



REPUBLIC OF KENYA



KENYA LAW
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**Ndung'u v Republic (Criminal Revision E027 of 2023)
[2023] KEHC 2526 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2526 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E027 OF 2023
GL NZIOKA, J
MARCH 24, 2023**

BETWEEN

KELVIN NDUNG'U APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the Chief Magistrate's Court at Naivasha charged vide Criminal Case. No. E1874 of 2022, with the offence of being in possession of Narcotics Drugs contrary to section 4 (a) (ii) of the Narcotic Drugs and Psychotropic Substances Control Amendment Act 2022. The particulars of the charge are as per the charge sheet.
2. He pleaded guilty, was convicted and sentenced him to a term of two (2) years imprisonment. He now seeks for review of that sentence to a non-custodial sentence vide his application filed on, 28th February 2023.
3. The application is supported by his grounds in a document entitled "memorandum of revision" and his affidavit, wherein he avers he is a first offender and pleaded guilty to the charge. That he is remorseful and has learnt to be a law abiding citizen. That he has a young family that requires him to cater for their needs. Further, that he has no pending appeal and is only applying for review of sentence and prays for leniency.
4. The Respondent has not responded to the application despite being granted an opportunity to do so and therefore the application is unopposed.
5. The court ordered for a pre-sentence report which was dated; 3rd January 2023 and filed in the trial court. It indicates that, the applicant is 25 years old and that both his parents are deceased. He is the first born and has two (2) other siblings. He is married with two (2) children aged three (3) years old and four (4) months old. That he completed his secondary school and started selling second hand



clothes but was forced to close the business during the COVID period and resorted to doing menial jobs “mjengo” until his arrest.

6. That he admitted to using bhang allegedly to assist him in doing the hard menial jobs under extreme conditions. However, the report states that he is remorseful of the offence and pleads for leniency. The Probation officer states that the applicant is a first offender and has a medium risk of reoffending and recommends the applicant be given a non-custodial sentence and placed under probation for a period of one (1) year.
7. In considering the application, I note that the revisionary power of the High Court is provided for under sections 362 of the [Criminal Procedure Code](#) which states as follows:

“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.”

8. However, the section should be read together with section 364 of the Code which 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.”

9. It is therefore clear from the above provisions that, the court will only exercise its revisionary powers where, 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.

10. Further, the revision jurisdiction does not allow the court to interfere and correct errors of facts, or of law when the order is within the jurisdiction of the subordinate court; even if the order is right or wrong, or in accordance with the law, unless it exercised its jurisdiction illegally or with material irregularity. Reference is made to the cases of; *Wesley Kiptui Rutto & Another vs Republic* [2017] eKLR, *Republic vs Everlyne Wamuyu Ngumo* (2016) eKLR, *Public Prosecutors vs Mubavi Bi Mond Jani & Another* 1996 4 LRC 728, 743-5, DPP vs Samuel Kimuche.
11. In the instant matter the applicant was convicted of the offence under section 4 (a) (ii) of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, which states as follows: -

“ 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—

(ii) where the person is in possession of more than 100 grams, to a fine of not less than fifty million shilling or three times the market value of the narcotic psychotropic substance, whichever is greater, or to imprisonment for a term of fifty years, or to both such fine and imprisonment,

12. Pursuant to the aforesaid the sentence imposed is legal and lawful. However, considering that the applicant pleaded guilty and saved the court’s time. That he is a first offender and the value of the subject matter is Kshs. 6,000, and finally the pre-sentence report filed in the trial court is favourable. I find this is a suitable case for revision.
13. Consequently, I revise the sentence to a period of 12 months. The period of three (3) months already served is considered. He shall serve the remaining period of nine (9) months under the Community Service Order. The Probation officer in charge of Naivasha to identify a place for the applicant to work, and record thereof be filed in court.
14. However, if he commits a similar offence, the remaining sentence shall be served in custody revived.
15. It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 24TH DAY OF MARCH, 2023

GRACE L. NZIOKA

JUDGE

In the presence of:

Appellant present in person, in court virtually

Mr. Atika for the Respondent

Ms Ogutu: Court Assistant

