



**Kimwetich v Republic (Criminal Revision E002 of 2023)
[2024] KEHC 1300 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1300 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL REVISION E002 OF 2023
RB NGETICH, J
FEBRUARY 14, 2024**

BETWEEN

FESTUS SIRMA KIMWETICH APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Background

1. The Applicant was charged with two counts of offences. Count one is the offence of cultivating narcotic drug contrary to section 2(1) (b) as read with section 6(b) of the *Narcotic Drugs And Psychotropic Substance Control Act* No. 4 of 1994. The particulars of the charge were that the accused on the 27th day of January, 2023 at about 2231 hours at Pemwai area in Baringo Central Sub- County within Baringo County was found in possession of Cannabis Sativa (bhang) to wit (9) live plants planted in eight plastic containers and one in gunny bag and dried leaves of about 100grams with a street value of Kshs. 100,000/=.
2. Count two is the offence of being in possession of Narcotic Drugs contrary to Section 4[1] as read with section 3[1] of the *Psychotropic drugs and substances control Act* No. 4 of 1994. The particulars of the charge being that the accused on the 27th day of January,2023 at about 2231hrs at Pemwai area in Baringo County was found being in possession of cannabis sativa to wit Nine (9) live plants planted in Eight plastic containers and one in gunny bag and dried leaves of about 100 grammes with a street value of Kshs. 100,000/=
3. On 30.01.2023 when the matter came up for take plea, the prosecution withdrew Count 2 under section 87(a) of the *Criminal Procedure Code* and accused discharged on this count.
4. The accused pleaded guilty to account 1. The prosecution amended the charge to remove the dry leaves. The amended charge sheet was read over to the accused who pleaded guilty to the charge.



Brief Fact of the Offence

5. The facts of the case were that on the 27th January, 2023 at around 9: 00 P.M, officers from Kabarnet police station acting on information from members of the public and the assistant chief of Moroi Sub-location proceeded to Pemwai area in company of the area chief arrived. When they arrived at accused's house, they found him sleeping. They inquired from him cannabis sativa plants he was alleged to have planted. The accused took them behind his house where they found eight plastic containers with plants of cannabis sativa and one plastic bag containing one plant of cannabis sativa making a total of 9 live plants of cannabis sativa. The officers photographed the scene and took the said plants to Kabarnet police station together with the suspect who was booked and placed in custody. He was charged with the offence. He admitted the charge and particulars of the charge. The nine plants of the cannabis sativa were produced in court as exhibit 1-9. The accused was convicted on his own plea of guilty. The court was informed that he had no previous criminal records.
6. In mitigation, the accused/Applicant sought forgiveness for having planted unlawful plants contrary to the laws of Kenya and said he planted cannabis sativa to treat depression. He was fined Kshs.250,000/= or in default to serve 15 years imprisonment.
7. Dissatisfied with the sentence of the trial court, the Applicant filed this application brought under the provisions of sections 213, 216, 329,362, 364 (1)(b), 365 of the CPC and Articles 1(c), 2(d), 22(1), 24(1), 4, 23(1), 48, 50, 51,159(1), 165(3)(a) of the Constitution of Kenya 2010 and Judicial Service Act 2011, Sentencing Policy Guidelines, 2016 and High Practice and Procedure Rules,2013 together with supporting affidavit sworn by him.
8. In his affidavit, the applicant aver that he has mental condition and he has been on medication and during arrest and trial, he did not understand the nature of the offence and the reason for his arrest since he is suffering from psychotic episode that affects his mental capacity and in the interest of justice and the powers bestowed upon this Honourable court, he prayed to be taken to Moi Teaching and Referral Hospital for mental assessment for just consideration and determination of this application.
9. When the matter came up for hearing on the 4th October,2023, the applicant pleaded to the court for the sentence to be reduced. He said he was fined Kshs.250,000/= in default 15 years imprisonment in February, 2023.On 4th October, 2023 the court gave directions that the lower court file to be availed and social inquiry report to be filed by the probation officer. The report was filed on the 1st December, 2023.
10. From the report, the applicant had formal education up to form four. He sat for K.C.S.E in the year 2021 and scored a mean of D+. Thereafter he did computer training for a period of 3 months and later did driving course at Kabarnet Driving school from April, 2022 to August 2022.He has been assisting his mother at her business premises. He is single and before his arrest, he had started doing farming at the family land. From the report, the applicant started having mental condition while he was in school in form four and was admitted at MTRH for a period of three weeks. He was later discharged and has been on medication. He confessed that it is his cousin who introduced him to smoking bang which affected his mental state.
11. Record show that while in custody, the applicant has received medication at Uasin Gishu Sub- County Hospital and he has continued to take medication daily though mental instability has had so much effect on him while in custody. He admits the offence and attribute it to peer pressure and bad company. He seeks forgiveness from the court and his family at large.



12. From social inquiry, the applicant's parents are separated and the mother stays at Pemwai while the father lives at Kaptimbor. The brother said the applicant's major problem is peer pressure which led him to start using drugs hence affecting his mental state and makes violent towards anyone within the family to the level of threatening to kill them.
13. The applicant's mother stated that her son's criminal behavior started when he underwent circumcision after doing his KCPE and it became worse when he was admitted at Oinobmoi High School where he was suspended for drug abuse while at school and other indiscipline cases. She said the mental illness began in the year 2019 and while under drug influence, he turns violent and destroy family property. She confirmed the applicant has been on medication from Moi Teaching and Referral Hospital (MTRH) but his major challenge is failing to take drugs as prescribed by the doctor which led to his relapse and in the year 2020, he was taken to a rehabilitation facility at Limuru for a period of three months. That he completed rehabilitation successfully and was able to do his KCSE. She said the cause of mental illness is use of drugs (bhang and cocaine) and peer influence from the youths within community.
14. The mother said she is willing to facilitate the applicant's economic empowerment by supporting him run a Matatu business since he already has a skill in driving. Her major prayer is for the applicant to stay with his father if released. She stated that his son planted the said narcotic drug because she had stopped giving him money. The Applicant's father said he is aware of his son's mental condition and most of the time the mother has been handling the issue but he is willing to facilitate his treatment if released.
15. Representative from Eldoret Prison indicated that at the point of admission into prison, the inmate was very violent, restless and always confused and has been receiving medication at Uasin Gishu Sub County hospital; that he takes drugs daily, he is placed at the mixed block and currently, he is not involved in any training or skills and is fairing on well.
16. The local administration indicated that the inmate is well known to him together with parents; he indicated that the inmate's behavior is due to peer pressure and parenting and if there was cooperation from parents the problem would not have reached that level. He confirmed that the inmate's mental illness is due to excessive use of drugs and is of the view that the parents should take personal responsibility to rehabilitate him before the inmate is released.

Determination

17. I have considered the nature of the offence, the views of the applicant's parents, local administration and prison administration as captured in the social inquiry report. I also take note of the fact that the applicant is 19 years old.
18. The applicant herein has maintained that the sentence was excessive and that he suffers mental illness hence he is not in his right state of mind. The applicant was convicted of the offence of cultivating narcotic drug contrary to section 2(1) (b) as read with section 6(b) of the narcotic drugs and psychotropic substance control Act No. 4 of 1994 and fined Kshs 250, 000/-... or to imprisonment for a term not exceeding twenty years.
19. A person convicted under section 3 (2) (a) of the Act is "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."



20. Record show that during the hearing of his application, the applicant informed court that he is using the drugs to cure depression. I take note of the fact that the applicant was a first offender, he was aged 19 years old and his parents lived separately which could have contributed to his depression coupled with peer pressure. In my view, this case is suitable for revision of sentence as rehabilitation within the community may aid in bringing the applicant back to track. From the report, both parents are willing to support the applicant in rehabilitation process.

Final Orders: -

21.

1. The applicant to serve 3 years' probation sentence.
2. Both parents of the applicant to execute an undertaking to support the applicant in rehabilitation.

RULING DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET' THIS 14TH DAY OF FEBRUARY 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

Ms Ratemo for State.

Accused present.

Elvis – Court Assistant.

