



**Wangari v Republic (Miscellaneous Criminal Application
E021 of 2022) [2023] KEHC 17745 (KLR) (12 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 17745 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
MISCELLANEOUS CRIMINAL APPLICATION E021 OF 2022**

GL NZIOKA, J

APRIL 12, 2023

BETWEEN

HASSAN KARIUKI WANGARI APPLICANT

AND

REPUBLIC RESPONDENT

*(Arising from the Senior Principal Magistrate's
Court at Engineer vide Criminal Case E610 of 2022.)*

RULING

1. The applicant was arraigned before the Senior Principal Magistrate's Court at Engineer charged vide Criminal Case E610 of 2022 with the offence of being in possession of narcotic drugs contrary to section 3 (1) (a) as read with section 3 (2) of the *Narcotic Drugs And Psychotropic Substances (Control) Act* No 4 of 1994. The particulars of the charge as per the charge sheet.
2. He pleaded guilty, was convicted and sentenced to pay a fine of Kshs 500,000 and in default to five (5) years imprisonment. However, by an application filed in court on April 8, 2022 he seeks that the sentence be reduced and/or converted into a non-custodial one.
3. The application is supported by the grounds in a document entitled "mitigation grounds", and his affidavit wherein he avers that he pleaded guilty and is a first offender. That, he is remorseful, has learnt to be a law abiding citizen and if released he will create awareness among the youth on moral values and be an ambassador of: "*Crime sio Poa*" initiative.
4. Further, that he is 32 years old and from a poor background as his father died when he was young and his mother is old and cannot provide for her own upkeep. Furthermore, he has a young family with three children and his wife is jobless and therefore cannot provide for them and his incarceration has placed them in a very difficult situation.



5. That, he is not appealing against the conviction and sentence but applying for sentence review under section 362 and 364 of the [Criminal Procedure Code](#) and is willing to abide by all conditions the court may deem fit to give.
6. However, the respondent opposed the application vide submissions filed on January 30, 2023 and argued that the offence herein is prevalent in the area where it was committed and that a lot of youth are wasting their lives due to drug addiction and therefore it is important to send a strong message to the community to deter people from engaging in such behaviour.
7. Further, the sentence meted is legal and lenient considering the maximum of ten (10) years ought to have been imposed. Therefore, the application should be dismissed and sentence. upheld
8. I have considered the application in the light of the material before court and I note that, the law that guides 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.”

9. 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.”



10. Pursuant to the afore provisions, 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 and that 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.
11. In the instant matter the applicant was convicted of an 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 provides as follows: -
 - “Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.
 1. 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;
12. Pursuant to the afore provisions, the sentence meted herein is lawful and legal and the court cannot therefore review it. However I direct that the matter be referred to the Probation Department for a pre-sentence report to consider the matter under the *Community Service Orders Act*.
13. It is so ordered.

DATED, DELIVERED, SIGNED ON THIS 12TH APRIL, 2023

GRACE L. NZIOKA

JUDGE

In the presence of:-

Applicant in court/ virtually

Mr. Atika for the Respondent

Ms Ogutu- Court assistant

