



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**CRIMINAL REVISION NO. E114 OF 2021**

**GIDRAFF MWANGI WAKANYI.....APPLICANT**

**VS**

**REPUBLIC.....RESPONDENT**

**RULING**

**Background**

1. The Applicant herein was charged with being in the possession of Narcotic Drugs contrary to **Section 3 (1)** as read together with **Section 3 (2) (a)** of the **Narcotic Drugs and Psychotropic Substance Control Act No.4 of 1994**.
2. The particulars were that on the 5<sup>th</sup> day of February, 2021 at Engineer township in Kinangop within Nyandarua County was found being in possession of Narcotic drugs namely bhang to wit 14 rolls with a street value of KShs.700/- which was not in medicinal preparation form.
3. The Applicant pleaded guilty, was convicted on his own plea of guilty and sentenced to four years imprisonment by the trial court on 18/03/2021.
4. The Applicant has now lodged a Notice of Motion application with a Supporting Affidavit filed on 18/05/2021 praying that the four (4) year jail sentence be reviewed by substituting it with a non-custodial sentence.
5. He further relies on what he referred to as the Mitigating Grounds on which he urges the court to review his sentence namely:
  - i. That he suffers from a chronic disease.
  - ii. That he is married and is the sole bread winner of the family.
  - iii. That he pleaded guilty to the charges.
  - iv. That he is remorseful for the offence.
  - v. That he has learnt to be a law abiding citizen.
  - vi. That he is from a poor family background.
  - vii. That he has acquired farming skills as part of his rehabilitation.
  - viii. That he would use the skills to cater for himself and build the Nation.
6. The application was canvassed orally on 10<sup>th</sup> November, 2021. The Applicant who was in person submitted that he had totally transformed and that he takes care of a sister whom he would wish to continue taking of, after release.
7. Learned State Counsel, Ms. Maingi opposed the application, submitting that the sentence had earlier been revised by learned judge, Hon. Nzioka on 15<sup>th</sup> June, 2021 and the application was dismissed. It was her submission that, in view thereof the Applicant was not eligible for a second review.

8. This being an application for revision of sentence, the court is mandated under **Section 362** of the **Criminal Procedure Code** to call for the original trial court record for purposes 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.

**Determination**

9. This court has accordingly called for the trial court record. I have noted that the earlier revision of sentence was done under the Community Service Orders (CSO) program. Under Section 3 of the CSO Act, persons eligible for review of the sentence are the convicted persons who were sentenced to three years or under or if sentenced to more than three years, the court determines a term of three years or less, with or without the option of a fine, is appropriate.

10. In the present case, the revision of the sentence was declined because the Probation Officer's Report (POR) was not suitable. I have had a look at the report. The same was prepared on 17<sup>th</sup> March, 2021. The Applicant was depicted as a bother to the community and his immediate family due to his addiction to bhang. As a result, he had resorted to stealing from home and the neighbours to finance his habits. When he was interviewed, he stated that he resorted to smoking bhang due to his HIV status and frustrations in life. The area chief on the other hand suspected that he was a vendor of the drug as opposed to a consumer. The report did however indicate that the Applicant was remorseful for the offence.

11. The Applicant was charged under **Section 3(1)** as read with **Section 3 (2) (a)** of the **Narcotic Drugs and Psychotropic Substances Control Act** for being in possession of narcotic drugs. **Sub section (2) (a)** provides for the penalty where the drug charged is cannabis. In the respect where the cannabis is intended for the person's sole consumption, the penalty is ten (10) years imprisonment and for any other case to imprisonment for twenty (20) years imprisonment.

12. The facts of the case in this matter do not clearly state whether the 14 rolls of cannabis the Applicant was found in possession of were for personal consumption or for trafficking. It is however clear that the Applicant was not alone at the time of arrest. He was in the company of other "boys" who according to the police ran away after they saw them. It is at this time that the 14 rolls of bhang were dropped on the ground. The police managed to arrest only the Applicant.

13. From these facts, it is easy to conclude that the cannabis was for personal consumption as one cannot easily deduce how many rolls of the cannabis each of the boys was carrying. The Applicant too in mitigation stated that he had it for smoking. It is factual that the POR was not favourable. It is also on record that the Applicant did not have a good track record at home and in the village. Further, it is also factual that he had regretted his deed and was remorseful. He cited frustrations in life which are a common factor with the youths. Such youths in my view require guidance in life support skills and behavior change as opposed to retributive punishments.

14. This is one case I feel would benefit from guidance and or a release so as to give the Applicant time to recollect himself and turn around his life. Indeed, having regard to the quantity of the subject matter and its value, the four- year jail term was excessive punishment.

15. The sentence having been passed on 18<sup>th</sup> March, 2021 means that the Applicant has been in custody for eight (8) and a half months which in my view is sufficient punishment.

16. In the result, I find the application meritorious. I find that the Applicant has served sufficient punishment. I set aside the remainder of the jail term and order that the Applicant be forthwith set free unless otherwise lawfully held.

17. It is so ordered.

**DATED AND DELIVERED AT NAIVASHA THIS 2<sup>ND</sup> DECEMBER, 2021**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Applicant in person.*

2. *Miss Maingi for the Respondent.*