



**Kamau v Republic (Criminal Appeal E037 of 2022)
[2023] KEHC 351 (KLR) (27 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 351 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E037 OF 2022
NW SIFUNA, J
JANUARY 27, 2023**

BETWEEN

PAUL KAMAU APPELLANT

AND

REPUBLIC RESPONDENT

(Arising from Kangema PM Criminal Case No 236 of 2022.)

JUDGMENT

Factual Background

1. The Appellant is a resident of Kangema Subcounty in Murang'a. He was found in possession of 2.8 Kilogrammes of bhang and arrested. Thereafter he was arraigned in Kangema PM's Criminal Case No 236 of 2022, on a charge of trafficking narcotic drugs contrary to section 4(a) as read together with 4(b) of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, No 4 of 1994; with an alternative charge of being in possession of narcotic drugs. He pleaded guilty to the charge and was convicted on his own plea of guilty, and sentenced to 10 years imprisonment.

This Appeal

2. Aggrieved by the trial court's decision, he filed this appeal vide his undated Petition of Appeal filed in this Court on August 22, 2022, challenging both conviction and sentence. Later by an Amended Petition of Appeal dated September 7, 2022 abandoned his appeal on conviction, and retained only the appeal on sentence. His appeal herein is therefore only the 10 years sentence; and on the ground mainly that it is harsh and severe. He has in this appeal urged this Court to reverse it. The said amended appeal has two grounds, namely that:

1. The learned trial magistrate erred in law and in fact by imposing a harsh and excessive sentence on the appellant who was a first offender; and



2. The learned trial magistrate erred in law and in fact by her failure to consider the mitigation offered by the Appellant during the sentencing.
3. The appellant and the State filed written submissions on the Appeal, and when the appeal came up for hearing on January 20, 2023, this court in the interest of justice, and especially given that the appellant prisoner who was not represented by counsel, allowed the parties to orally argue the appeal, as they also highlight the main points in their respective submissions. The appellant's submissions were dated January 5, 2023 and filed on January 9, 2023, while the respondent's submissions dated January 13, 2022 were filed on January 18, 2023.
4. In highlighting his said written submissions, the appellant submitted that having been convicted on his own plea of guilty, his appeal is based on Section 348 of the *Criminal Procedure Code* (Cap 75 Laws of Kenya) as he is appealing the severity of the sentence. He further argued that the trial magistrate while imposing the said harsh and excessive sentence neither took into account his mitigation nor considered that the appellant was a first offender.
5. In her reply the Respondent's counsel, argued that the appeal was bad in law, as that under section 348 of the *Criminal Procedure Code*, no appeal shall be allowed for an accused who has pleaded guilty and has been convicted on the plea by a subordinate court, except as to the extent of the legality of the sentence. These were her exact words.

Analysis and Determination

6. Upon reading the appellant's Amended Petition of Appeal as well as the proceedings of the subordinate court, the record of appeal, as well as the respective written submissions, of the parties and hearing the oral arguments of both parties, my determination is as hereunder.
7. The respondent's counsel in her filed written submissions and in her oral arguments attempted, and unsuccessfully, to quote verbatim section 348 of the *Criminal Procedure Code*, by quoting as follows:

“No appeal shall be allowed in the case of an accused person who pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent of the legality of the sentence”. (My emphasis)
8. I respectfully beg to differ with the learned counsel, in the sense that, despite attempting to quote verbatim the said provision, her quote was as inaccurate as it was misleading, particularly in regard to the underscored part of her said attempted quote.
9. There is need of care, dexterity and due diligence in reading the law, as any slight goof even in punctuation or arrangement of words can cause a distortion and harm or mislead anyone who reads it without keenness, or relies on it; and worse when it is a court such as this. In reading, restating and quoting the law, much is expected of lawyers. An accurate rendition of section 348 of the *Criminal Procedure Code* is as follows.

“No appeal shall be allowed in the case of an accused person who pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or the legality of the sentence”. (My emphasis)
10. The substitution of “or” with “of”, has in the in the instant case created a whole different meaning. With the use of “or”, the import is that an accused person who has been convicted on his own plea of guilty may appeal his sentence, either on the ground of the extent (magnitude) of the sentence or on its legality. The option is on the appellant. The appellant in this appeal exercising that election in his



appeal elected to impugn the extent instead of the legality of his sentence of 10 years imprisonment by describing it as harsh and excessive., at least in his opinion. This is his Ground 1 of his Amended Petition of Appeal.

11. In consequence therefore the sole issue for determination in this appeal, and rightly so, is whether the sentence 10 years imprisonment that the trial court imposed on the appellant for the offence of trafficking bhang was harsh and excessive, or reasonable and non-improportionate. Under universal practices on sentencing as well as Kenya's Sentencing Guidelines, reasonableness and proportionality are key in determining the quantum or duration of a sentence, such as in this case. Arriving at a correct sentence should not be left to guess work or pre-adventure. It should be based on solid criteria and take into account the circumstances of the particular case. For instance, the age of the accused, aggravating factors, mitigating factors, etc.
12. On the facts and circumstances of this case, it is my finding that the trial court failed to apply a fairly objective approach as well as the imperative of reasonableness and proportionality. This the court did by instead substituting such noble parameters and protocols, with its own emotions, personal prejudices and personal knowledge. This is evident in the generalized claims made mode in its final verdict at sentencing, unsupported. This is exhibited in the following extract of the mitigation and sentencing, in the trial court on July 13, 2022 and July 18, 2022:

Court: Accused is found guilty on his own plea of guilty.

Prosecutor: No previous records. But I urge the court to consider circumstances of the case. Accused admitting selling narcotic drugs. Some of his customers are school going children. I thus urge court to mete out the maximum penalty provided under law.

Accused: I never used to sell to school children but to others. I am a first offender. I plead to be fined to be able to go out there. I started to sell narcotics [read bhang] because of my two children who are in secondary school. I sell narcotics [read bhang] to get money to pay their school fees.

Court: Noted.

Court: Submissions by the prosecution counsel and mitigating submissions by the accused are hereby considered.

However, considering the adverse effects that bhang has on population and the fact that accused shows no remorse or slight desire to stop trafficking in narcotics [read bhang], he is hereby sentenced to serve ten (10) years imprisonment.

14 days Right of Appeal.

13. With due respect, care should be taken in a trial court taking wholesome the factual claims that the prosecutor makes in response to the mitigation address of the accused. Especially since they such facts are in most cases off-curve, unsupported, their veracity untested and are not made under oath. A trial court need to receive such sentiments with caution as they can at times be misleading and merely calculated to deny the accused's mitigation a favourable consideration.
14. With regard to appeals an appellate court such as this court, may pursuant to Section 348 of the [CPC](#) interfere with a sentence of a trial court if it finds it either harsh, excessive, illegal or even unconstitutional. I find the ten (10) years imprisonment imposed on the appellant by the trial court rather harsh and excessive. I accordingly set that sentence aside and substitute it with a sentence of five (5) years imprisonment commencing on the date of sentence of the lower court ie, July 18, 2022, so as to include the period already served.



It is so ordered.

DATED, SIGNED AND DELIVERED ORALLY IN OPEN COURT THIS 27TH DAY OF JANUARY, 2023.

PROF N. SIFUNA

JUDGE

In the presence of:

Mr. Kirubi for the Appellant

The Appellant Present

Ms Otieno for Respondent

Quinteen Ndubi & Jackline Njeru – Court Assistants

