



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HCCREV No. 13 OF 2018

BETWEEN:

SAMUEL MASHA MWASHIGHADI APPLICANT

AND

REPUBLICRESPONDENT

(Being a Review from the Judgment of Hon. N. N. Njagi SPM at SPM's Court Wundanyi. CR. Case No.133 of 2018 delivered on 6th March 2018)

R U L I N G

1. The Court has before it an application for the review of a sentence passed in the lower court. The sentence was passed by the Learned Senior Principal Magistrate in Wundanyi on 6th March 2018.
2. The Applicant pleaded guilty and admitted that the cannabis (bhang) was his. It was weighed and found to be 106 grams. It was said to have a street value of KShs15,000/=. The Applicant was treated as a first offender and put forward any plea in mitigation. The Learned Trial Magistrate took all those considerations into account and found that 106 grams "is a lot" and deserves a custodial sentence. The sentence arrived at was 5 years.
3. The Applicant's case can be summarised as the sentence is too harsh in the circumstances. It is argued that the trial Court failed to take into account the circumstances of the Applicant namely that he was a first offender. In addition the trial Court failed to take into account his mitigation. The arguments for mitigation is that he is the sole breadwinner for a young family and they have been denied his care while he is in custody. The Applicant prays for a non-custodial sentence.
4. The Applicant has not filed an appeal. The Applicant is asking for the sentence to be varied and replaced with a lesser sentence which should be non-custodial with the alternative of a fine. The Applicant is said to be of good conduct.
5. There is an argument raised in *Felix Muoki Muteti v Rep Criminal Revision No. 124 of 2015 High Court Machakos* that any Review must be accompanied by an appeal. There is a counter argument that Article [110] of the Constitution overrules that part of the Code and the interests of justice require that in most cases that additional administrative step is not necessary. This Court is yet to hear legal argument on that point. However, for the purposes of this case and the facts presented this Court takes the view that on the particular facts of this case an appeal is unnecessary.
6. State Counsel on behalf of the Prosecutor accepts that 5 years incarceration is unduly harsh. Although the Prosecution has no objection to a fine in default of a non-custodial sentence. Counsel directed the Court to applicable authorities relied upon.
7. Notwithstanding the prayer that the sentence should be replaced with a fine, the Applicant will be unable to meet any fine as he is already unable to meet the needs of his Children according to his Advocate. In the circumstances a fine with a custodial sentence in lieu of a fine is an exercise in futility.
8. The Accused pleaded guilty to possession of 106 gms of cannabis (bhang). That is a significant amount and cannot be assumed to be purely for personal use. In the circumstances, the offence justifies a custodial sentence. The Prosecution has conceded that the sentence awarded is harsh. It is also conceded that it should be lowered to 2 years. The Accused has already served about 6 months of his sentence.
9. In the circumstances it is appropriate that there be a custodial sentence. The Accused will not, of his own admission, be able to meet any fine. It is therefore ordered that the sentence be and is hereby reviewed to 2 years. The first year to be spent in custody. Sadly, neither the Applicant nor the probation service have been able to satisfy the Court that there is an alternative for this Applicant for instance, enrolment

into any programme that raises awareness of drug abuse or community service with similar aims and therefore a custodial sentence is the only option available for now.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED ON THIS the 26th day of September 2018.

In The Presence of :

Court Assistant: Josephat Mavu

Applicant: Mr Rono and Applicant

Respondent: Ms Anyumba