REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL REVISION NO 7 OF 2015

LENNOX GABRIEL MUTUNDU……..... APPLICANT

VERSUS

REPUBLIC …….……..…… RESPONDENT

RULING

INTRODUCTION

1. By a letter dated 10th November 2015 filed on 11th November 2015, the Applicant moved the court for a revision of the sentence that was meted upon him on 29th October by the Trial Magistrate, Hon E.G. Nderitu, Senior Principal Magistrate in **Cr Case No 924 of 2015 Republic vs Lennox Gabriel Mutundu** at Voi Law Courts.

2. The Applicant had been charged with the following offence:-

> **On the 28th day of October 2015 at about 1800 hrs at Msambweni Voi Township within Taita Taveta County arrested one** (sic) **who was found in possession of cannabis sativa (bhang) of** (sic) **wit 100 gms with a street value of Kshs 40 (fourty** (sic) **shillings) in contravention of the said Act.**

3. The Applicant pleaded guilty whereupon a plea of guilty was entered. After the facts were read to him, he stated that he was indeed found in possession of the green substance. The Prosecutor asked that he be treated as a first offender. In mitigation, the Applicant sought forgiveness. The said Learned Trial Magistrate considered his mitigation and sentenced him to serve four (4) years imprisonment.

4. Being aggrieved by the sentence, the Applicant sought a Revision of his case on the ground that the **"green substance"** he was found in possession of was never taken to the Government analyst to prepare a Report to confirm through a lab test, what the said substance was as it was required by law before he took a plea. He also stated that the sentence that he was given was extremely harsh considering that he was a student at Taita Taveta University and was due to sit for his final exams in December 2015.

LEGAL ANAYSIS

5. In his undated Written Submissions that were filed on 18th November 2015, the Applicant reiterated the grounds in his application for Revision and added that the police who had arrested him had assured him that the court would order the said substance be tested before he could take a plea but that did not happen.

6. He was adamant that the mandatory step of analysing the substance was skipped and as both the Trial Court and the Prosecution did not have the expertise or legal prowess to analyse and prove that the said substance was narcotic, the Trial Court erred in sentencing him to four (4) months without the option of a fine.

7. In its Written Submissions dated and filed on 27th November 2015, the Respondent argued that the Applicant's averment that there was no Government Analysis Report was not a ground for Revision under the provisions of Sections 362 and 364 of the Criminal Procedure Code Cap 75 (Laws of Kenya), a position this court wholly concurred with, as it was not an issue touching on the legality, correctness or propriety of a finding, sentence or order or regularity of the proceedings.

8. Section 362 of the Criminal Procedure Code provides as follows:-

> **"The High Court may call and examine any 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, and as to the regularity of any proceedings of any such court."**

9. Be that as it may, the court had due regard to the case of **Charles Gitau vs Republic [2008] eKLR** where Ojwang J (as he then was) referred to the case of **R. v. Ajit Singh s/o Vir Singh [1957] E.A. 822.** He stated and observed as follows:-

> **""In that case the Court clarified the situation in which the revision jurisdiction might be exercised even when the matter arising was one in which appeal lay (p.824 – Rudd, Ag. C.J.):**
>
> **"We are of opinion that sub-s.(5) is not intended to preclude the Supreme Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of appeal. We do not think this sub-section is intended to derogate from the wide powers conferred by s.361 and s.363 (1). To hold that sub-s. (5) has that effect would mean that this court is powerless to disturb a finding, sentence or order which is manifestly incorrect…merely because the aggrieved party, who might well be an ignorant person, has not exercised a right of appeal but has asked for revision and thus brought the matter to the notice of the court. In our judgment the court can in its discretion, act suo motu** (sic) **even where the matter has been brought to its notice by an aggrieved party who had a right of appeal.""**

10. What this court understood to have been the purport of the said holding was that a court could act *suo moto* and exercise powers conferred on it by Section 361 and 361(3) of the Criminal Procedure Code to disturb a finding, sentence or order where the issue had been presented as a revision instead of an appeal especially where an applicant was a layman as was contemplated in the case of **Republic vs Ajit Singh s/o Vir Singh** (Supra).

11. It is important to point out right at the outset that the court was persuaded by the Respondent's submissions that the lack of the said Government Analyst Report was not an issue for Revision but rather one of appeal. It went into the heart of the question as to whether the Prosecution had proven its case to the required standard. The Applicant ought to have appealed but he did not.

12. His assertion that the police who arrested him had assured him that the court would order the said substance be tested before he took plea but that did not happen was a question of fact that would have had to be addressed in an appeal and not in a Revision.

13. Having said so and bearing in mind the provisions of Article 159 (2)(d) of the Constitution of Kenya, 2010 that mandates courts to administer justice without undue regard to technicalities, if the court were to consider the Applicant's application as an appeal instead of a Revision as he was a layman, it found the Applicant's arguments that there was no analysis by the government analyst to have been neither here nor there as he admitted the charge.

14. He was fully aware that he had been charged for being in possession of *cannabis sativa*, a narcotic drug as the same was clearly set out in the Charge as having been an offence that was contrary to Section 3(1) as read with Section 3(2) of the Narcotics Drugs and Psychotropic Substance (Control) Act Cap 245 (Laws of Kenya).

15. On pleading guilty, the facts that were read to him were also clear that he was found in possession of bhang. There was no ambiguity in the manner he pleaded to the charge and in the manner the facts were read to him as the Charge and facts were read to him in a language that he understood.

16. This was in line with the holding in the case of **Kariuki vs Republic[1954] KLR 809** that Wendoh J referred to in the case of **Fredrick Musyoka Nyange vs Republic[2012]eKLR** wherein it was held as follows:-

> **““2. The manner in which a plea of guilty should be recorded is:**
>
> **(a) the trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands;**
>
> **(b) he should then record the accused's own words and if they are an admission, a plea of guilty should be recorded;**
>
> **(c) the prosecution may then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;**
>
> **(d if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused's reply – Adan v Republic [1973] EA 445””**

17. Further, the court could not consider the ground of Revision as an appeal, even if it had power to do so due to the provisions of Section 348 of the Criminal Procedure Code that stipulates as follows:-

> **“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.”**

18. Clearly, the Applicant's contention that the lack of a Government Analysis Report to confirm the **“green substance”** prejudiced him was in fact an afterthought so as to escape the sentence that had been meted upon him. Once he admitted that he had been found in possession of bhang or *cannabis sativa*, the Prosecution was under no obligation to tender any corroborating evidence to prove what the **“green substance”** was. The situation would, however, have been definitely different had he pleaded not guilty and he ended up being convicted without the Prosecution having tendered in evidence the said Report.

19. Hence, bearing in mind the circumstances of the case herein, the court was thus not persuaded that it could act *suo moto* to consider the Applicant's application for Revision as an appeal with a view to determining the question of lack or thereof of the Government Analysis Report.

20. On the issue of the severity of the sentence that was meted upon the Applicant, the court considered the provisions of Section 3 of the Narcotics Drugs and Psychotropic Substance (Control) Act that states as follows:-

> **“A person guilty of an offence under subsection (1) shall be liable—**
>
> **(a) in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years; and**

(b) in respect of a narcotic drug or psychotropic substance, other than cannabis, where the person satisfies the court that the narcotic drug or psychotropic substance was intended solely for his own consumption, to imprisonment for twenty years and in every other case to a fine of not less than one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, or to imprisonment for life or to both such fine and imprisonment.

21. As was held by the Court of Appeal in the case of **Daniel Kyalo Muema vs Republic [2009] eKLR** that was relied upon by the Respondent, the penalty prescribed, unless a contrary intention is shown, is the maximum penalty and not the mandatory penalty.

22. Consequently, in view of the Applicant's admission of the charge, the court was in agreement with the Respondent's submissions that the Trial Magistrate acted correctly and within the law when she exercised her discretion in sentencing of the Applicant to four (4) months' imprisonment without option of a fine and not sentencing him to ten (10) years that had been prescribed therein.

23. For the reason that the said sentence was just, legal, correct and proper, the court found itself in agreement with the Respondent's submissions that it ought not to disturb it.

24. It is unfortunate that the Applicant is a student at Taita Taveta University and was due to sit for his exams in December 2015. Where there has been an admission such as was in this case, the court find its hands ties as it cannot interfere with a sentence meted out by a lower court unless of course the same is illegal.

DISPOSITION

25. In the circumstances foregoing, the court found the Applicant's application for Revision not to have been merited and the same is hereby dismissed. Instead, the court affirms the sentence that was meted upon him.

26. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 10th day of December 2015

J. KAMAU

JUDGE

In the presence of:-

Lennox Gabriel Mutundu…….....Applicant

Mr Sirima …….....Respondent

Simon Tsehlo– Court Clerk