



REPUBLIC OF KENYA



KENYA LAW
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**Manda v Republic (Criminal Revision E287 of 2021)
[2023] KEHC 780 (KLR) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 780 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E287 OF 2021
RN NYAKUNDI, J
FEBRUARY 10, 2023**

BETWEEN

CHARLES MANDA PLAINTIFF

AND

REPUBLIC PROSECUTOR

RULING

Coram: Hon. Justice R. Nyakundi

Mugun for State

1. This is a review motion of 10 year period imprisonment imposed upon the applicant for the offence of being in possession of narcotic (drugs) namely bhang.
2. Following a full trial, the applicant was found culpable as a consequence it was thought fit that a period of 10 year incarceration was be proportionate for the crime in question. The applicant aggrieved with both conviction and sentence he preferred an appeal to the High Court in Criminal Appeal No 27 of 2020. On the strength of the evidence his appeal on both conviction and sentence was dismissed in its entirety what emerges from the decision of the two courts is an inter section of the offence level on the vertical and horizontal axis which identifies the applicant sentencing range to warrant a term of 10 years custodial sentence.
3. In the instance application, the applicants has moved the court to reconsider and review the custodial sentence of 10 years imprisonment based on the following grounds:
 1. Whether the court failed to comply with section 213 of the *Criminal Procedure Code Cap 75* of the Laws of Kenya in failing to avail a presentence report and actual giving a copy to the applicant to read and make comments before the sentence was passed.



2. Whether the court offended the judiciary sentencing policy guideline 2016 in sentencing the accused to custodial sentence yet there were no mitigating aggravating circumstances in existence.
 3. Whether there was glaring error on the face of the record as the court failed to assign counsel to the applicant yet the matter was complex and that the interpretation of evidence and cross examination ought to have been in language but the applicant. In criminal cases the language used to the court must be understood by the applicant and the same must be extended to the counsel representing the accused person(s)
 4. Whether the court failed to comply with section 211 of the Criminal Procedure Code Cap 75 of the Laws of Kenya by not informing the applicant the right of entitlement to address the court before close of defence case?
 5. Whether the court failed to accord prohibitive value to the applicant in sentencing in regard to other option of imprisonment as first offender
 6. Whether the trial was conducted fairly under article 50(1) of the *Constitution of Kenya 2010* in view of the non-consideration of the applicant's predicament that exist at that time as to medical challenges attendant thereto.
4. On the above memorandum the applicant has again approached this court persuade to article 50 (6) (a) and (b) of the Constitution which provides as follow: A person who is convicted of a criminal offence may petition the High Court for a new trial if:
- a. The person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal and
 - b. New and compelling evidence has become available
5. So what the court will be looking for as against these considerations by the applicant that the circumstances that will amount to new and compelling evidence that has become available at the time of filing the application. By analogy the principles indicated in the case of: *S vs Mafoken 1999(1) SACR 502* where the court observed that'

' That for substantial and compelling circumstances to be found, the facts of the particular case must present some circumstances that is so exceptional in the nature and that so obviously opposes the injustice of the statutory prescribed sentence in the particular case to the extent that it could be described as compelling the conclusion that the imposition of a lesser sentence than that prescribed by parliament is justified'

6. On the other hand the thrust of the applicant's argument seems to tilt the scale towards revisionary jurisdiction in terms of section 362 as read with 364 of the Criminal Procedure code. The question therefore is whether the application has made the threshold for this court to exercise discretion to review the sentence downwards. The courts have addressed these issues on the guiding principles on revisionary jurisdiction. To cite but a few would demonstrate that the applicant is far from bringing himself within the ambit of this statute on revision. In the case of *Joseph Nduvi Mbuvi vs Republic (2019) eKLR* which says

' In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest



irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.'

7. First and foremost, the fundamental purpose of sentencing is to protect the society and to contribute along with crime prevention initiatives. By imposing just sanctions traditionally, courts exercise discretion having the following objectives in mind.
 - a. To denounce unlawful conduct and the harm done to victim or to the community that is caused by unlawful conduct
 - b. To deter the offender and other persons from committing offences
 - c. To separate offenders, from society where necessary
 - d. To assist in rehabilitating offenders
 - e. To provide reparations for harm done to victims or to the community and
 - f. To promote a sense of responsibility in offenders and acknowledgement of the harm done to victim or to the community
 - g. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender
8. It was incumbent upon the applicant in the application for review under article 50 (6) (a) and (b) to show that they had been discovery of new and important matter or evidence which have the due diligence was not within his knowledge and if was to be produced at the time it could show an error or mistake apparent on the face of the record to call upon the court to vary the decision on sentence. In my view it is also the onerous task of the applicant to present prima facie evidence the principle elements for consideration in consonant in sentencing were not followed by the trial court and subsequently the High Court on appeal. As long as sentencing is in accordance with the principles and objectives provided for in the statute there is necessity to interfere with order of the court.
9. In the context of the constitutional provisions cited by the applicant and in reference in section 362 as read in with section 364 of the Criminal Procedure Code there are no sufficient grounds to warrant this court to vary and substitute the sentence as prayed by the applicant. Fast forward the application is denied.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 10TH DAY OF FEBRUARY 2023

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R NYAKUNDI

JUDGE

In the presence of Appellant – Present

Mugun Present

