



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CRIMINAL REVISION NO. 6 OF 2019**

*(From Original Conviction and sentence in Criminal Case No. 1108 of 2018 of the Senior Principal Magistrate's Court at Baricho –E. H. KEAGO -SPM)*

**IRENE WAMBUI MIRIAM..... APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

1. The applicant Irene Wambui Miriam filed this application under **Section 362 and 364 of the Criminal Procedure Code** seeking review of the sentence of Four years impose on her by Hon. E. h. Keago Senior Principal Magistrate Baricho Court for the offence of being in possession of cannabis contrary to **Section 3(1) as read with Section 3(2) of the Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994.**

2. In her mitigation the applicant submits that she had pleaded not guilty to the charge. The trial Magistrate did not factor in the period that she had spent in the remand when passing sentence. That she is remorseful and vow not to repeat the offence and has fully reformed.

3. The applicant prays the court to review the none custodial sentence, consider deducting the One Year duration that she served in remand from her sentence and allow her application.

The State did not oppose the application.

4. I have considered the application. This court exercises jurisdiction to review criminal cases arising from orders issued by the sub-ordinate court. This is provided under **Section 362 to 366 of the Criminal Procedure Code Cap 75 of the Laws of Kenya. Section 362** provides:-

***“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. This call on the High Court to call for the record of the lower court and satisfy itself on the correctness or otherwise of the orders and the sentence.

6. The appellant was alleged to have been in possession of 3 rolls of cannabis with a street value of Kshs 30/-.

7. Upon conviction the State informed the trial Magistrate that the applicant was not a first offender as she had been convicted in Cr. Case No. 1349/2016. The applicant admitted that she had been convicted. In the previous Criminal Case 1349/2016 she was charged with being in possession of Cannabis, was convicted and sentenced to pay a fine of Kshs 10,000/- i/d Six months imprisonment, she had also had a previous conviction in Criminal Case No.1143/2016 where she was convicted of the charge of being in possession of cannabis and was fined Kshs 10,000/- or i/d to serve Six months imprisonment.

8. A Probation Officers report did not recommend probation as the applicant was a high risk offender due to recidivism. The applicant admitted the previous conviction.

9. The sentence passed by the trial Magistrate was deserved. The appellant had two previous convictions and had not reformed. A deterrent sentence was called for. Sentencing is the discretion of the trial Magistrate. In this case I find that the trial Magistrate exercised his discretion judiciously considering the circumstances of this case.

**Section 3(1) an 3(2) of the Narcotic Drugs and Psychotropic Substances Control Act** 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 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; and***

***(b) in respect of a narcotic drug or psychotropic substance, other than cannabis, where the person satisfies the court that the narcotic drug or psychotropic substance was intended solely for his own consumption, to imprisonment for twenty years and in every other case to a fine of not less than one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, or to imprisonment for life or to both such fine and imprisonment.”***

The applicant was charged with being in possession of cannabis. The charge attracts a sentence of upto Twenty Years. The sentence of Four years for a repeat offender is not harsh nor can it be said to be unfair. It is not excessive in the circumstances of this case. I find no reason to interfere with the sentence. However **Section 333 of the Criminal Procedure Code** provides:-

***“(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.***

***(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.***

***Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”***

10. The Section provides mandatorily that the period a person has spent in remand pending trial must be taken into consideration when passing the sentence. The trial Magistrate has no discretion, he has to take the period served in remand in consideration. The trial Magistrate did not take into consideration that the applicant had been in remand. This is the only issue under which I should review the sentence. The record of the lower court shows that the applicant was remanded in custody on 2/10/2017 and was sentenced on 4/10/2018. She was therefore in remand for a period of One year. I order that the sentence of Four Years be reduced by One year which the applicant spent in custody before the sentence was imposed. That will be the order of this court on revision.

**Dated at Kerugoya this 10<sup>th</sup> day of February 2020.**

**L. W. GITARI**

**JUDGE**