
2. The background to the application is that the Applicant was charged in the Senior Principal Magistrate's Court at Engineer in Criminal case No. 246 of 2021 with two counts namely:

COUNT I: Trafficking in Narcotic Drugs Contrary to Section 4 (a) of the Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994.

It was alleged that on the 4th day of February, 2021 at around 0530 hours at Karangatha Trading Centre at Kinangop Sub-County within Nyandarua County, he was found trafficking drugs namely Cannabis Sativa (Bhang) to worth 500 (five hundred) grams of street value of Kshs 5,000/= by selling to members of public which was not in its medical preparation form.

COUNT II: Possession of plastic flat carrier bags contrary to a measure banning possession of plastic flats and plastic carrier bags prescribed under Gazette Notice No. 2356 and 2334 as read with Section 140 (b) of the Environmental Management and Co-ordination Act of 2015 Cap 387 Laws of Kenya.

The particulars of the offence were that on the 4th day of February, 2021 at around 0530hours at Karangata Trading Centre in Kinangop within Nyandarua County, he was found in possession of 173 plastic carrier bags knowingly and unlawfully retaining them at his dwelling house.

3. Count II was withdrawn by the prosecution under **Section 87 (1) of the Criminal Procedure Code**. As to Count I, the Applicant was convicted on his own plea of guilty and sentenced to serve 5 years imprisonment. He did not prefer an appeal but instead filed the present application seeking a review of the sentence. He then only offered mitigating factors that would warrant a review of the sentence.
4. He submitted that he had reformed and was remorseful and he thus prayed for a non-custodial sentence.
5. The Respondent through learned State Counsel, Miss Maingi did not oppose the application.
6. I have considered the Applicant's submissions. It is notable that the Applicant was found in possession of 500 grams of Cannabis Sativa believed to be for trafficking purposes. **Section 4 (a) of Narcotic Drugs ad Psychotropic Substances Control Act** provides that:

“Any person who trafficks in any narcotic drug or psychotropic substance or any substance represented or held out by him 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 to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life; or

b.”

7. It is well settled law that an appellate court will normally not interfere with a trial court's discretion of sentencing unless it is shown that the court applied the wrong principles or did not take into account relevant factors or the sentence imposed was inordinately too high, amongst other factors.

8. In the present case, the record of trial court proceedings clearly shows that the Applicant was a first offender which ought to have mitigated for a lenient sentence. Further, the quantity of the narcotic drugs found with the Applicant was of low value and ought not to have attracted such a lengthy imprisonment term. In my view, the learned trial magistrate failed to appreciate the essence of a sentence one of which is to reform an offender rather than harden him or her. The circumstances of this case did not warrant such a stringent sentence. A non-custodial sentence should have been the first option.

9. The Applicant was sentenced on 4th March, 2021 and had been arrested on 4th February, 2021, a month earlier. This means that he has been in custody for now close to one year which in my view is sufficient punishment.

10. In the result, I find the application meritorious. I set aside the remainder of the sentence and order that the Applicant has served sufficient sentence. I order that he be forthwith set free unless otherwise lawfully held.

11. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 27TH DAY OF JANUARY, 2022

G. W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Patrick Kathuri Kihara - Applicant in person

2. Ms. Maingi for the Respondent