



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL REVISION NO. E045 OF 2021

DAVID NJOGU GITAU.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

RULING

1. **DAVID NJOGU GITAU** by his application filed before this Court on 14th June, 2021 is seeking this Court to revise the sentence of the trial court, Senior Principal Magistrate’s Court at Limuru. Before that trial court, the applicant was charged with the offence of being in possession of bhang 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. He pleaded guilty to that offence.

2. The trial court after considering the applicant’s mitigation and the probation report sentenced the applicant to serve 18 months imprisonment.

3. The applicant seeks revision of that sentence on the ground that the trial court did not give him an option of a fine. The applicant in his affidavit in support of his revision application deponed:-

“THAT I am satisfied with the conviction but I kindly request this Honourable Court to revise my sentence of 18 months imprisonment to a non-custodial sentence.

THAT the jail term of 18 months without the option of a fine was very harsh sentence taking into consideration circumstances of the case.”

ANALYSIS

4. The applicant has moved this Court under the provisions of **Section 362** of the Criminal Procedure Code. That Section provides 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.”

5. The applicant was charged under **Section 3(1)** as read with **Section 3(2) (a) of Act No. 4 of 1994**. **Section 3(1)** criminalises possession of any narcotic drug. The applicant pleaded guilty to possession of “one bundle of bhang of street value of Kshs.2000.”

6. **Section 3(2)(a) of Act No. 4 of 1994**, on sentencing after conviction under Section 3(1) provides as follows:-

“Any 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 for ten years and in every other case to imprisonment for twenty years;”

7. The Court of Appeal in the case **DANIEL KYALO MUEMA VS. REPUBLIC (2009) eKLR** discussed whether the provisions of **Section 3(2)(a) of Act No. 4 of 1994** sets mandatory sentence. In its discussion and considering the provisions of **Section 26 and 28(1)** of the Penal

Code the Court of Appeal stated that the Section did not provide for mandatory sentence. The Court of Appeal in that case **DANIEL KYALO MUEMA** (supra) stated:-

“The last observation we want to make is that the phrase as used in Penal statutes was judicially construed by the predecessor of this Court in OPOYA VS. UGANDA [1967] EA 752 where the Court said at page 754 paragraph B:

‘It seems to us beyond argument the words “shall be liable to” do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it’”.

8. The trial court in sentencing the applicant to 18 months had the benefit of having the probation report dated 20th May, 2021. That probation report stated that the applicant was a habitual user of bhang. The Chief of Karanje area, Limuru described the applicant as a known bhang trafficker and seller. The probation report therefore concluded that the applicant was unsuitable for non- custodial sentence.

9. Bearing in mind the conviction of the applicant, his mitigation before the trial court and the probation report, I am satisfied that there is no illegality in the sentence meted out to the applicant. There is therefore no basis of interfering with the trial court’s decision on sentence.

DISPOSITION

10. The application filed before this Court on 14th June, 2021 is for the reasons set out above.

RULING DATED AND DELIVERED AT KIAMBU THIS 26TH DAY OF OCTOBER, 2021.

MARY KASANGO

JUDGE

CORAM:

COURT ASSISTANT: NDEGE

COURT

COPY OF THIS RULING TO BE SUPPLIED TO THE APPLICANT AND DPP

MARY KASANGO

JUDGE