Muthuri v Republic (Criminal Appeal E131 of 2022) [2024] KEHC 13857 (KLR) (29 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13857 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E131 OF 2022

LW GITARI, J

OCTOBER 29, 2024

BETWEEN

JAMLICK MUTHURI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. Grounds of appeal.
    1. That the learned trial magistrate erred in both law and facts by failing to note that the period spent in custody (pre-trial) under Section 333(2) was not considered.
    2. That the learned trial magistrate failed to consider the mitigation of the appellant.

Background:

3. The appellant was charged in the Chief Magistrate's Court Meru Criminal Case No. E770/2022 with the offence of Trafficking in Narcotic Drugs contrary to Section 4(1) (ii) of the *Narcotic Drugs and Psychotropic substances (control) (Amendment) Act* of 2022.
4. The particulars were that on 27/6/2022 at Kaaga area in Imenti Central Sub-County within Meru County, he trafficked by storing in his house Narcotic drugs namely cannabis to wit 500 grams with a street value of Ksh.6000/- two (2) flags, fifteen (15) packets of Korobo (rolling papers) one electronic weighty scale in contravention of the provisions of the said *Act*.
5. The appellant denied the charge. He later changed plea and pleaded guilty to the charge. He was convicted and sentenced to serve ten years imprisonment. The appellant has not challenged the conviction and sentence. He pleads that the time spent in prison awaiting trial be considered.

6. The appellant has initially filed four grounds of appeal but he later amend the grounds and relied on the two grounds listed above. The appeal was canvassed by way of written submissions.

Appellant's Submissions:

7. He reiterates that the learned magistrate erred in matters of law and fact by failing to take into account the period spent in custody as provided under Section 333(2) of the *Criminal Procedure Code*.

8. He relies on the Court of Appeal decision in *Abolfath Mohamed and Another v Republic* (2018 eKLR and *Bethwel Wilson Kibor v Republic* (2009) eKLR. The appellant has also submitted that his mitigation was not considered when passing sentence. He prays for leniency.

Respondent's Submission:

9. The respondent submits that-

> *S vs. Malgas* 2001 (1) SACR 469 (SCA) at paragraph 12 it 1Qwas held that:
>
>> A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court.... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court have imposed had it been the trial court is so marked that it can properly be described as "shocking," "startling" or disturbingly inappropriate."

10. Similarly, in *Mokela vs. The State* (135)/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:-

> It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

11. The predecessor of the Court of Appeal in the case of *Ogolla s/o Owuor vs. Republic* [1954] EACA 270 pronounced itself on this issue as follows:-

> The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

12. In case of *Shadrack Kipkoech Kogo-v- R.* Eldoret Criminal Appeal No.253 of 2003 the court of appeal stated thus:-

> Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error or principle must be interfered (see also *Sayeka-v- R*. (1989 KLR 306)."

13. The court of Appeal, on its part, in *Bernard Kimani Gacheru-v- Republic* [2002] eKLR restated that:-

> It is now settled law, following several authority 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."

14. The respondent submits that the sentence was reasonable and lawful. It cannot be said to be manifestly excessive or given on account consideration of irrelevant factors.

15. That no material factors were overlooked. That his mitigation was considered and a lenient sentence was imposed.

Analysis and determination:

16. The appellant has not challenged his conviction. I have considered the proceedings and I am satisfied that plea was properly taken in line of the procedure laid down in *Adan v Republic* (1973) EA 445 supra.

17. The plea was unequivocal. The appellant has not challenged his conviction.

18. On ground No. -1 Section 333(2) of the *Criminal Procedure Code* provides:

> "(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."

19. The section is couched in mandatory terms and therefore if an accused person has remained in custody throughout the entire trial, the period spent in custody must be taken into account to reduce the sentence imposed on the accused. This was discussed by the Court of Appeal in the Case of *Mohamed Abolfathi Ahamed and Another v Republic* (2018) eKLR where the court was emphatic that the trial court should take into account the period spent in custody while awaiting trial and that 'taking into account' means reducing the sentence imposed proportionately with the time spent in custody. The court stated:

> By dint of Section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced.......
>
> > Taking into account" the period spent in custody must mean considering that period so that the sentence imposed is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of conviction because that amount to ignoring altogether the period already spent in custody."

20. The appellant was arraigned in court on 28/6/2022 and sentence on 19/9/2022. The learned magistrate did not take into account the period spent in custody. The appellant was remanded for two months and twenty one days. The sentence imposed should be reduced by two months and twenty one days.

21. The appeal on the ground that time spent in custody was not considered succeeds. The sentence imposed shall be reduced by two months and nineteen days to take into account the time spent in custody. On sentence, the mitigation was considered. The learned magistrate considered relevant matters. It is important to state what the learned magistrate stated. She stated as follows:-

> I have considered the charges against the accused. He is a first offender. He is remorseful. This court is alive to the recent amendment made to the Act under which the accused was charged making the sentences therein to be punitive, as such in line with the law the accused person is hereby sentence to serve ten (10) years imprisonment."

22. It is a cardinal principle in criminal justice system that sentencing remains the exercise of discretion by the trial Judge. See the submissions by the learned prosecution's Counsel above.

23. The appellant was convicted under Section 4 (a) (ii) of the *Narcotic Drugs and Psychotropic substances (control) (Amendment Act* of 2022) which provides as follows:-

    a. In respect of any narcotic drug or psychotropic substance-

        (ii) where the person is in possession of more than 100 grams, to a fine of not less than fifty million shillings or three times the market value of the narcotic or psychotropic substance, whichever is greater, or to imprisonment for a term of fifty years or to both such fine and imprisonment."

24. The appellant was sentenced to serve ten years imprisonment. The learned magistrate did consider relevant factors that the appellant was a 1st offender and he was remorseful also considered the fact that the sentence was punitive. It is my view that relevant factors were considered and in view of the possible maximum sentence which the court could impose, the sentence of ten years was not manifestly harsh or excessive. The learned trial magistrate exercised her discretion fairly. I find no reason to interfere with the sentence.

Conclusion:

25. For the reasons stated above I find that the appeal lacks merits. The sentence shall be reduced by two months and twenty one (21) days.

26. The appeal is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 29TH DAY OF OCTOBER 2024.

L.W. GITARI

JUDGE

29/10/2024

Ms Joan (ADPP)

C/A Muriuki

Appellant- Present- Virtual from Meru Prison.

L.W.GITARI

JUDGE

29/10/2024