



**Obwogi v Republic (Criminal Appeal 31 (E026) of 2022)
[2023] KEHC 26782 (KLR) (22 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26782 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL 31 (E026) OF 2022
HI ONG'UDI, J
DECEMBER 22, 2023**

BETWEEN

EDWIN ASAIRI OBWOGI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal against the conviction and sentence by Hon. C.N. Sindani P.M. on 13th December 2022)

JUDGMENT

1. Edwin Asairi Obwogi, the appellant, was charged with the offence of being in possession of bhang contrary to Section 3(1)(a) as read with Section 3(2)(a) of the *Narcotic Drugs & Psychotropic Substances (Control) Act* No. 12 of 2012. The particulars being that the appellant on the 10th day of December 2022 at Riobaru Sub location Nyamayusu Location Kenyerere Division in Sameta Sub-County within Kisii County was found being in possession of three hundred and eight (308) rolls of bhang valued at KShs. 4,500/=.
2. He was arraigned in Court on 13th December 2022 when the charge was read to him in Kiswahili language. He admitted the charge and also the facts and a plea of guilty entered. He was thereafter convicted on admission. He was a first offender. In mitigation he said he was sorry. He was fined KShs. 308,800/= in default three years imprisonment.
3. Being dissatisfied, he filed this Petition of Appeal dated 20th December 2022 through Nyariki and Company Advocates raising the following grounds: -
 - i. That the plea of guilty was not unequivocal.
 - ii. That the particulars as framed in the charge sheet did not disclose the ingredient of the offence as framed.



- iii. That the sentence of a fine of three hundred and eight thousand eight hundred and in default a custodial sentence of three years was manifestly harsh and in excess in the circumstances.
4. The appeal was canvassed by written submissions.

The Appellant's submissions

5. These are dated 30th October 2023. In them Counsel indicated having abandoned grounds (i) & (ii). He thus addressed the Court on ground (iii) only. He submitted that the value of the bhang was only KShs. 4,500/= yet the fine imposed was KShs.308,800/= which was manifestly harsh. He urged the Court in exercising its discretion to intervene and offer an alternative sentence. He contended that the period of ten (10) years served was sufficient punishment.

The Respondent's submissions

6. The same are dated 18th December 2023 having been filed by Learned Counsel Brian P. Ayodo for the ODPP. He opposes the appeal and submits that the sentence is legal and very lenient. He referred to Section 3(2) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No. 4 of 1994.- Counsel therefore urged the Court to dismiss the appeal and uphold the decision of the Trial Court.

Analysis and Determination

7. This is a first appeal and this Court has a duty to re-evaluate and reconsider the evidence before the Trial Court as well as the Judgment and arrive at its own independent judgment on whether or not to allow the appeal. See *Okeno v Republic* (1972) EA 32; *Pandya v Republic* [1975] EA 336.
8. I have considered the grounds of appeal, evidence on record, both submissions and the law. The appellant having withdrawn the 1st and 2nd grounds of appeal, this Court is left with only the 3rd ground to determine. That is whether the sentence meted out on the appellant should be interfered with or not.
9. To begin with the circumstances under which an appellate court can interfere with an accused's sentence as prescribed by the trial court were underscored by the Court of Appeal in the case of *Benard Kimani Gacheru v Republic* (2002) eKLR 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, the 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 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.”

10. Accordingly, this Court in analyzing whether the sentence meted out was appropriate or in need of review will have to consider whether the trial Court applied the requisite guiding principles in issuing the sentence. These principles were highlighted in the case of *Dalmas Omboko Ongaro v Republic* [2016] eKLR as follows:

“9. In order to arrive at a conclusion that a sentence imposed by the trial court was harsh, the appellate court must have a basis for reaching such a conclusion. In my view, this Court has to consider whether the trial court properly applied the sentencing principles in imposing sentence.



10. The principles of sentencing were summarized at page 86 paragraph B of the *Judiciary Bench Book for Magistrates in Criminal Proceedings* (published by the Kenyan Judiciary in 2004) as follows:

“In determining what is the appropriate sentence to mete out, the Court has to consider such factors as the nature of the offence, the attitude of the accused person, prevalence of the type of offence, the seriousness of the offence, the circumstances under which the offence was committed, the effect of the sentence on the accused person, the fact that the maximum sentence is intended for the worst offenders of the class for which the punishment is provided, etc. (*Makanga v R*. Criminal Appeal No. 972 of 1983 (unreported)). The Court may also consider the value of the subject matter of the charge (*Mathai v R* [1983] KLR 442) and whether there has been restitution of the property by the accused (*Hezekiah Mwaura Kibe v R* [1976] KLR 118).”

The antecedents of an accused person also come into play when the Court is considering the appropriate sentence. If an accused person is a first offender the sentence ought to reflect this fact as the aim of the Court is to encourage reform and discourage recidivism.”

11. In this matter the appellant was charged with being in possession of bhang (308 rolls) contrary to Section 3(1)(a) as read together with Section 3(2)(a) of the *Narcotic Drugs and Psychotropic Substances (Control Act)* No. 12 of 2012. A perusal of the Act No. 12 of 2012 shows that Section 3 of the Act No. 4 of 1994 was never amended. It was therefore an error for the prosecution to cite it then.
12. Furthermore, the appellant was first arraigned in Court on 13th December 2022. By this time there were already other amendments to the said Act, and Section 3 was affected. The said amendments came into effect on 21st March, 2022. They provide as follows:

13.

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 to a term of not more than five years or to a fine of not more than one hundred thousand shillings;
- b in respect of a narcotic drug or psychotropic substance, other than cannabis, where a person is in possession of less than one gram, to a fine or not less than five million shillings, or to imprisonment to a



term of not less than five years, or to both such fine and imprisonment; and

- (c) to, in addition to the sentences in paragraph (a) and (b) respectively, committal to appropriate court appointed treatment programme or to voluntary submission to a rehabilitation programme for a period not less than six months, where the court deems fit.

14. What was being amended by the [Narcotic Drugs & psychotropic Substances \(Control\) \(Amendment\) Act 2022](#) in as far as the charge in this case is concerned was Section 3 of No. 4 of 1994. And as already stated earlier Section 3 was NEVER affected by the [Narcotic Drugs & Psychotropic Substances \(Control\) \(Amendment\) Act 2012](#).
15. In this case the appellant should have been charged with being in possession of bhang contrary to Section 3(1)(a) of the [Narcotic Drugs & Psychotropic \(Control\) \(Amendment\) Act](#) No. 4 of 1994 as read with Section 3(2)(a) of the [Narcotic Drugs & Psychotropic Substances \(Control\) \(Amendment\) Act](#) No. 4 of 2022 which came into effect on 21st March 2022.
16. The Act cited in the charge sheet as No. 12 of 2012 had no relevance to the charge. It did not disclose any offence against the appellant and should have been amended on the onset. That was never done.
17. The appellant was convicted and sentenced on 13th December 2022. He has therefore served one (1) year plus one (1) week in Prison. I would in all fairness not consider a retrial since he never contributed to the occurrences of that day. The sentence served is sufficient punishment. In my view the appellant has learnt his lesson.
18. I allow the Appeal, quash the conviction and set aside the sentence. The appellant shall be released forthwith unless otherwise lawfully held, under a separate warrant.
19. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED AT KISII THIS 22ND DAY OF DECEMBER 2023.

H.I. ONG'UDI

JUDGE

In the presence of:

Mr. Aming'a for Mr. Nyariki for the Appellant

Mr. Ochengo for the State

Otieno: Court Assistant

Appellant

