REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CRIMINAL REVISION NO. 4 OF 2017

(From Original Conviction and sentence in Criminal case No. 1154 of 2016 of the Senior Principal Magistrate's Court at Baricho)

PATRICK KARANI MURIUKI .....APPLICANT

V E R S U S

STATE .....RESPONDENT

RULING

1. The background of this application is that the applicant Patrick Karani Muriuki was charged with being in possession of Cannabis Contrary to Section 3(1) as read with Section 3(2) of the **Narcotic Drugs and Psychotropic Substances Control Act** before the Principal Magistrate's Court at Baricho. It was alleged that on 29/8/2016 he was arrested at Kahuhoini village in Kirinyaga West Kirinyaga County while in possession of 3 ½ stones of bhang with a street value of Kshs 1,750/-.

2. The applicant denied the charge. The hearing proceeded to full trial. The applicant was found guilty and sentenced to serve three years imprisonment.

3. He filed this application for revision under Section 362 and 364 of the Criminal Procedure Code. He urged the court to revise the sentence and give him an option of a fine. He relied on the following grounds in mitigation:-.

1. That I have indeed transformed from my previous life of hopelessness and promised that I will be law abiding citizen.

2. That my wife left me with three children and I had been taking care of them before I was convicted and sentenced,

3. That I left them under the care of my aged mother who is ailing and unable to provide for them as I was the sole bread wined.

4. My ladyship, I humbly request for revision of my sentence to an option of a fine or a non-custodial sentence to enable me provide for my children and my ailing mother.

5. That what is deponed is true to the best of my knowledge.

4. The application was opposed by the State through the prosecution counsel Mr. Sitati who submitted that under the Section which the applicant is charged the sentence provided is ten years. The applicant was sentenced to serve three years. He submits that the sentence was lenient as the offence is a social menace which has destroyed the lives of many young men and families. He urged the court to let the appellant serve the sentence to give him sufficient time to reform and be rehabilitated. He submits that the sentence should serve as a deterrent.

5. I have considered the application. The jurisdiction of this court on revision of the decision of the sub-ordinate courts is donate by **Section 362 of the Criminal Procedure Code.** The High Court exercises supervisory role over sub-ordinate courts to determine whether the orders issued are correct, legal or proper. This role is also provided for under **Article 165(6)** which provides:-

"The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court."

This power maybe exercised as provided under ***Section 364 of the Criminal Procedure Code:-***

"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.

(c) in proceedings under section 203 or 296 (2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and AntiMoney Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

(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."

6. The High Court will exercise the powers of revision to correct mistakes by the sub-ordinate courts. Where the applicant seeks revision of the sentence, the court will consider whether the sentence was lawful as provided under the provision which the applicant was charged. An application for revision is not an appeal. The applicant must satisfy the court that there is a mistake which the High Court can correct under its powers of revision. The threshold for revision is that the applicant must show that the sub-ordinate court made incorrect, unlawful or improper orders. Where these allegations are not made, the court will not entertain an application for revision of the sentence.

7. An application on finding on the sentence must be filed by way of an appeal. Section 364(5) of the Criminal Procedure Code which I have quoted above states that where an applicant has a right of appeal, the party must file an appeal and not a revision. In a persuasive decision of the High court in **Wahome –v- R (1981) KLR 497** the Court stated:-

"Revision is a discretionary remedy which if exercised, a right of appeal lies but where the Judge declines to exercise this power there in no right of appeal."

8. In this case the applicant ought to have approached court by way of appeal. Sentencing is a discretion of the trial court. The appellate court will not interfere with the exercise of the discretion unless the sentence is excessive in view of the circumstances of the case, that some material factors were overlooked or took into consideration some wrong material or acted on a wrong principle. This was the holding in a binding decision by the Court of Appeal in

Bernard Kimani Gacheru V Republic [2002] eKLR

The court in holding that sentence given was well deserved and found absolutely no reason to interfere with it stated;

It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.

In **George Karanja Njoroge V Republic [2008] Eklr**

The court in affirming the sentence imposed by the Court below stated;

The last-listed case, an appellate Court decision, sets out the pertinent principles which must guide this Court in disposing of the instant matter. The Court in that case stated (p. 270):

"The principles upon which an Appellant Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v. R (1950) 18 EACA 147, 'it is evident that the Judge has acted upon some wrong principle or overlooked some material factor.' To this we would add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case....."

These are matters the court must consider in an application for review of the sentence.

The applicant was charged under:-

Section 3 of the Narcotics Drugs and Psychotic Substance Control Act No. 4 of 1994 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.

9. The penalty for being in possession of Cannabis under **Section 3** above is 10 years imprisonment therefore the sentence imposed upon the appellant of 3 years was lawful. The trial court did not act on some wrong principle or overlooked some material factor therefore there is no reason whatsoever for this court to interfere with the sentence meted out on the applicant by the trial court as the same was neither harsh nor overly excessive.

10. Furthermore, from the record, the applicant was not a first offender. He had been previously sentenced to serve six months for a similar offence. This called for a more severe sentence to discourage the appellant. In the circumstances as submitted by the state, the sentence meted out was lenient. The sentence imposed was deserved. I reject the application for revision. It was not properly before this court as there are no grounds to warrant the court to revise the sentence.

11. In Conclusion:

I find that the application is without merits and is dismissed.

Dated at Kerugoya this 12th day of February 2019

L. W. GITARI

JUDGE