Maina v Republic (Criminal Appeal E050 of 2022)
[2023] KEHC 280 (KLR) (27 January 2023) (Judgment)

Neutral citation: [2023] KEHC 280 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E050 OF 2022

LN MUGAMBI, J

JANUARY 27, 2023

BETWEEN

ERICK MATHENGE MAINA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against conviction and sentence of the Senior Principal Magistrate's Court at Siakago (W. Ngumi, PM) dated 15th August, 2022 in Criminal Case No. (S.O) No. E890 of 2021)

JUDGMENT

1. The appellant Erick Mathenge Mainawas charged with the offence of trafficking in narcotic drugs contrary to Section 4(1) of the Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994.

2. The particulars of the offence were that the appellant, on the 8th day of December, 2021 at Kiritiri Township, Kithunthiri location in Mbere South Sub-County within Embu County jointly with another not before court were found trafficking Cannabis Sativa (bhang) to wit, 5kgs of street value of Kshs.150,000 on a motor cycle registration number KMFN 882G Sonlink make which was not in medical preparation form.

3. The second count was being in possession of cannabis sativa contrary to Section 3(1) as read with Section 3(2)(a) of Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994 Act.

4. The particulars being that on the 8th day of December, 2021 at Kiritiri Township, Kithunthiri location in Mbeere South Sub-County Embu County jointly with another not before court was found in possession of 23 Kgs of Cannabis Sativa of street value of Kshs.700,000 which was not in medical preparation form.

5. The third count also related to possession of Cannabis Sativa contrary to Section 3(1) as read with Section 3(2)(a) of Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994 Act.

6. The particulars of the offence being that on the 24th day of December, 2021 at Kiritiri township, Nyangwa Location in Mbeere South Sub-County within Embu County was found being in possession of 1Kg of Cannabis Sativa with street value of Kshs.30,000 which was not in medical preparation form.

7. After a full trial, the appellant was found guilty in all the three counts and sentenced to ten (10) years imprisonment on each count. Count I and II were to run concurrently but count III will run consequtively.

8. The appellant appealed against the conviction and sentence based on the following grounds:-

    1. That the learned trial magistrate erred in both matters of law and fact by imposing only a sentence of ten (10) years on each count without imposing a sentence of a fine (sic) without cogent reasons for non-compliance with the law.

    2. That the pundit trial magistrate erred in both matters of law and fact by convicting and sentencing the appellant without considering that the ingredients of trafficking narcotics were not proved beyond reasonable doubt.

    3. That the pundit trial magistrate erred in both matter of law and facts by failing to take into consideration that as a first offender the appellant was qualified for the benefit of law as stipulated under Article 50(2)(p) of the Constitution of Kenya 2010.

    He thus prayed that this appeal be allowed.

9. This is a first appeal and as the appellate court, my duty is to re-evaluate the whole evidence and arrive at my own conclusions save for the fact that I must always remember that I had no opportunity to see or listen to the witnesses as they testified (See Okeno vs. Republic 1972 EA).

Summary of Evidence

10. The prosecution evidence comprised of seven witnesses and several exhibits that were produced before the trial court.

11. The evidence of the prosecution mainly comprised of testimony of police officer who participated in the operation to seize the drugs in question and eventual arrest of the appellant. The police officers were PW1-PC Joseph Mukola; PW2-PC Esther Mutua; PW4-PC Yusuf Molu; PW5-PC Henry Kisila and PW6-PC Sospeter Simiyu.

12. Margaret Iruma Wachira, the Chief of Kithinthiri location testified as PW3. Stephen Tukei, PW7, a government Chemist Analyst also testified.

13. The operation occurred in two phases according to the witnesses. The 1st phase was on 8/12/2021.

14. On this particular day, they were successful in laying ambush at the house of the appellant where they recovered a substantial amount of Cannabis Sativa but could not arrest the appellant because despite finding him there together with an accomplice, both of them managed to escape in the midst of the altercation that ensued as a result of the ambush.

15. The 2nd phase was on 24/12/2021 when the appellant was arrested after being on the run for some time.

16. In respect of the operation of 8/12/2021, I will set out the testimony of PW1 which was substantially similar to those of the other police officers who participated in the raid albeit negligible variations. I will also briefly set out the testimony of the Chief, (PW3) who was called to witness the recovery.

17. PW1 was PC Joseph Mukola (according to the lower court proceedings, although in her judgment, the magistrate refers to him as Joshua Makokha).

18. He testified that on 8/12/2021 he was at Kiritiri market at around 10.30 am. He received a tip off that there was a man who was on his way to Kiritiri market to deliver a consignment of Cannabis for sale on board a motor-cycle registration number KMFN 829G.

19. He testified as follows with regard to his encounter with the motor cycle and its rider: -

> " On the motor cycle, he had tied a green sack in which I could not identify the contents at the time. He had worn a big baggy jacket that appeared swollen and it was clear there was something in the jacket."

20. At this juncture, he dashed to the station and informed the officer in charge of crime who in turn apprised the OCS.

21. A team of officers was quickly assembled to undertake the operation. It comprised of (PW1), PC Esther Mutua-PW2; PC Sospeter and Simiyu -PW6. The OCS and O.C. Crime also accompanied them.

22. On arrival at the compound of the appellant, there was motor cycle parked outside the house. The house door was ajar. PW1 and PC Simiyu (PW 6) entered the house. They found two men inside. One was the appellant (Mathenge) and another he could not recognize. He then asked the two men what they were up to. The appellant stood and responded: -

> " Tunajaribu Maisha."

23. Next to the appellant, there were 16 parcels in polythene bags which this witness described as Cannabis Sativa.

24. There was a blue bag with Cannabis seeds. There were two other bundles; one in a blue bag while the other, a blue-red bag was filled with plant material.

25. There was another transparent bag full of plant material and a green sack too, also full of suspected cannabis plant material.

26. In the ensuing commotion, the appellant sprung out of the house. P.C. Simiyu (PW6) tried to stop him but the appellant overpowered him and broke off. PW1 also struggled with the other accomplice but he also slipped from his grasp as well.

27. A search was then carried out and the suspected packages of Cannabis were all seized including the equipment that the police officers suspected were being used in connection with the said criminal activity.

28. He described the rest of the paraphernalia seized alongside the said Cannabis as follows: -

> " 2 dagger knives, one in reed sheath, a blender white and green in colour for blending the Cannabis into small pieces, ... two digital weighing scales, one black and one white in colour... there were also rizzler rolling papers suspected to be used for wrapping Cannabis, there were 31 packets of different colours ... there were also two motor cycles registration number KMCK 406 V red in colour make Tiger. The other motor-cycle did not have number plate ..."

29. Other than the above items, there was also one pair of handcuffs that was recovered, 6 mobile phones, personal identity card of the appellant number 31365157 bearing the name of Erick Mathenge Maina and also a KDF Certificate of appointment (C of A) in the name of the appellant and his photograph. The witness was able to identify all the above which were subsequently produced in P. Exhibits 1 to 21.

30. The appellant was arrested later on 24/12/21 by others police officers who testified before the trial Court.

31. During the recovery, the OCS alerted the OCPD who came to the scene and then invited the Area Chief (PW3) to also join them to witness the recovery that had been done.

32. On cross-examination by the appellant, PW1 confirmed that the entire quantity of suspected Cannabis found that day was 5Kgs. He replied: -

> " ... All the bhang weighed 5 Kg ... the bhang was 5 kgs at the time ..."

33. The testimony of PW2 – PC Esther Mutua and PW6 – PC Sospeter Simiyu who took part in the operation was substantially similar to the descriptive account contained in the evidence of PW1 with only minor or negligible variations.

34. The Area Chief PW3 Margaret Irima Wachira told the trial court that he was called to the scene (which was a house behind Kiritiri Dispensary) by the OCPD. She found the OCPD, OCS and DCIO and a number of items lying outside the house. The police informed her they had recovered from the house.

35. The second phase was the arrest of the appellant.

36. This was contained in the testimony of PC Sospeter Simiyu-PW6; PC Yusuf Molu-PW4 and PC Henry Kisila-PW5 which was also materially similar hence I will only set out the evidence of one of the witnesses.

37. PC Henry Kisila-PW5 testified that he together with his colleagues were on patrol duties within Kiritiri market on 24/12/2021 when he spotted the appellant whom he knew well outside the supermarket. He was aware that the appellant was at large over suspected bhang trafficking. When he saw the police officers, the appellant took off. They gave chase and caught up with him at Gataka area.

38. They searched him. From him, they recovered a kilogram of bhang, (P. Exh. 26), two rolling sticks (P.exh.29(a) & (b), and a mobile phone. They also recovered the military boots he was wearing (P. Exh.31).

39. All the exhibits recovered during the two episodes were produced in evidence by the investigating officer PC Sospeter Simiyu (PW6). In respect of the raid on 8/12/2021, the exhibits produced were:- sixteen (16) small polyethene bags with suspected cannabis as P.Exh.2, Green sack with suspected cannabis – P.Exh.6, big transparent paper bag with suspected Cannabis seeds – P.Exh. 5, two bags with Cannabis PExh.3(a) & (b), a blue and red bag with suspected cannabis – Pexh.4, weighing scales – Pexh.11(a) & (b), blender – Pexh.9, 2 rungus – Pexh.8(a)&(b), 2 daggers – Pexh.7 (a) & (b), 6 assorted phones – P.Exh. 1, National Identity Card with the name Eric Mathenge – Pexh.19, Certificate of Appointment -P. Exh.20, rizzler papers – Pexh. 31. Two motor cycles – make Tiger – KMCK 406 X. & the numberless motor cycle – Pexh.21: ten basins – P.Exh. 22, blue military boot – P.Exh. 23.

40. The exhibits recovered during the arrest on 24/12/21 were 1Kg of suspected Cannabis – P.Exh. 26, 2 rizzler papers P.Exh. 28, rolling stick – pliers 29, mobile phones make Itel – P.Exh. 31. At the time of arrest, the witness said that the accused had stuffed the suspected Cannabis (P.Exh. 26) on the right-hand side pocket of his black jacket. PC. Simiyu testified that the total value of bhang recovered

from the house was estimated at Kshs.150,000 while the 1 kg recovered on the day of arrest was about Kshs.30,000/=.

41. The exhibit memo was prepared by IP Mureithi in respect of suspected Cannabis that had been recovered. That one recovered from the house was preserved in four buckets of which a sample was scooped from each. The samples were produced as P.Exh. 34. The Khaki envelope containing the 4 samples was P.Exh.35. In respect of the recovery on the day of arrest, 2 samples – P.Exh. 36 were obtained. They were forwarded via Khaki envelop – P.exh. 37.

42. Thereafter, a report of Government Chemist was compiled confirming the samples to be Cannabis (P. exhibit 38 & 39).

43. Stephen Tukei, (PW7) a Government Chemist analyst produced the government analyst reports- P.Exh. 38 and P.Exh. 39.

44. The appellant gave sworn evidence in his defence during the trial. He stated in as follows in his opening: -

> " ... I am Eric Mathenge Maina. I come from Nyeri. I am a boda boda (sic) and I sell shoes. I know the offence I am charged with. I heard the evidence against me. I was found with bhang. It was not produced in court. I am using it and I take it always. If I am not able to find medicine, I take bhang to enable me sleep ... I have a report from the doctor as an exhibit in court ..."

45. In his submissions the appellant contended that there was no proof of the market value of the Cannabis in question and relied on Section 88(1) and (2) of Narcotics & Psychotropic Substances Control Act in that there was no certificate under the hand of a proper officer as to the market value of the cannabis that was produced in court.

46. He argued that he was convicted of a lesser offence of possession yet the sentence that was imposed of ten (10) years applied to more serious offence of trafficking. He further submitted that he was a first offender. He also submitted that the court ought to have considered giving him a less severe sentence as stipulated in Article 50(2)(7) of the Constitution:

47. He submitted that his two motor cycles were forfeited to the State on top of his 30-year custodial sentence and described the same as double jeopardy.

48. The appellant urged the court to substitute the consecutive sentence with concurrent one and cited the case of ROnald Nyaga vs. Rep (2020) eKLR.

49. In reply, the State/Respondent argued that it had proved all the elements of the offence, namely: possession of cannabis that the appellant was found with in his house on 8/12/2021 as attested to by evidence of PW1, PW2 and PW6.

50. Further, again on 24/12/2021 when he was arrested as confirmed through the testimony of PW4 and PW5. The cannabis was produced in court (P.Exh.1-6 and P.Exh.26) and reports confirming it was Cannabis produced – P.Exh.39 & 38.

51. On sentence, the state cited S.3(2)(a) and submitted that the sentences prescribed vary so that where one satisfies the court that Cannabis was intended for his own use, the sentence is ten (10) years but in any other case, the sentence is 20 years.

52. The State thus argued in sentencing the appellant, the court considered all the mitigating and aggravating factors and discretionary imposed an appropriate sentence.

Determination

53. Before delving into various issues emerging from this appeal, it is important that I set out the relevant legal provisions that are key to this determination.

54. Firstly, is what does trafficking entail? Under Section 2 trafficking means:

> " The importation, exportation, manufacturing, buying, sale, giving supplying, storing, administering, conveying, delivering, or distribution of narcotic drug and psychotropic substance..."

55. In an offence of trafficking therefore, it would be incumbent upon the prosecution to prove beyond reasonable doubt the following: - 13 | High Court Embu Criminal Appeal No. E050 of 2022

1. The substance in question was a forbiden narcotic or psychotropic substance under the schedule to the Act.
2. That any of the mentioned activities was done in relation to the forbiden substance, and;
3. The participation by the appellant.

56. The penalty for the offence of trafficking if convicted is provided under Section 4. It provides thus: -

> " Any person who trafficks in any narcotic drug or psychotropic substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence and liable :-
>
> a. In respect of any narcotic drug or psychotropic substance to a fine of Kshs one million or three times the market value of the narcotic drug or psychotropic substance or whichever is greater and in addition to imprisonment for life."

57. I now lay down the relevant provisions relating to possession.

58. Possession per se is not defined in the Act. However, possession of narcotic or psychotropic substance is an offence under the Act.

59. Section 3 provides: -

> " (1) Subject to subsection (3), any person who has in 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 cannabis was intended solely for his own consumption to imprisonment for ten years and in every other case, imprisonment for twenty years.
>
> (3) Subsection (1) shall not apply to: -
>
> (a) ...
>
> (b) ...

(c) a person who possesses the narcotic drug or psychotropic substance for medical purposes, from or pursuant to prescription of medical practitioner, dentist or veterinary surgeon."

60. In respect of an offence involving possession of forbiden psychotropic or narcotic substance, it is for the prosecution to prove beyond reasonable doubt the following: -

i. That the substance in question was prohibited narcotic or psychotropic substance under the Act.

ii. That the said was in possession of or under the power or control of somebody

iii. That the person was/is the appellant.

61. Moving now to count one (1), the appellant was charged with trafficking in narcotic drugs.

62. As to whether the substance was a narcotic psychotropic substance, the trial court found in the affirmative.

63. The said substance which was found pursuant to a search by the police officers was produced in court as (P.Exh. 1-6 and P.Exh. 26). Samples obtained from it and taken for analysis at the Government Chemist were confirmed to be cannabis as per the two reports, (P. Exh. 38 and 39. Cannabis is a prohibited drug under Schedule 1 of the Act. The finding that of the trial court that what was recovered is a prohibited drug under the Act was thus correct.

64. The next question by the trial court was whether there was trafficking of the said Cannabis.

65. It analysed the evidence and found that when PW1 got intelligence about a man who was transporting Cannabis using a motor cycle, he rushed to the police station to inform the OC Crime who informed the OCS and a team was quickly assembled. They did not find the man in transit with the said cannabis. Instead, they raided the house of the suspect where they found him packaging.

66. From the definition of trafficking under the Act, the trial court reasoned that there was no trafficking because none of the doings constituting trafficking was proved, namely: -

"transporting, exporting, manufacturing, buying, selling, giving, supplying, storing, administering, delivering, distributing or conveying".

67. In essence therefore, the trial court declined to convict the appellant for trafficking in count 1. However, it made an odd finding as follows:

".... I find the accused guilty of the offence of possession being the alternative to count 1 and possession in count 3. I find him guilty under Section 215 of the Criminal Procedure Code. He is acquitted on the first count..."

68. In spite of the above finding, in sentencing the appellant, it again flubbed by pronouncing itself as follows: -

"...the accused is sentenced to serve in the first count 10 years imprisonment. In the second count, he shall serve 10 years imprisonment. Both sentences shall run concurrently. The third count, he shall serve 10 years. To run consecutively noting that the offenses were not committed in the same transaction."

69. As correctly pointed by the appellant in his submission, the trial magistrate pronounced herself unequivocally in count 1. She said that:-

> " He is acquitted in the 1st count."

70. Indeed, a perusal of record which I have alluded to in the foregoing shows why the trial magistrate declined to convict in count 1, and perfectly so. How then did the learned magistrate turn around to impose a ten (10) year sentence in the same count 1 she acquitted him on is baffling.

71. The trial magistrate then proceeded to say that she was acquitting the appellant in count 1 but convict him on alternative to count 1 for the offence of possession. There was no alternate charge to count 1 for possession that had been preferred against the appellant.

72. It may be that the trial court meant applying Section 179 of the Criminal Procedure Code to substitute for a lesser included offence even though not charged since possession would be a lesser offence of trafficking. That could not be possible as the court also convicted him in count II. Looking at particulars of Count II, they relate to the recovery done in the house of the appellant. It was not a separate incident nor a separate date. In fact, although in count II the amount stated is 23 kgs, when the appellant cross-examined PW1 on total Cannabis recovered on 8/12/21, he was categorical that it was estimated at 5 kgs and there was no other. The only other recovery done was on 24/12/21 at the time of the appellant's arrest.

73. Evidence is thus clear, what is in count 1 and count II emanated from one source, that is, the recovery in the house of the appellant on 8/12/21. Indeed, no recovery was ever made in transit on board a motor cycle as particularised in count 1.

74. There was absolutely no evidence to substantiate the particulars in count 1.

75. Another error by the trial court. It never made any specific finding on count II. Throughout the entire judgment, it does not even mention it and the only time it appears is during sentencing.

76. Having gone through the entire evidence therefore, this is my take in this appeal.

77. I agree with the trial court in count I to the extent that the prosecution could not establish count 1 based on evidence it presented.

78. I do not agree however that the trial court could convict for possession whether as alternate to count I and still proceed and convict on count II for it was one incident, same date same time. That would be multiplicitous and would subject the appellant to double punishment for one offending act charged twice.

79. Having said so, was count II proved by evidence adduced? Clearly, my finding is that it was. The substance seized from the house (P.Exh.1-6) whose samples were taken for analysis was confirmed to be Cannabis as per Government analyst report P.Exh.39.

80. The officers who participated in that operation positively identified the appellant as the person who together with another they found packing the said Cannabis in his house. Besides the physical identification, his identity card and military appointment card P. exhibit 19 & 20) were recovered from that house which connects him to that dwelling where it was recovered.

81. In his defence, the appellant accepted that he was found with Cannabis but explained that he was taking it for medical reasons. He could not however provide the medical prescription allowing to take cannabis as indicated in his defence. The letter he exhibited (D. exhibit I) was in my view correctly

rejected by the trial court. It was not a medical prescription and did not permit him to take cannabis either.

82. I would thus convict the appellant for the offence of possession in count II.

83. Nevertheless, I would be hesitant to rely on the quantity quantities cited in particulars of count II, namely, 23 kgs. Throughout the evidence on record, no such amount was attested to by the witnesses. In cross-examination of PW1 by the appellant, PW1 was categorical that the entire quantity recovered on 8/12/21 was 5 kgs and no other. Indeed, he was clear that it was an estimate, not exact. There was no evidence that it was weighed and exact weight found.

84. The appellant, although admitting he was found with bhang, did not indicate the quantity either, he only insisted it was for his own consumption. He thus did not effectively challenge the estimation by the prosecution witnesses.

85. The trial magistrate who had the opportunity of seeing the quantity produced remarked as follows in regard to the quantities-

> " The amount he was found with, both on 24/12/21 and 8/12/21 was too much."

86. Again, the court did not also make any specific finding as to the exact quantity.

87. In view of the above, I find that it would be safe to go by the estimate that the prosecution witnesses provided, that is approximately 5kgs, not 23kgs as stated in the charge sheet. I would thus hold count II is proved to the extent of possession of approximately 5kgs of cannabis.

88. Count III relates to what was recovered on the date of arrest. Again, the appellant never disputed the arrest and the recovery done on him. The Government analyst report confirmed that a sample taken from (P.Exh. 26) which was recovered from him on 24/12/21 was Cannabis per government analyst report (P.Exh. 38). The conviction in respect of count III was thus proper and I would not interfere with the same.

89. On sentence, the appellant faulted the trial court for not considering a lenient sentence, since he is a 1st offender. Secondly, for imposing a consecutive sentence and not considering giving him the benefit of a lesser severe sentence.

90. The State position was that the court correctly applied its mind to all the mitigating and aggravating factors and imposed the correct sentence.

91. The guiding principle in altering sentences was laid down in Ogolla S/O Owuor vs. R (1954) EACA 270 as follows: -

> " The court does not alter the sentence unless the trial Judge acted on upon wrong principles or overlooked some material factors. To us, we would add, third criterion, namely; the sentence is manifestly excessive in view of circumstances of the case ..." R. vs. Shermosky (1912) YLR.

92. In the present case, I have already demonstrated why the sentence imposed on count I of 10 years imprisonment is untenable.

93. The trial court pronounced itself in its judgment that it had acquitted the appellant on this count.

94. Secondly, it purported to convict him on a purported alternative charge to count I of possession which had not been preferred in the charge sheet.

95. Thirdly, I considered that it could still not substitute under Section 179(1) of the Criminal Procedure Code and at the same time convict him and sentence him in count II as it was basically one incident of same date, same time. It would be multiplicitous to do so.

96. The ten years sentence imposed on count 1 was thus without merit and is set aside.

97. As to the other sentences, the sentence in count 2 & 3, I have observed that the court asked for probation officer's report. I have read the report. I have noted from the report that the appellant had history of mental illness. He was discharged from the military because of that. He has had constant brushes with the law. He has also been earning a living by selling shoes. At the time he was convicted and sentenced, he was 28 years old. He was married to Gladys Wanja a hairdresser and they had been blessed with a one-month old son. He also had other ongoing cases at Siakago court.

98. As to the quantity of bhang found in his possession, from the evidence on record, it was approximately 6kgs in total, that is count II, an estimated 5 kgs as attested by PW 1 and count III, an estimated 1kg.

99. The trial court imposed a minimum sentence of 10 years on each count. It did not give consideration the quantity netted. The charge sheet was misleading in count 2 to allege it was 23 Kgs yet in actual fact, according to the testimony it was approximately 5kgs. That was a material factor that the trial court ought to have considered.

100. The trial court also expressed that the sentences were to run consecutively.

101. Additionally, it confiscated two motor cycles found in the house during the raid at his house on 8/12/2021. It ordered those motor cycles to be forfeited to the State.

102. In Daniel Kayalo Muema vs. R Court of Appeal at Nairobi Criminal Appeal No. 479 of 2007, the Court of Appeal held that there was room for the court to exercise discretion in passing sentence under the Narcotic Drugs and Psychotropic Substances Control Act. In overturning a High Court decision on sentence (Sitati, J), it stated:-

> " It is manifest from the judgment of the Superior Court that the court understood the phrase "shall be liable" in Section 3(2)(a) of the Act as presenting a mandatory minimum sentence of the offence of possession of cannabis sativa. The 1st observation to make is that generally speaking the penalty prescribed by written law for an offence, unless the contrary intent appears is maximum penalty. This principle is confirmed in Section 66(1) of interpretation of General Principles Act Cap. 21 Laws of Kenya...
>
> We have no doubt that the sentences of 10 years and 20 years imprisonment prescribed in Section 3(2)(a) for the possession of Cannabis sativa are the maximum and the court can lawfully impose a shorter term. Furthermore, although Section 3(2) does not expressly provide for a fine, the court can lawfully in accordance with section 26(2) of the Penal Code sentence the offender to pay reasonable fine in substitution for imprisonment. We conclude the Superior Court misconstrued Section 3(2)(a) in enhancing the sentence of imprisonment..."

103. Under the judiciary sentencing, at paragraph 23.8- a number of factors are listed by way of illustration as mitigating factors. They include mental illness and being 1st offender among others. So far, apart from the appellant escape when police tried to arrest him twice, which in my view is a natural reaction

of many offenders, there is no real aggravating circumstance that was attributed to him. At paragraph 23(5) of the Judiciary Sentencing Policy it is provided: -

> " The effect of mitigating circumstances/factors is to lessen the term of custodial sentence. The court shall consider the mitigating circumstances/factors and deduct some time off the fifty percent of the custodial sentence provided by statue from the particular offence..."

104. In my view, considering that the appellant was 1st offender, the quantity that was recovered from him and given the history of his mental illness as reflected in his probation report, the fact that he has a very young family and he is also a relatively young man, I would consider, I find the trial court sentence was quite heavy on him and thus manifestly excessive.

105. I thus set aside the sentences and order that he will serve six (6) years imprisonment in count II and three (3) years imprisonment in count III. The sentences will be consecutive as they were committed on two different occasions.

106. As for the forfeiture of his two motor cycles, I refer to Section 20(1) of the Narcotics and Psychotropic Substances Control Act No. 4 of 1994.

> "
>
> "(1) Any machinery, equipment, implement, pipe, utensil, or other article used for commission of any offence under this Act shall be forfeited to the Government.
>
> (2) Every conveyance used for the Commission of any offence under this Act or for carrying any machinery, equipment, pipe, utensil, or other article used for commission of any offence under this Act, or any other narcotic drug or psychotropic substance shall be forfeited to the Government.
>
> Provided that where, on application made by any person who was the owner of conveyance to the court in which any prosecution for any offence under this Act or before any proceeding under this Act for forfeiture and condemnation of any conveyance, not being a proceeding under Part IV is pending, the court is satisfied beyond reasonable doubt that
>
> a. The person was the owner of the conveyance and,
>
> b. In the case of an aircraft, or ship, every person who was responsible officer thereof; when it was made use of for such conveyance, was not concerned in or privy to such use, the conveyance shall be restored to the owner by the court.

107. Lawful forfeiture is to be made by the trial court only when there is irrefutable evidence that the machinery, equipment, article or implement in question was being used to facilitate or aid in the commission of an offence under the Act. It was never intended that it would be a matter of conjecture or innuendo. In the instant case, the trial court found, and rightly so, that the offence of trafficking was not proved and acquitted the appellant on that charge. The appellant was not arrested while transporting or conveying the said cannabis on any of the motor cycles that was forfeited by the trial court. Evidence adduced was that they were seized from his house together with other items when the police raided the house in search of cannabis. The other items were ordered restituted to him except the two motorcycles. What then was the basis of forfeiting his two motorcycles?

108. Going by evidence on record, there was no valid justification to warrant making of those forfeiture orders against the appellant's property, namely, the two motor cycles. I am prepared to set aside those forfeiture orders but with one condition. From the evidence, it was demonstrated that one of the motor

cycles was numberless. I do not know whether that means it was never registered or that it had been acquired dubiously. This is a matter that needs an explanation.

109. The condition I make therefore is that the appellant will be entitled to get back his motor-cycles upon prima facie proof of ownership.

110. The sentences of imprisonment that I have already imposed in substitution of the lower court sentence are:-

i. In count II to serve six (6) years imprisonment.

ii. In count III to serve three (3) years imprisonment.

iii. All will run consecutively and commence from the date of sentence by the trial court.

JUDGMENT DATED AND DELIVERED VIRTUALLY THIS 27TH DAY OF JANUARY, 2023.

L.N. MUGAMBI

JUDGE

In the presence of:-

Coram:

Court Assistant: Kinyua

Appellant: Present

DPP for Respondent: M/s Gakuo

COURT

Judgment delivered virtually.

L.N. MUGAMBI

JUDGE