



**Kariuki v Republic (Criminal Revision E146 of 2023)
[2024] KEHC 2197 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 2197 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL REVISION E146 OF 2023
AK NDUNG’U, J
FEBRUARY 9, 2024**

BETWEEN

JANE WANGARI KARIUKI APPLICANT

AND

REPUBLIC RESPONDENT

*(Being an application for revision of the orders of court
in Nyahururu Cmc case no 1467/2023 C. Muboro SRM)*

RULING

1. The applicant is aggrieved by the conviction and sentence of the subordinate court and through a letter dated 11th December, 2023 written by her counsel, she has implored the court to review the conviction and the sentence meted out on grounds that it was illegal, null and void having been based on repealed law or sections or subsections of the law. She seeks review of the orders of court since the same are illegal.
2. The High Court has jurisdiction to entertain an application for revision and its power of revision is set out in Article 165 of the Constitution of Kenya which provides:
 - (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
3. Section 362 of the Criminal Procedure Code further states:

“The High Court may call for and examine the 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 or passed, and as to the regularity of any proceedings of any such subordinate court”.

4. According to the Applicant, on the first count, she was charged with possession of 14 ½ rolls of cannabis sativa with street value of Kshs.725/- which was not in medical prescription and the charge was framed under Section 3(1) and 3(2) of the *Narcotic Drugs and Psychotropic Substances (Control) Act*. The Applicant argues that the conviction and sentence in Count I were based on a repealed subsection where the sentence prescribed is 10 years. The repealed Section 3(2) of *the Act* (old subsection 2) provides as follows:
 3. Penalty for possession of narcotic drugs, etc.
 - (1) Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.
 - (2) 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.
5. The *Narcotics, Drugs and Psychotropic Substances (Control) (Amendment) Act*, No. 4 of 2022 amended the said Section 3(2) by deleting the old subsection (2) and substituting therefore the following new subsection:
 - (2) 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 to a term of not more than five years or to a fine of not more than one hundred thousand shillings.
 - b. In respect of a narcotic drug or psychotropic substance, other than cannabis, where a person is in possession of less than one gram, to a fine of not less than five million shillings, or to imprisonment to a term of not less than five years, or to both such fine and imprisonment; and
 - c. To, in addition to the sentences in paragraph (a) and (b) respectively, committal to appropriate court appointed treatment programme or to voluntary submission to a rehabilitation programme for a period not less than six months, where the court deems fit.
6. It is plain and obvious to the naked eye that the Applicant was charged under the old law as clearly cited in the charge sheet and not *The Narcotics, Drugs and Psychotropic Substances (Control) (Amendment) Act*, No. 4 of 2022. The charge was based on a repealed law and can therefore not stand the legality test.



7. I now turn to consider the second count where the Applicant's contention is that the same was brought under the repealed *Children Act* No. 8 of 2001. It was pointed out that the subordinate court substituted the word '2001' with '2002' by hand yet there is no *Children Act* No. 8 of 2022. Additionally, it was further argued that it is not clear when the application for amendment was made as the same is not captured by the lower court record and there is a real possibility that the amendment may have been made after the Applicant was sentenced.
8. The Applicant was arraigned in court on 13th October, 2023 and therefore any charge against him ought to have been brought under the *Children Act*, No. 29 of 2022 which came into force on 26th July, 2022. I am therefore constrained to agree with the Applicant's observation that there does not exist any legislation referred to as the *Children Act* No. 8 of 2022 even assuming that the amendment by hand in the charge sheet was regular. The record supports the contention that the amendment in any event is irregular as there is no application for amendment on record and neither is there an order allowing amendment.
9. Section 10 of the *Children Act*, 2011 is on the right of the child to protection from child labour and armed conflict and Section 20 of the *Children Act*, 2011 provides the penalty for the violation such right. It provides as follows:

“ 20. Penalties

Notwithstanding penalties contained in any other law, where any person wilfully or as a consequence of culpable negligence infringes any of the rights of a child as specified in Section 5 to 19 such person shall be liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine not exceeding fifty thousand shillings or to both such imprisonment or fine.”

10. Interestingly, Sections 10 and 20 of the *Children Act*, No. 29 of 2022 provide for 'differential treatment not discrimination', and establish the 'rights of children with disability', respectively. It is therefore clear that the Applicant was charged under the repealed *Children Act*, 2011.
11. The conviction and sentence in Counts 1 and 2 were therefore based on non-existent law by virtue of the provisions of the Narcotics, Drugs and Psychotropic Substances (Control) (Amendment) Act, No. 4 of 2022 and were therefore illegal improper. I have also considered the Applicant's contention that the language of the court was not clear. I dismiss this argument on the basis that the lower court record reveals that on 07/11/2023 when the facts were read to the Applicant, an interpreter was availed.
12. Ultimately, I find that the application has merit and is allowed. I hereby set aside the conviction and sentence. The Applicant be set at liberty forthwith unless lawfully held under another warrant.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF FEBRUARY 2024

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A.K. NDUNG'U

JUDGE

In the presence of:

For the Applicant Mr. Sigilai

For the Respondent no appearance



Vanessa C/A

