



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CRIMINAL APPEAL NO. E107 OF 2021

MARIA ELENA COLMENARES.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an appeal from the decision of Hon. L. O. Onyina, (Chief Magistrate) rendered on

24th June, 2020, vide Criminal Case No. 18 of 2018, at the Chief Magistrate's Court at JKIA)

1. The appellant was arrested and arraigned before the Chief Magistrate's Court at JKIA, on 6th February 2018, charged with the offence of; trafficking in narcotic drugs contrary to; section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994 (herein "the Act"). The particulars of the charge are as per the charge sheet.
2. The appellant pleaded not guilty and the case proceeded to full hearing. The prosecution case was supported by evidence of eight (8) witnesses. Corporal Ruben Muniolo (PW1), attached to Anti-Narcotics Unit (ANU) at Jomo Kenyatta International Airport, testified that, on 1st February 2018, at about 1500 hours, he was on duty with Corporal Faith Naserian (PW2), when Officer in Charge, (ANU); Chief Inspector Sophia Kinoti informed them that, there was narcotic drug trafficker suspect and instructed them to wait at terminal 1E.
3. That, the Chief Inspector gave them the description of how the suspect was dressed, therefore they were able to spot her at the Immigration counters. That, she cleared with Immigration desk and collected a greenish suitcase from the baggage hall, and the officer intercepted her, confiscated her passport and escorted her to the narcotics office.
4. Upon arrest, PW2 conducted a search of the content of the suitcase and recovered a powdery substance concealed in a clear polythene bag hidden in a false bottom, which was suspect. PW1 then prepared an inventory, which was signed the following day, 2nd February 2020 after photographing, weighing and sampling was done and the flight manifest collected from the Immigration office.
5. The investigation into the matter continued where upon, Sophia Mukiri Kinoti weighed of the powdery substance, and was found to be 2085.44 grams. Dennis Owino (PW3), the Government Analyst, gazetted vide Gazette Notice No. 6934, dated 12th July 2007, and attached to the Government Chemist Department, on 2nd February 2018, went to the Narcotics Unit at JKIA, and witnessed the weighing and took a sample thereof of; 1.19 grams, a certificate of sampling was prepared and produced in court as exhibit 10.
6. On 6th February 2018, the sample was received at the chemist from Corporal Otando (PW7) and analysed. That, it was found to contain 35% pure cocaine a report to that effect was prepared and produced as exhibit 13. In addition, Joshua Okalo (PW4), attached to the National Police Service for drug enforcement, appointed vide Gazette Notice No. 12710 dated, 3rd October 2011 for purposes of valuation of drugs in line with section 86 of the Act, valued the seized narcotic drug and gave the drug weighing 2085.44 grams, a value of; Kshs. 4,000. per gram thus a total of Ksh. 8,341,760.
7. That, Chief Inspector Sophia Mukiri (PW5) the in-charge Anti-Narcotics Unit to JKIA, took the suspected narcotic drugs and kept them in safe custody. She produced the seizure notice issued to the accused as exhibit 3. Similarly, Corporal Erick Mugendi (PW6), from the Criminal Investigation Department, attached to the Scenes of Crime, took photographs of the weighing and/or the suspected narcotic drug, and produced them and his report dated 10th September 2018 as; exhibit 16 (a) to (i) and 17 respectively.
8. At the close of the prosecution's case, the trial court ruled that, the accused had a case to answer. The accused supported her case by her evidence led through a sworn statement. She did not call any witness. She stated that she was arrested on the 2nd of February 2018, by an armed white man who took her to a room where there were four other people.
9. That she did not understand what the people were saying and she was forced to sign a document that she did not know its content. She

denied that the suitcase searched belonged to her and that alleged that, it was the white man who brought the bag into the room. Further, that she did not understand what the interpreter, Peter Musyoki (PW8) the Spanish interpreter was saying. She also denied being present when the bag was opened and photographs taken.

10. At the conclusion of the case the trial court rendered a judgement dated; 4th June 2020, and held that, the prosecution had proved its case beyond reasonable doubt and convicted the appellant.

11. On 24th June 2020, the learned counsel Mr. Ondiek, counsel representing the appellant, stated in mitigation as follows: -

“The accused is a first offender. We plead for leniency. She is a single mother and she is the only breadwinner in her family. She has cooperated with the prosecution for the last three years and she is very remorseful. She also supports her extended family and she is sick. She has osteoporosis which has affected her pelvis. She cannot even bend. She has medical documents showing that she has that condition. We ask you to take into account the period she has been in custody for three years. I know the court has no discretion on mandatory one year, but the composite sentence we pray that you reduce it to the period served in custody and she be repatriated to her country upon service of the mandatory sentence...We also urge the court to take into account the outbreak of COVID-19 so that a non-custodial sentence is appropriate.”

12. On 25th June 2020, the trial court considered the mitigation by the the appellant and stated as follows while sentencing the appellant:

“I have taken full account the period of time the convict has spent in remand custody awaiting trial, alongside the mitigation made by the advocate on record for the convict herein. I have also taken into account the nature of the charge, the quantity and value of the cocaine in question and the sentences provided for at section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, No. 4 of 1994. I have also taken into account the fact that the convict has during the trial, been on treatment and has been having difficulties in walking and standing up. Her advocate has informed the court in his mitigation that she has some disease of the bones. There is a need to balance all these considerations alongside the need to discourage commission of offences related to trafficking in narcotic drugs.”

13. The appellant was then sentenced to pay a fine of; Kshs. 20 million and in default one (1) year imprisonment and in addition, serve ten 10 years' imprisonment.

14. However, the appellant is aggrieved by the decision of the trial court and has appealed against the same, vide an undated; Petition of appeal on the following grounds, reproduced verbatim:

- a) That, I am so remorseful.
- b) That, I am a first offender.
- c) That, I am sick and require to go for an operation on my back.
- d) That, I am a single mother of four children.

15. The appeal was opposed by the Respondent vide grounds of opposition dated 21st October 2021, which states:-

- a) That, the prosecution proved its case against the Appellant's appeal and standard of beyond reasonable doubt.
- b) That the sentence that was meted out by the trial court against the Appellant was legal and lenient.
- c) That the Appellant's appeal lacks merit, and should accordingly be dismissed.

16. The appeal was disposed of vide filing of submissions which I have considered. The appellant filled her submissions on; 18th October 2021, and submitted that, she was not granted an opportunity to mitigate as required under section 216 of the Criminal Procedure Code, that provides as follows: -

“The court may, before passing sentence or making an order against an accused person under section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made”.

17. She submitted that, under sections 216 and 329 of the Criminal Procedure Code, the court had the jurisdiction to hear her mitigation. Section 329 of thereof states that:-

“The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed”.

18. The appellant submitted that, she was remorseful for the offence, a consideration to be taken into account before sentencing. She placed reliance on the case of; Michael Kalewa v Republic (2018), where the court took into account the sentencing policy guidelines (2016) and the aggravating and mitigating circumstances.

19. The appellant further submitted that, she had been rehabilitated and cited paragraph 4.1 of the Sentencing guidelines policy that states the objective of a custodial sentence is reformation and rehabilitation. She further argued that the court should consider the time that she spent in custody during trial and relied on section 333 (2) of the Criminal Procedure Code and the cases of; Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR and Vincent Sila Jona & 87 others v Kenya Prison Service & 2 others [2021] eKLR.

20. The Respondent filed submissions dated; 19th November 2021, and submitted that, the court considered the time the appellant spent in remand custody and the seriousness of the offence that required a deterrent sentence. It was argued that, the sentence of ten (10) years instead of a maximum life imprisonment was lawful under the Act. That, the learned trial magistrate took into consideration the fact that, the appellant was unwell during the entire process and cited paragraph 20.25 of the Judiciary Sentencing Guidelines that provides that:

“There is no special consideration for terminally ill and elderly offenders. However, as with the case of offenders with disability, the consideration is whether in view of the illness or age, the sentence is rendered excessive. There are two dimensions worth considering. First, whether the illness or old age would cause the offender to experience undue and unjustifiable hardship in custody. Further, whether the conditions in custody would be termed inhuman bearing in mind the offenders’ state.¹³⁴ Second, whether the offender’s condition is one that would cause undue burden on other offenders and/or prison officers taking care of him/her”.

21. I have considered all the arguments advanced herein and the materials before the court and I find that, the appeal herein is apparently on sentence per se. The appellant confirmed the same during the hearing. As such I shall not consider the appeal on conviction and I confirm the same to have been safe and sound.

22. As regards the sentence I find that, sentencing is the discretion of the trial court and an appellate court can only interfere with the sentence under very specific or special circumstances, as held in the case of; Benard Kimani Gacheru vs Republic (2002) eKLR that: -

“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 stated is shown to exist.”

23. Similarly, in the case of; Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No. 253 of 2003 the Court of Appeal stated that:

“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 of principle must be interfered.”

24. In determining the appropriate sentence, the court should take into consideration the mitigating factors, as well as aggravating factors. In that regard, the Supreme Court in the case of; Francis Karioko Muruatetu & another v Republic [2017] Eklr stated as follows: -

“To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- (a) age of the offender;*
- (b) being a first offender;*
- (c) whether the offender pleaded guilty;*
- (d) character and record of the offender;*
- (e) commission of the offence in response to gender-based violence;*
- (f) remorsefulness of the offender;*
- (g) the possibility of reform and social re-adaptation of the offender;*
- (h) any other factor that the Court considers relevant.”*

25. Pursuant to the aforesaid, the Court of Appeal Mohammed Hussein Mohammed v Republic [2019] eKLR observed as follows:-

“The essence of the Supreme Court’s holding in the Muruatetu case is that the principle of fair hearing extends to the sentencing stage wherein mitigation as an important congruent element of fair hearing comes into play. Mitigation is what enables the court to assess and apply its mind to the surrounding circumstances of each case for the sole purpose of meting out an appropriate penalty.

The centrality and importance of mitigation in our criminal legal system is embraced under Sections 216 and 329 of the Criminal Procedure Code which require a sentencing court to hear and take into account mitigating factors before sentencing a convicted person.”

26. Similarly, the provisions of; paragraph 4.1 of the sentencing policy referred to herein, provides that:

“4.1 Sentences are imposed to meet the following objectives:

- 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.*
- 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.*
- 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.*
- 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.*
- 5. Community protection: To protect the community by incapacitating the offender.*
- 6. Denunciation: To communicate the community’s condemnation of the criminal conduct.*

27. As regard the subject matter herein, I find that, the learned trial magistrate has clearly stated the factors that were considered before sentencing the appellant and the same are well within the parameters of the law. The sentence imposed is in my considered opinion, within the provisions of; section 4 (a) of the Act, 1994, which provides that: -

“Any person who trafficks in any narcotic drug or psychotropic substance or any 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 one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life.”

28. As such the sentence is lawful and legal. However, the appellant argues that, the period she was in custody was not considered. I note that, the trial court stated that, it was considered. In that regard, I refer to section 333 (2) of the Criminal Procedure Code which states that; -

“(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) 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”.

29. In considering the aforesaid provisions, the Court of Appeal in the case of; Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR stated that:

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the Criminal Procedure Code. That provision provides as follows:

“333(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) 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.”

The appellants have been in custody from the date of their arrest on 19th June 2012. 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. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. “Taking into account” the period spent in custody must mean considering that period so that the imposed sentence 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 the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants’ sentence of imprisonment to run from the date of

their arrest on 19th June 2012.”

30. In the same vein, the Court of Appeal in the case of; *Bethwel Wilson Kibor vs. Republic* [2009] eKLR stated that:

“By proviso to section 333(2) of Criminal Procedure Code, where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the Appellant did not specifically state that he had taken into account the 9 years’ period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009, he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.”

31. I find that, the learned trial magistrate herein merely indicated that, he had taken into account the period the appellant was in custody without specifying the period and/or indicating when the sentence commenced. Pursuant to the aforesaid provisions, I find and hold that, clarity ought to be put on the sentence meted herein in terms of when it should commence.

32. I therefore order that, the sentence imposed of ten (10) years should run from the date the appellant was arraigned in court on 6th February 2018. However, no remission will be applied to that sentence, the remissions shall be calculated and applied to the custodial sentence served from the date of sentence. The rest of the orders on sentence are upheld.

It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED AT NAIROBI ON THIS 31ST DAY OF MARCH 2022.

GRACE L NZIOKA

JUDGE

In the presence of:

Appellant present in custody at Langata Women Prison

No appearance for the appellant

Ms Kibathi for the Respondent

Edwin Ombuna - Court