



**REPUBLIC OF KENYA**

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

**MISC. CRIMINAL APPLICATION NO. 47 OF 2015**

**KING’OO KIOKO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

[1] This is a ruling on an application for revision of a sentence passed on 28<sup>th</sup> June, 2013 upon a person convicted on his own plea of guilty to a charge of trafficking in Narcotic drugs contrary to section 4 (a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars of the offence were that the applicant had on the 27<sup>th</sup> day of June 2013 at about 8.00am at Malatani village of Kaara location in Mbooni East district with Makueni County trafficked by distributing a narcotic drug namely cannabis sativa (bhang) to wit 600 grammes with a street value of ksh.15,000/- in contravention of the said Act.

[2] The applicant was in the trial court shown to have been previously convicted for the similar offence when he was sentenced to serve 6 months community service. In sentencing the applicant in this case to a fine of Ksh.45,000/- and in addition to imprisonment for three years, the learned trial court (Hon. H.M. Ng’ang’a Resident Magistrate) on 28<sup>th</sup> June, 2013 held as follows:

*“I have considered the accused person’s mitigation. I take into account that the accused is not a first offender. He had been previously convicted in Cr. Case No. 253 of 2009 of the offence of being in possession of Cannabis Sativa and sentenced to serve 6 months imprisonment.*

*The offence the accused is charged with is a serious offence and the parliament deems it necessary to impose strict penalties of up to 3 times of the value of the narcotic drug or one million whichever is greater. In addition to imprisonment up to life imprisonment.*

*Needless to say, trafficking in narcotic drugs has caused untold misery to the society as young people lives are destroyed. It is immaterial whether the narcotic drugs is bhang or other hard stuff like cocaine. The bottom line is that trafficking of narcotic is detrimental to the society and deterrent sentence is required.*

*It is clear from the facts that the accused was selling the bhang and he had in his possession 5 empty cigarette packets which show the intention. **Considering all***

***the above, I sentence the accused to pay a fine of Kshs. 45,000/= in addition the accused shall serve three (3) years imprisonment. In default of paying the fine, the accused to serve an addition one (1) year imprisonment. Right of appeal within 14 days explained.”***

[3] Apparently aggrieved by the sentence, the applicant applied for an order of revision under section 362 and 364 of the Criminal Procedure Code contending that “the sentence of three years together with fine of Ksh.45,000/- or further one year in default is both harsh and cruel and cruel for a poor man of my circumstances.”

#### **Jurisdiction to entertain revision application**

[4] Section 364 (5) provides that –

“(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.”

[5] Although the applicant could not have appealed against the conviction having pleaded guilty it was open to him to appeal against the severity of the sentence in terms of section 348 of the Criminal Procedure Code, which provides as follows:

“348. No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”

[6] The court would, therefore, not interfere with the sentence on application by the applicant who could have appealed but did not appeal from the sentence passed by the trial court.

#### **Interference with discretion of the trial court as to sentence**

[7] The principle upon which an appellate court may interfere with the exercise of discretion in imposing sentences is set out in **Wanjema v. R** (1971) EA 494 –

*“An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into consideration some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.”*

[8] Section 14 of the Criminal Procedure Code provides that sentences will run consecutively unless a court otherwise directs:

*“14. (1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.*

*(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.*

*(3) Except in cases to which section 7 (1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences -*

*(a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or*

*(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.*

*(3) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.”*

[9] The provision of law (section 46 of the Prisons Act) that empowered the Commissioner for Prisons to commute prison terms for 1/3 for prisoners for good conduct in prison which was repealed by the Statute Law (Miscellaneous Amendments) Act No. 18 of 2014 (commencing 8<sup>th</sup> December 2014), has been reinstated by the State Law Act of 2015 and consequently, the applicant who did not then enjoy remission may qualify for the second limb of the sentence which commenced when the default sentence was executed.

[10] It appears for the record that the trial court meticulously considered the circumstances of the matter including the previous conviction of the applicant and gravity of the offence before imposing the sentences.

[11] Section 4 (a) of the Narcotic Drugs and Psychotropic Substances Act provides that –

*“Any person who trafficks 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; ”*

[12] The trial court was entitled to pass a sentence of imprisonment in addition to the fine which is pegged at one million shillings or three times the market value of the narcotic drug, whichever is the greater. Indeed, the court may have fined the applicant the greater sum of Ksh.1,000,000/-

### **Orders**

[13] Accordingly, for the reasons set out above, I do not find any basis to interfere with sentences of the lower Court. The application for Revision of the Sentences is dismissed.

**DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF DECEMBER 2015.**

**EDWARD M. MURIITHI**

**JUDGE**

**In the presence of: -**

**Applicant Present in Person**

**Mr. Kimani, State Counsel for the Respondent**

**Mr. Ndola - Court Assistant.**