

REPUBLIC OF KENYA
IN THE HIGH COURT OF AT ELDORET
CRIMINAL REVISION NO E303 OF 2024

**IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS AS
UNDER ARTICLE 22(1) OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF FUNDAMENTAL RIGHTS AND FREEDOM AS UNDER
ARTICLE 27, 28, 29 AND 48 OF THE CONSTITUTION OF KENYA 2010**

BETWEEN

HAMISI VULIMO.....

APPLICANT

VERSUS

REPUBLIC.....

.....RESPONDENT

Coram: Before Justice R. Nyakundi
M/s Sidi for the State

RULING

- 1.** The Applicant herein was charged with the offence of being in possession of Narcotic Drugs Contrary to section 3(1) as read with section 3(2)(a) of the Narcotic and Psychotropic Substances Control Act 1994. The particulars of the offence were that HAMISI VULIMO on the 26th day of November 2021 at about 10.00 Hours at Langas Kisumu Ndogo Estate, Kapseret Sub County within Uasin Gishu County was found in possession of Narcotic drugs to wit 13kgs of Cannabis Sativa with a street value of kshs 390,000 in contravention of the said Act.
- 2.** The Applicant was sentenced to a fine of kshs. 1,170,000/= in default to serve a prison sentence of 20 years.
- 3.** The Applicant/Petitioner herein has thus petitioned this Honourable Court for a sentence review by way of a Notice of Motion Application dated 24th

July 2024 in which the Applicant is seeking is seeking the following orders:

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- a. That the Petitioner is seeking for sentence review in accordance to Article 50(2)(p)(q) of the Constitution of Kenya and section 362 & 364 of the Criminal Procedure Code.
 - b. Spent
 - c. That the Applicant will be seeking a declaration by the court that this application has merits and qualifies to be heard.
- 4.** The Application is made on the following mitigation grounds for review as follows;
- a. That the Applicant is a first offender and thus beg for leniency.
 - b. That the Applicant is remorseful, repentant and reformed since he has learnt incarceration in prison to take responsibility of his own actions.
 - c. That the sentence meted upon him was too harsh considering his mitigating factors and circumstances.
- 5.** The Application is supported by the annexed affidavit dated 24th July 2024 sworn by the Applicant herein who deponed as follows: -
- a. *That I was charged with the offence of possession of cannabis sativa contrary to section 3(1)(a) of the Narcotic and Psychotropic Substance Control Act No. 4 of 1994 and sentenced to 20 years' imprisonment.*
 - b. *That the sentence meted upon me is harsh and excessive against my mitigation.*
 - c. *That I am now approaching this Honourable Court to kindly review my sentence to a lesser or non-custodial sentence.*
 - d. *That I have no other application in the court of appeal, hence this application.*
 - e. *That I am a young man with a family who solely depend on me for their survival.*

- f. *That may the Hon. Court be pleased to grant me provisions of section 4 cap 63 of the Probation of offenders' act i.e. to allow the applicant serve the remaining sentence on probation terms.*
- g. *That this Hon. Court has competent, unlimited jurisdiction to hear and determine this application under the provisions of Article 165 (3)(b) of the Constitution of Kenya 2010.*
- h. *That I am remorseful, repentant, reformed and rehabilitated as I have learnt hard lessons while in custody and now beg for leniency.*
- i. *That I do beg that I be accorded to benefit with the provision of Article 50(2)(q) of the Constitution of Kenya 2010.*
- j. *That it is my humble prayer that I be granted a fair opportunity to argue my petition.*

Analysis and Determination

6. I have read and considered the Notice of Motion Application, the grounds on the face of it and the annexed supporting affidavit. There is one sole issue for determination by this Honourable Court: -

Whether the Application for sentence review is merited?

7. The jurisdiction of this Honourable court is exercisable under Article 50 (2) (p)(q), Article 50(6)(a)(b) & Article 165 (6) and (7) of the Constitution as read with section 362 and 364 of the Criminal Procedure Code. The revisionary jurisdiction is provided for in section 362 to 368 of the Criminal Procedure Code which states as follows;

“362. 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.

364. (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.”

8. 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”.

9. Some of the key principles which are applicable in sentence review were highlighted in the case of **Benard Kimani Gacheru Vs Republic [2002] eKLR** in which the Court of Appeal held as follows: -

“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 states is shown to exist.”

- 10.** From my reading, the issue which arises is whether the sentence was excessive and not justified. This issue arises not out of legality of the sentence but excessiveness and mitigation. Sentencing is one of the most intricate aspects of trial. It complements the trial. The sentencing should be one that meets the ends of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. The objectives of sentencing as set out in the **2023 Sentencing Guidelines** are as follows: -

“1.3.1 Sentences are imposed to meet the following objectives. There will be instances in which the objectives may conflict with each other – insofar as possible, sentences imposed should be geared towards meeting the objectives in totality.

- a. **Retribution:** To punish the offender for their criminal conduct in a just manner.*
- b. **Deterrence:** To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.*
- c. **Rehabilitation:** To enable the offender to reform from his/her criminal disposition and become a law-abiding person.*
- d. **Restorative justice:** To address the needs arising from the criminal conduct such as loss and damages sustained by the victim*

- or the community and to promote a sense of responsibility through the offender's contribution towards meeting those needs.*
- e. **Community Protection:** To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts.*
 - f. **Denunciation:** To clearly communicate the community's condemnation of the criminal conduct.*
 - g. **Reconciliation:** To mend the relationship between the offender, the victim and the community.*
 - h. **Reintegration:** To facilitate the re-entry of the offender into the society"*
- 11.** The Applicant herein was sentenced to 20 years' imprisonment. This application for sentence review revolves around section 3 (1) as read with 3 (2) (a) (b) of the Narcotic Drugs and Psychotropic Substances Control Act. This section provides as follows in verbatim: -
- 3. Penalty for possession of narcotic drugs, etc.**
- (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.*

12. In the case of **Daniel Kyalo Muewa Vs Republic (2009) eKLR** the Court of Appeal considered this very question of whether section 3(2) provided for a mandatory minimum ten (10) year sentence. In that case the court cited with approval the meaning ascribed to the term 'shall be liable' in the case of **Opoya Vs Uganda [1967] E.A 752** where it was held: -

"It seems to us beyond argument that the words 'shall be liable to' do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it" ...

"We have no doubt that the sentence of 10 years' imprisonment and 20 years' imprisonment prescribed in Section 3 (2) (a) of the Act for the possession of 'cannabis sativa' are the maximum and that the court can lawfully impose any shorter term of imprisonment. Furthermore, although Section 3 (2) (a) of the Act does not expressly provide for a fine, the law can lawfully in accordance with Section 26 (3) of the Penal Code sentence the offender to pay a reasonable fine in substitution for imprisonment"

13. The provision 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. The sentence also had to be one that was hinged on retributive justice for the secondary victims. If the court did not take into account the three (3) objectives of deterrence, retribution and denunciation of his offence at the time of sentencing him, chances of the accused person being reintegrated in the society would be next to impossible as there were possibilities of being harmed. From the facts of the case, the Applicant was found in possession of 13 kg of cannabis sativa with an alleged street value of Kshs. 38,000/=.

- 14.** The sentence imposed therein must be viewed against the facts, the Applicant's means and the objective seriousness of the offence. A sentence will be interfered with on review where it is disproportionate in the circumstances or the sentencing court failed to take account of material mitigation. On the record before this Court, there is a plausible argument that the custodial default of 20 years is excessive, particularly given the Applicant's first offender status and the rehabilitative objective of sentencing. The Narcotics Act does allow heavy penalties for possession, but sentencing must still respect proportionality and the discretionary exercise of judicial discretion where appropriate.
- 15.** The Probation of Offenders Act provides mechanisms for conditional release and supervision by probation officers and contemplates the use of probationary measures where appropriate, having regard to the character of the offender and nature of the offence. Probation orders are however, subject to statutory limits and the availability of probation services. A total conversion of a 20-year default custody to probation would be inconsistent with the Act's maximums but the Court may suspend part of a custodial sentence and make a probation order for a lawful period or reduce the fine and suspend the remaining custodial element subject to conditions. A tragedy that can be seen from the file, is that the Petitioner and/or Applicant has requested for non-custodial sentence. There is no pre-sentence report to guide the court. In that respect absence of the report makes denial of non-custodial sentence perfunctory. Non-custodial sentence cannot be ruled out in offences of this nature without considering a report from Probation and Aftercare Services.
- 16.** The sentencing regime and imposition of various categories of sentences remain conferred within the provisions of trial courts. The exercise of judicial discretion must be done under the structure provided under the law. In the case of **Veen v. The Queen (No 2) (1998) 164 CLR 465 Mason CJ Brennan Dawson and Toohey JJ** said at 476

.... sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.

17. Having considered the record, the applicable law and exercising the Court’s revisionary powers under sections 362 and 364 of the Criminal Procedure Code, the Court finds that the sentence imposed by the trial court requires to be set aside in the interests of justice, proportionality and rehabilitation. In view of the foregoing, I am inclined to interfere with the 20 years’ imprisonment imposed by the trial court being the maximum sentence on this offence and substitute it with a lesser sentence of 8 years’ imprisonment. The application therefore succeeds and in considering the provisions of section 333(2) of the Criminal Procedure Code the sentence shall run from the date date of arrest being **26th November 2021.**

**DATED, SIGNED AND DELIVERED VIA CTS AT ELDORET THIS 5TH DAY
OF NOVEMBER 2025**

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R. NYAKUNDI

JUDGE