



**Gitonga v Republic (Criminal Revision E138 of 2024)
[2024] KEHC 13673 (KLR) (6 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13673 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL REVISION E138 OF 2024
LM NJUGUNA, J
NOVEMBER 6, 2024**

BETWEEN

BENSON GITONGA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant has filed a notice of motion dated 05th September 2024 seeking the following orders:
 - a. That this honourable Court be pleased to reverse the sentence passed by the lower Court in Siakago Criminal Case No.E661 of 2023.
2. The applicant was charged with the offence of being in possession of narcotic drugs contrary to section 3(1) as read together with section 3(2)(a) of the Narcotic Drugs and Psychotropic Substances Control [Act No. 4 of 1994](#). He pleaded guilty and he was convicted on his own plea of guilty. He was sentenced to pay a fine of Kshs.100,000/= and in default to serve a 5 years sentence. He would like the sentence reviewed downwards or he be granted a noncustodial sentence. In the supporting affidavit to the application, he stated that he is a first offender who highly regrets the offence. That he saved judicial time by pleading guilty but the sentence meted out to him is harsh and excessive given the circumstances of the case.
3. The respondent filed grounds of opposition, stating that the applicant's mitigating factors do not form basis for revision of the sentence under section 362 of the Criminal Procedure Code. That the sentence meted out to the applicant is in line with the provisions of the relevant law. It urged the court to dismiss the application stating that the same is bad in law.
4. The application was canvassed by way of written submissions.



5. The applicant submitted that the trial court was not bound to apply the mandatory minimum sentence prescribed under the act and he relied on the case of *S. v. Malgas* 2001 (2) SA 1222 SCA 1235. He urged the court to exercise leniency since he is a first offender and the fine is harsh in the circumstances.
6. The respondent submitted that this court should focus on considering the correctness, validity and propriety of the orders of the court. It argued that according to section 3 of the Narcotic Drugs and Psychotropic Substances Control *Act No. 4 of 1994*, sentence passed by the trial court is fair in the circumstances. That the application does not meet the threshold for revision and it urged the court to dismiss it.
7. From the foregoing, the issue for determination is whether the application has merit.
8. The High Court's supervisory jurisdiction in criminal cases is established under Section 362 of the Criminal Procedure Code 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. In the Malaysian case of *Public Prosecutor vs. Muhari bin Mohd Jani and Another* [1996] 4 LRC 728 at 734, 735 it was held:

“The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.

10. The applicant was sentenced to pay a fine of Kshs.100,000/= and in default, 5 years imprisonment having been convicted on his own guilty plea. In mitigation, he stated that he is a father of 4 children and he is the breadwinner. Section 3(1) and (2)(a) of the Narcotic Drugs and Psychotropic Substances Control Act Cap 245 provides;

“

“(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) 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. In this case, the applicant did not satisfy the court that he was using the substance for his personal use. He was found selling the substance at the market and he pleaded guilty to the charge. The correctness, legality and propriety of the sentence imposed is not in question as the same was imposed through the guidance of statute, which is silent on offenders who sell the substance and who did not indicate to



the court that they possessed the substance for their own personal use. That being said, it is a lenient sentence in the circumstances, assuming that the penalty for selling the substance could have been higher given the impact of the offence to the large community. I find that, in the premises, the trial court did not err in imposing the sentence.

- 12. The application has no merit and it is hereby dismissed.
- 13. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE

.....for the Applicant
.....for the Respondent

