

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 398 OF 2015

F G MAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Pursuant to **Section 362 of Criminal Procedure Code** the original record of proceedings in **Makadara Chief Magistrate's Court Criminal case No. 4163 of 2014 - Republic vs F G M** was forwarded to this court with a view to the court satisfying itself as to the correctness, legality or propriety of the sentence passed and as to the regularity of any proceedings of the subordinate court.

The court was moved by the Applicant by an undated Chamber Summons filed on 16th November, 2015 asking the court to revise the sentence passed against him. In his own Supporting Affidavit sworn on 9th November, 2015, he states that the sentence passed was harsh and excessive in the circumstance, that he was remorseful, that he was HIV Positive and was the sole bread winner of the family. He asks that a non custodial sentence be imposed.

The Applicant was charged with 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 Substance (Control) Act No. 4 of 1994**. The particulars of the offence were that on 3rd September, 2014 at Dandora [particulars withheld] Estate in Njiru District within Nairobi County, was found in possession of Narcotic Drugs to wit two stones and 40 rolls of Cannabis Sativa with street value of Kshs. 1,000/= which was not in medical preparation form. He was convicted on his own plea of guilty and was sentenced to pay a fine of Kshs. 20,000/= in default to serve 3 years imprisonment.

This court called for probation officer's report which was filed in court on 17th March, 2015 by Ayuma A. Otukho, a Probation Officer at Milimani Law Courts. The report is dated 20th March, 2016. The same is favourable to the Applicant. A background enquiry of the Applicant was made by the probation Officer who attributes the Applicant engaging in the offence due to poverty and lack of employment. He was married but his wife passed on due to HIV related illness leaving behind their only 4 years old son. His fixed abode was however not ascertained because his mother failed to attend an interview with the probation officer who only spoke to her on telephone. According to the probation officer, despite the Applicant being a widower, HIV Positive and with a young son, it would pose a challenge to supervise and rehabilitate him without the support of his family. It was concluded then that he was not suitable for a noncustodial sentence.

Under **Section 3 (2)(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994**, any person who is found guilty of being in possession of Cannabis Sativa that was intended solely for his own consumption is liable to imprisonment for 10 years and in any other case to imprisonment for 20 years. The Applicant did not offer any mitigation but the police having charged him under **Section 3(2)(a)** must have been convinced that he was in possession of the cannabis sativa purely for his personal consumption. He was treated as a first offender as no record of his previous convictions was available. A custodial sentence should always be imposed when no other form of sentence is suitable. The view of this

court is that the learned trial magistrate exercised reasonableness in fining the Applicant Kshs. 20,000/= only. He however failed to look into the fact that under **Section 3(2)(a)** provides only for an imprisonment term . Therefore, having preferred a fine with default penalty of a custodial sentence he should have invoked **Section 28(2) of the Penal Code**. Under this provision, where the fine imposed is between Kshs. 15,000 and 50,000/= the default sentence should not exceed 6 months. The default sentence imposed therefore was unlawful.

In the result, the sentence imposed against the Applicant is revised. The same is set aside and substituted with an order that the Applicant be and is hereby sentenced to pay a fine of Kshs. 20,000/= in default to serve 6 months imprisonment commencing the date of sentencing by the trial magistrate. The Applicant having been sentenced on 5th January, 2015 has served the term of six months. I accordingly order that he be and is hereby set free unless otherwise lawfully held. It is so ordered.

DATED and DELIVERED this 21st day of MARCH, 2016

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *The Applicant in person.*
2. *M/s Akuja for the Respondent.*