



**Kibunja v Republic (Criminal Revision E142 of 2022)
[2023] KEHC 3355 (KLR) (17 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3355 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL REVISION E142 OF 2022
GL NZIOKA, J
APRIL 17, 2023**

BETWEEN

SIMON KARIUKI KIBUNJA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant was arraigned before the Senior Principal Magistrate’s Court at Engineer charged vide Criminal Case No E505 of 2022, with the offence of preparation to commit a felony contrary to section 308(1) of the *Penal Code* in count 1, resisting arrest by a Police Officer contrary to section 254 (b) of the *Code* in count 2, and being in possession of cannabis sativa contrary to section 3 (1) (2) (a) of the *Narcotic Drugs and Psychotropic Substance Control Act* No 4 of 1994 in count 3. The particulars of each charge are as per the charge sheet.
2. He pleaded not guilty and the case proceeded to full hearing. At conclusion of the case, he was found guilty, convicted and sentenced to seven (7) years imprisonment on count 1; one (1) year imprisonment on count 2, and five (5) years imprisonment on count 3. The sentence was ordered to run concurrently.
3. However, by an application filed herein on September 15, 2022, he seeks that the sentence be reviewed and converted into a non-custodial sentence. The application is supported by a document entitled “memorandum of sentence review” and his affidavit wherein he avers that he is a first offender, remorseful and has learnt to be a law-abiding citizen. That, he is not appealing against conviction but for a lenient sentence.
4. The Respondent opposed the application vide submissions dated February 8, 2023 and argued that the Hon Trial Magistrate considered the circumstances of the case and the mitigation of the applicant prior to sentencing him. Further he was sentenced to seven (7) years imprisonment which is the minimum



sentence under the law. Furthermore, it will deter others from committing a similar offence. Therefore, the court should uphold the sentence and dismiss the application

5. In considering the application, it is noted that, the law that guides 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.”

6. However, the subject provisions should be read together with section 364 of the [Code](#) which provision states as follow: -

“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.”

7. The afore provisions indicate that, the court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. 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.



8. In the instant matter, the applicant was convicted in the 1st count and sentenced for an offence under section 308 (1) of the Penal Code, which section states as follows: -
- “(1) Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.”
9. He was also convicted and sentenced under section 254 (b) of the Penal Code. However, the Penal Code does not have section 254 (b) of the Penal Code and in any case section 254 of the Penal Code defines the offence of “kidnapping from Kenya”. Thus the correct section for the offence the applicant is charged with in count 2 is; section 253 (b) of the Penal Code that states: -
- “Any person who—
- (b) assaults, resists or wilfully obstructs any police officer in the due execution of his duty, or any person acting in aid of that officer;
- is guilty of a misdemeanour and is liable to imprisonment for five years”.
10. The applicant was further convicted and sentenced under section 3 (1) as read with section 3 (2) (a) of the Narcotic Drugs and Psychotropic Substances Control Act that stipulates: -
- “(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 to a term of not more than five years or to a fine of not more than one hundred thousand shillings
11. Pursuant to the above provisions, the sentence imposed on the 1st count is the minimum sentence and indeed the sentence meted out is legal and lawful.
12. It is also noteworthy that, the court ordered the Probation Department to avail pre-sentence report and a report dated October 19, 2022 was filed. It indicates that the he is 27 years old and fourth born out of nine (9) siblings.
13. He is not married and has no dependants. That he dropped out of school in class eight (8) due to a lack of interest in education and was doing casual jobs before his arrest. He suffers from asthma.
14. That he admits using bhang and accepts he committed the offence but promises not to repeat the same and pleads for a favourable sentence. However, his father states that he used to steal things at home and stole a radio from his elder brother twice. That he is stubborn and did not complete his driving course despite expressing interest in the same. As such, his father is not willing to welcome him back and prefers the applicant completes his sentence in custody so he could learn his lesson.
15. In the given circumstance, there is no reason to interfere with the sentence meted out. The upshot is that the application lacks merit and is dismissed accordingly save that the sentence will run from February 10, 2022 when he was arraigned in court as he was remanded through-out.



16. It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 17TH DAY OF APRIL, 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

