



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CRIMINAL REVISION NO. E020 OF 2021**

**VINCENT OPIYO OMONDI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**Background**

1. The Applicant herein, was charged with the offence of trafficking in narcotic drugs contrary to **Section 4 (a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994**. It was alleged that on the 1<sup>st</sup> day of March, 2021 at County Council Estate in Naivasha sub-county within Nakuru County was found trafficking in Narcotic drugs to wit, 9 kilograms of bhang with a street value of KShs.90,000/- which was not in medicinal preparation form.
2. The Applicant pleaded guilty and was sentenced to 12 months imprisonment by the trial court on 26/06/2021.
3. The Applicant lodged a Memorandum of Appeal on 25/08/2021 vide High Court Criminal Appeal No. E017 of 2021. As per the court record of 04/11/2021 the appeal was marked as abandoned as the Applicant opted to pursue the instant review of sentence application.
4. The Applicant tendered the following grounds for review of the sentence as per memorandum of review dated 05/11/2021, namely:
  - i. That he is a first offender.
  - ii. That he is remorseful of the offence.
  - iii. That the probation report was positive and it recommended a sentence under probation.
  - iv. That he is from a poor family background.
  - v. That he is the sole breadwinner of his family and his incarceration has placed them in a very difficult situation.
  - vi. That he has no pending appeal.
5. The Applicant in oral submission stated that he was a first offender. He urged for a non-custodial sentence so that he could be able to take care of his family including enrolling his child to school.
6. Learned State Counsel, Miss Maingi submitted that the Applicant's mitigation was taken into account before sentencing and taking into account the seriousness of the offence, the sentence should not be revised. Instead, the Applicant should await a remission of sentence should he be of good behavior.

**Determination**

7. This court is conferred with supervisory jurisdiction over the subordinate courts under **Article 165 (1) of the Constitution** which states that:

***“The High Court has supervisory jurisdiction over the subordinate court and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”***

8. Section 362 of the **Criminal Procedure Code** on the other hand provides that:

*“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.”*

9. On the other hand, **Section 364** of the Act spells out the powers and orders that the court can issue on revision. It reads as follows:

*“(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.*

*(c) in proceedings under **Section 203** or 296 (2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.*

*(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.”*

10. The Applicant was charged under **Section 4 (a)** of the **Narcotic Drugs and Psychotropic Substances (Control) Act** which provides that:

*“Any person who traffics 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) .....”*

11. In the present case, the Applicant was sentenced to serve twelve (12) months imprisonment. Under **Section 364** of the **Criminal Procedure Code**, the court is conferred with the powers to set aside an illegal sentence and substitute the same with a proper sentence.

12. Under **Section 4 (a)** of the **Narcotic Drugs and Psychotropic Substances Control Act**, the Applicant ought to have been fined Kshs One (1) million or three times the market value of the narcotic drug or psychotropic substance whichever is greater and in addition to imprisonment for life.

13. It is clear that the learned trial magistrate only applied the 2<sup>nd</sup> limb of the sentence and failed to impose the fine under the 1<sup>st</sup> limb. For this reason, the court would not hesitate but to impose the proper sentence that the Applicant was entitled to.

14. It is my view that this being of a case of trafficking narcotic drug, the Applicant is not entitled to leniency. This is more so because, had the drug been released to the market, it would have had great health and psychosocial adverse effect on the consumers. Rather than be released, the Applicant should remain in jail so that the sentence can serve as a deterrence.

15. In the result, in addition to the two (2) years imprisonment, I order that the Applicant shall pay a fine of Kshs 270,000/= in default serve one (1) year imprisonment. The two sentences shall run consecutively.

16. It is so ordered.

**DATED AND DELIVERED AT NAIVASHA THIS 16TH DAY OF DECEMBER, 2021.**

**G. W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

*1. Applicant in person*

*2. Miss Maingi for the Respondent*