



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITUI**  
**CRIMINAL REVISION CASE NO. 1 OF 2018**

**PETER MALUSI ZEKO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being Revision from the original conviction and sentence in **Kitui Chief Magistrate's Court Criminal Case No. 1377 of 2017** by **J. Munguti P M** on 18/12/17)*

**CRIMINAL REVISION**

1. The Applicant, **Peter Malusi Nzeko** seeks revision of the conviction and sentence imposed by the Lower Court. He was charged with the offence of **Being in Possession of a Narcotic Drug** contrary to **Section 3(1)(2)(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 (the Act)**. Facts of the case being that on **16<sup>th</sup> December, 2017** at **7.00 p.m.** APs from Kitui Police Station received a tip off from the public. They mobilized themselves and raided the accuseds homestead. They searched his home and recovered a stone of bhang valued **Kshs. 600/=**.

2. His contention is that there was no report from the Government Chemist to confirm that indeed what was tendered in Court was 'Bhang'.

3. **Article 165(6)** and **(7)** of the **Constitution of Kenya** provides thus:

*“(6) The High Court has 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.*

*“(7) For the 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.”*

In the case of **Andrew Kibet Cheruiyot & Another vs. Medical Practitioners and Dentist Board & 2 Others** **Petition No. 260 of 2013** the Court held that:

*“Article 165(6) gives the High Court jurisdiction over bodies such as the 1<sup>st</sup> Respondent by providing that the High Court shall have supervisory jurisdiction over subordinate courts and over any person .....” (Emphasis mine).*

4. **Section 364** of the **Criminal Procedure Code** provides thus:

*“(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.*

*(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.”*

Pursuant to the cited provisions of the law this Court is seized of the supervisory power over the Subordinate Court.

5. This matter came to my knowledge following a letter written by the firm of **Muttisya & Company Advocates** representing the Applicant. My duty is therefore to satisfy myself of the legality, propriety and correctness of the order of the trial Magistrate.

6. A perusal of the record show that when the Applicant was arraigned before the Lower Court the charge was read to him and he replied thus:

*“True.”*

Facts were presented thus:

*“On 16<sup>th</sup> December, 2017 at 7.00 p.m. APs from Kitui Police Station received a tip off from the public. They mobilized themselves and raided the accuseds homestead. They searched his home and recovered a stone of bhang valued Kshs. 600/=.”*

The learned Magistrate proceeded to record thus:

*“Accused: The facts are correct.*

*.....*

*Court: Plea of guilty, accused convicted on admission.*

*.....”*

7. The legal principles to be followed in plea taking were enunciated in the case of **Adan vs. Republic 1973 EA 445** where it was held that:

*“(i) The charge and all the essential ingredients of the offence should be explained to the accused in the language or in a language he understands.*

*(ii) The accuseds own words should be recorded and if they are an admission, a plea of guilty should be recorded.*

*(ii) The Prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain facts or to add any relevant facts.*

*(iv) If the accused does not agree with the facts or raises any questions of his guilt his reply must be recorded and the change of plea entered.*

*(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused’s reply should be recorded.” (Also see Section 207 of the Criminal Procedure Code; John Muendo Musau –v- Republic (2013) eKLR).*

8. It is indicated that the police searched the home of the Applicant and recovered a stone of bhang valued at **Kshs. 600/=**. Bhang is an edible preparation of cannabis. Its leaves and flower tops are used as a narcotic. **Section 2** of the **Act** defines narcotic as:

*“...the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by tops) from which the resin has not been extracted by whatever name they may be designated.”*

The first schedule to the Act list drugs that are narcotic in nature. One of the drugs is cannabis.

9. Looking at the facts that were presented it was alleged that the homestead of the Applicant was searched and a stone of bhang was recovered. The stone was not subjected to analysis to establish if indeed it was bhang.

10. I have been asked to interfere with the plea that was taken. I must therefore interrogate if the proper criteria for plea taking was adopted. In the case of **Laurent Mpinga vs. Republic (1983) TLR 166** the Court stated that:

“.....

***(4) That upon the admitted facts the appellant could not in law have been convicted of the offence charged.”***

11. It is stated in the facts that Administration Police Officers went to the homestead of the Applicant. They searched the home and recovered a stone of bhang valued **Kshs. 600/=**. It is not stated where they recovered the stone from and whether the Applicant was in possession of the alleged stone. Facts as presented were ambiguous such that the learned Magistrate was in error in finding that they supported the charge. The plea was therefore vitiated by the ambiguity.

12. The question to be posed is whether a retrial should be ordered? As correctly pointed out an order was made for the exhibit to be destroyed. In the premises, ordering a re-trial will be an exercise in futility. In the circumstances the Applicant shall be set at liberty unless otherwise lawfully held.

13. It is so ordered.

**Dated, Signed and Delivered at Kitui this 12<sup>th</sup> day of April, 2018.**

**L. N. MUTENDE**

**JUDGE**