



REPUBLIC OF KENYA



**Mugo v Republic (Criminal Revision E221 of 2023)
[2024] KEHC 4306 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4306 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E221 OF 2023
GL NZIOKA, J
APRIL 12, 2024**

BETWEEN

TIMOTHY GACHARA MUGO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the Chief Magistrate’s court charged vide Chief Magistrate’s Criminal Case No. E110 of 2023 with the offence of; being in possession of narcotic drugs contrary to section 4(a) (1) of the *Narcotic Drugs and Psychotropic Substance Control (Amendment) Act*, No. 4 of 2022 (herein “the Act”).
2. The particulars of the charge are that, on the 26th day of January 2023 at Tam Tam area in Gilgil Sub-county within Nakuru County the applicant was found in possession of narcotic drugs to wit thirty rolls (30) of bhang with estimated street value of Kshs 1,500 which was not medically prepared.
3. He pleaded guilty to the charge, the facts were read to him and he confirmed the same to be correct consequently he was convicted on his own plea of guilty and sentenced to pay a fine Kshs 500,000 and in default serve five (5) years imprisonment.
4. By an undated document described as a memorandum of sentence review, the applicant seeks for sentence review on the grounds therein reproduced here below: -
 - a. That I am a first offender.
 - b. That, I pray that this honourable court allows me to spend the remaining period of my sentence under Community Service Order (C.S.O) or set me at liberty.
 - c. That, I am remorseful of my offence and I have learnt to be a law abiding citizen and hence I will not repeat the same offence or any other offence provided under our laws of Kenya.



- d. That, I am from a poor family background.
 - e. That, I did not give proper mitigation during my sentencing and hence would like to be present during the hearing and determination of this application.
 - f. That, I was sentenced to serve a manifestly harsh sentence and excess fine considering the circumstances of the offence.
 - g. That, I humbly beg this court for leniency and reduce my five (5) year sentence.
 - h. That, I am not appealing against the sentence and conviction but applying for review of sentence.
5. The application is supported by his affidavit in which he states that, he was charged with the offence of being in possession of narcotic drugs contrary to section 4(a) (1) of the *Act*. He pleaded guilty and was convicted and sentenced to pay a fine of Kshs. 500,000, in default to serve a term of imprisonment of five (5) years.
 6. The application was served for response but none was filed. The court further ordered for a pre-sentence report which was availed and indicates that the applicant is twenty-four (24) years old. That his parents separated but his father re-married and as such the applicant has step sisters and brothers. Further, his father enrolled him in a plumbing course but he dropped out and opted to sell drugs.
 7. Furthermore, the applicant has no permanent place of abode and before his arrest he was residing in a rented house at a crime prone area called Tam Tam. That during the interview, the applicant admitted to using bhang, alcohol and cigarettes but pleads for leniency stating that he is positively transformed and is law-abiding citizen.
 8. However, the report indicates that his family members are not willing to support his release as he has previously been convicted and they paid the fine and therefore are unable to assist in his community rehabilitation.
 9. Further, due to the afore previous conviction, the applicant has a negative record within Gilgil Township as he has re-offended. That, he is a well known drug user who has graduated to a drug peddler.
 10. The applicant is said to be undergoing counselling programs designed by the Prison authority but he has not attended any course but works at the Prison farm. However, he has no ill record in Prison.
 11. That as a result of the aforesaid, the pre-sentence report recommends that the applicant completes his term in custody.
 12. The applicant also filed mitigation submission in which he states that, although he was using drugs since his incarceration, he has participated in rehabilitative programmes that deal with drugs and alcoholism that have helped him abstain from illegal drugs.
 13. Further, he is barely twenty-three (23) years old and not married. That, at the time of the offence he was naive and lacked wisdom on how to deal with pressures of life. However, during his incarceration for eight (8) months he has reformed and learnt to be a hardworking and law-abiding citizen and is remorseful.
 14. Furthermore, he voluntarily pleaded guilty to the charge, thus contributing to efficiency of the court saving the court's time and resources.



15. That in the circumstances, the sentence by the trial court is harsh and severe and prays that the court revises it downward and release him unconditionally or in the alternative sentenced him to serve the sentence under the Community Service Order to enable him raise his family as a trained plumber.
16. I have considered the application in the light of the provisions of section 362 of Criminal Procedure Code (Cap 75) Laws of Kenya which states that:
- “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.”
17. However, the section should be read together with section 364 of the Code which provision states as follow: -
- “(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
- (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
- (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
- (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- (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.”
18. Pursuant to the afore, to revise a sentence, the court must be satisfied that, the impugned sentence is either incorrect, illegal or improper. Thus, the objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be invoked where the decision under challenge is; grossly onerous, there is no compliance with the provisions of the law, or the finding re-ordered are based on no evidence, or material evidence is ignored or judicial discretion is exercised arbitrarily or perversely.



19. The sentence for the offence *the applicant was charged is provided for under section 4(a) (1) of the Narcotic Drugs and Psychotropic Substance Control (Amendment) Act*, No. 4 of 2022 that: -

Any person who trafficks in, or has in his or her possession any narcotic drug or psychotropic substance or any substance represented or held out by him or her 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—
- (i) where the person is in possession of between 1—100 grams, to a fine of not less than thirty million shillings imprisonment for a term of thirty years, or to both such fine and imprisonment;

20. Based on the afore the sentence meted out the fine of Kshs 500, 000 is legal and proper under the law. Furthermore the pre-sentence report by the Probation Department clearly reveals that the applicant is a habitual offender and needs to be kept away from the society. Furthermore, the alleged reform is not supported by any tangible evidence.

21. The upshot is that the application lacks merit and is dismissed accordingly.

22. It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 12TH DAY OF APRIL 2024

GRACE L. NZIOKA

JUDGE

In the presence of:-

The applicant absent

Mr. Abwajo for the respondent

Ms Ogutu: Court Assistant

