



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL REVISION E007 OF 2021

MARGARET NYAORO OGOSO.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an Application for Revision of sentence in Ukwala SRM Court's Cr. Case NO. 172 of 2021 delivered on 26.03.2021 by Hon. C.I. Agutu, Senior Resident Magistrate)

RULING ON REVISION

1. The applicant herein **Margaret Nyaoro Ogo**, a 67 year old convict. She was sentenced to serve three (3) years imprisonment for 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 substances Control Act No. 4 of 1994**.
2. The particulars of the charge as stated in the Charge Sheet dated 26.3.2021 and presented before Ukwala Senior Resident Magistrate's Court in Criminal Case No. 172 of 2021 are that on the 24th day of March 2021, at Udira Kamrembo area of Nyamsenda Location of Ugenya Sub-County within Siaya County the applicant was found in possession of bhanga to wit 219 rolls of cannabis sativa which was not in its medical preparation of a street value of Shs10,219/=.
3. The applicant was arraigned on 26.3.2021 before Hon. C.I. Agutu, Senior Resident Magistrate, Ukwala and she is said to have pleaded guilty to the charge and facts upon which she mitigated and was sentenced to serve three (3) years imprisonment without an option of a fine. The applicant was not represented by any advocate or any intermediary. She was committed to Kisumu Women's Prison where she is serving her prison term.
4. On 21.4.2021, the applicant through the Kisumu Women Prison filed an application for Sentence Review where she made it clear that she was not contesting the conviction but was begging this court to revise her three (3) year sentence. She stated that she is remorseful for the offence and prayed for the alternative to imprisonment as she was a single parent and widowed, she is aged 67 years, she was left with very young children under her care following her husband's demise, and that she also cares for her grandchildren who are orphaned and who all depend on her. She prayed for leniency and an alternative sentence to imprisonment.
5. Upon the registry receiving the application, the file was placed before me expeditiously for directions on 21.4.2021 and I immediately directed that the application be served upon the Office of Director of Public Prosecutions, Siaya and Ukwala and the Probation Officer do file a Sentence Revision Report. I then set the matter for online mention for the applicant/convict who was in prison for 26.4.2021.
6. On 26.4.2021, the applicant was availed to court online Via Microsoft Teams from the Kisumu Maximum Prison and Dholuo language which she understood, as per the Prison Officer's guidance, was used in court for interpretation by Mr. Mboya Court Assistant.
7. The Probation Officer, Ms. Catherine Amimo had also filed her Sentence Revision Report that morning and so the court had had the opportunity to peruse the said Report and the brief proceedings from the lower court.
8. Having perused the proceedings and Probation Officer's Report, I was persuaded beyond doubt that this was a case where the applicant deserved Sentence Revision and I proceeded to revise the three (3) years Imprisonment, setting it aside and substituting it with an unconditional discharge of the applicant. I also directed that she be set at liberty forthwith. I undertook to issue reasons for my decision within seven (7) days which I have done by this detailed ruling.
9. I now proceed to give reasons for my summary decision of 26.4.2021. Starting with the Law, **the Constitution of Kenya at Article 165(6) and (7)** grants this court 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.
10. For purposes of **Clause (6)**, the High Court may call for the record of any proceedings before any subordinate court or person, body or

authority referred to in **Clause (6)** and may make any Order or give any direction it considers appropriate to ensure the fair Administration of Justice.

11. The power to call for the Magistrate's Court's records in Criminal cases other than in Criminal appeals is donated to this Court by **Section 362 of the Criminal Procedure Code** which provides:

“362. 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.”

12. The above section must be read with **Section 364 of the Criminal Procedure Code** which Provides:

364(1). In the case of a proceedings 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 out as a Court of Appeal by Section 354, 357 and, 358 and may enhance 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.

13. In the instant case, the applicant/convict filed together with her application, all the proceedings and Charge Sheet from the lower court duly certified hence there was no need of calling for the trial court record.

14. This court has jurisdiction to examine the trial Court's record and determine its legality, propriety or regularity. Therefore, having examined the trial court record, I have found the following issues in the said proceedings:

1) There is no language indicated as the language in which the applicant was read the charge. Neither do the proceedings show in which language the Applicant is said to have responded to the charge;

2) The trial court record does not show in which language the facts were read out to the applicant and neither does the record show in which language she allegedly admitted the facts as the trial magistrate simply asked in English: are facts right? Accused: Facts are right.

3) There is no conviction of the applicant hence there was no basis upon which the mitigation and sentence were being sought and being imposed on the applicant.

15. From the Probation Officer's Report filed on 26.4.2021, the applicant is aged 67 years, she is an illiterate old lady and a widow. She is a small scale farmer and takes care of her two orphaned grandchildren aged nine and six years respectively. The two are children of her late daughter.

16. In addition, the Probation Officer Ms. Catherine Amimo established that the applicant herein suffers from high blood pressure and diabetes and was to commence attending clinics prior to her arrest. Due to her advanced age and weak immune system, she stands a higher risk of contracting Covid-19. The applicant prays for a non-custodial sentence.

17. Curiously though, from the fact finding mission exercise-Social Inquiry conducted by Ms. Amimo, it emerges that the applicant has a son who lives with her and who partakes of bhang and even sells it and that it was him who kept the narcotic in his mother's house as he has no house of his own. The applicant was not even aware that the drug was in her house but out of fear and ignorance, she purported to plead guilty to the charge. She was arrested together with her son but he was released from Police custody simply because, most probably, the narcotic drug was found in his mother's house where he had hidden it and not on him as he has no house. This court also inquired from the applicant on why she would keep such substances and she responded saying she had no idea that the narcotic was in her house. All these information from the probation officer and response by the applicant lends credence to her ignorance of, even, what she was asking from this court. No doubt, the Prisons authorities assisted her draft the application out of sympathy hoping that she would get a reprieve from this court.

18. The community feels aggrieved by the arrest and imprisonment of the old widow and caregiver of orphaned grandchildren and consider her and the children vulnerable. The applicant, according to the Probation Officer, deserves to be assisted to be empowered by well-wishers to ensure that she has a sustainable livelihood to care for herself and her orphaned grandchildren.

19. Having considered all the above factors, which include the age of the applicant, her vulnerability and responsibility to third parties who are minor orphans and the fact that the purported plea of guilty was equivocal, coupled with the fact that the applicant was sentenced to serve a prison term without any presentence report and her sentence being fatally irregular as she was never convicted by the trial magistrate, I have no option but to quash all the proceedings and set aside the sentence of three (3) years imprisonment imposed on the applicant **Margaret Nyaoro Ogo** and Order that the applicant shall be unconditionally released from prison and set at liberty forthwith unless otherwise lawfully held.

20. I so Order and direct that this Ruling be supplied to ODDP and to Hon. C.I. Agutu for her noting and further action, this not being the first of its kind case in respect of proceedings conducted in her court where accused persons are sent to prison to serve sentences without being convicted.

21. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 26TH DAY OF APRIL, 2021

R.E. ABURILI

JUDGE

In the presence of:

Applicant via Microsoft Teams at Kisumu Maximum Prison

Mr. Kakoi Principal Prosecution Counsel

CA: Modestar and Mboya