



**Wakanyi v Republic (Criminal Revision E175 of 2022)
[2023] KEHC 2483 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2483 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E175 OF 2022
GL NZIOKA, J
MARCH 24, 2023**

BETWEEN

GIDRAFF MWANGI WAKANYI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the Senior Principal Magistrate’s Court at Engineer charged vide Criminal Case No E1256 of 2022, with the offence of being in possession of Narcotics Drugs contrary to section 3 (1) as read with section 3 (2) (A) the [Narcotic Drugs and Psychotropic Substances Control Amendment Act](#) No 4 of 1994. The particulars of charge are as per the charge sheet.
2. He pleaded guilty, was convicted and sentenced to serve a term ten (10) years imprisonment. He now seeks vide a letter dated October 5, 2022, for review of that sentence
3. The Respondent filed submissions opposing the application and argued that the applicant is a habitual offender and that the pre-sentence report filed in the trial court indicates that he is a vendor of narcotic drugs. Therefore, he does not deserve a lenient sentence. Further, the Supreme Court of Kenya in Petition No 15 of 2015 [Francis Karioko Muruatetu and Another vs Republic](#) recognized that the objectives of sentencing includes deterrence. That the sentence meted out is appropriate in this case.
4. I have considered the application in the light of the material before court and I note that, the law that govern the revisionary power of the High Court is provided for under sections 362 of the [Criminal Procedure Code](#) (herein “the 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.”

5. However, the above 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.”

6. 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. Indeed, 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.

7. 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*.

8. In the instant matter, the applicant was convicted of the offence under section 3(1) as read with section 3 (2) (a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* 4 of 1994, which stated that: -



- 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;
9. Pursuant to the above provisions the sentence meted out herein of ten (10) years is lawful and legal. I note that prior to sentencing the applicant, the court ordered for a pre-sentence report and the Probation Department filed a report dated, September 6, 2022, he is 25 years old, a 2nd born out of two siblings.
10. That his mother is deceased and he lives on the family land with his nephew. That, the family is poor, lives on meagre means and struggles to afford basic needs. He is married but his wife works at Qatar.
11. Further he completed his primary education but could not proceed with his secondary education due to financial constraints and a lack of interest in education. He has does casual jobs and farming. He is said to be HIV positive and on ARVs.
12. He is further described as a habitual offender, indifferent and not willing to change his character. According to his father, the short time he has live with him, he is hardworking and obedient but maintains negative social groupings. The other family members indicated that he engaged in criminal activities and steals to sustain his addiction.
13. The area chief described him as a bad resident who is suspected to be a vendor of bhang as opposed to being a consumer. He opposed the applicant's release on non-custodial sentence. Similarly, the probation officer states that he is not suitable for a non-custodial sentence and that he was sentenced to a three (3) year probationary sentence but did not seem to benefit therefrom.
14. In sentencing the trial magistrate stated that: -

“I have considered the accused person's mitigation. The probation officer's report paints the accused person as a habitual offender having been convicted previously twice on a similar offence and from the report the accused person is portrayed as a vendor of narcotic drugs as opposed to being a consumer...”
15. Pursuant to the aforesaid, the applicant is not suitable for a non-custodial sentence. However, taking into account the value of the substance the applicant had in his possession ten (10) years imprisonment is extremely harsh. I therefore revise the sentence to a custodial sentence of five years and order the other period shall be suspended subject to the applicant not committing a similar within two years upon release.
16. However, if he commits a similar offence, the suspended sentence shall be revived.
17. 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

