REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 32 OF 2019

DANSON NJOLA MWAMBANGA.....APPELLANT

VERSUS

REPUBLIC.....APPELLANT

(Being an appeal against the sentence in Lamu Principal Magistrate's Court Criminal Case No. 131 of 2019 delivered by Hon. V. K. Asiyo (SRM) on 23/3/2019)

Coram: Justice Reuben Nyakundi

Mr. Alega for the State

Appellant in person

JUDGEMENT

This is an appeal preferred by Danson Njola Mwambanga, the appellant who was charged with the offence of being in possession of narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994.

The brief particulars are that on the 10/8/2019 at around 2300 hrs at Mkomani area at Lamu West Sub-County the appellant was found in possession of narcotic drugs, namely cannabis to wit 353 big rolls with an estimated market value of Ksh.176,500/= which was not meant for medical purposes in contravention of the Act.

The appellant through a plea-bargaining negotiated agreement pleaded guilty to the charge, in which he was convicted to five (5) years imprisonment.

Being aggrieved with the order on sentence appellant preferred an appeal alleging that the penalty of five (5) years was excessive and punitive in the circumstances of the case.

Determination

The only issue before court is whether the appellant has placed before the court sufficient material for review of sentence. The answer to that question is to be found in the well settled jurisprudential principles in a plethora cases; in **Kyewahabye v Uganda Cr. Appeal No. 143 of 2001**. It was held that **"An appellate court is not to interfere with sentence by a trial court which has exercised its discretion on sentence unless the exercise of discretion is such that it results in the sentence imposed to be manifestly excessive or so law as to amount to a miscarriage of justice or where a trial court ignores, to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle."** Similarly, in **Ogalo S/O Owoura v Rex [1954] 24 EACA 70** that **"this court has powers to interfere with any sentence imposed by a trial if it is evident that the trial court acted on wrong, principles or overlooked some material factor or the sentence is illegal or manifestly excessive as to amount to a miscarriage of justice." (**See also **Wanjema v R [1971] EA 494).**

In this appeal I bear in mind that sentencing is a discretion of the trial court, and thus appellate court only interferes with a sentence passed by that court based on the settled principles in **Ogalo case (supra).** There is no power donated to the appeals court to interfere with the sentence for the mere reason that it would have passed a different sentence if it was trying the appellant. It is also imperative to remind the appellant that harsh and excessive is not argued of appeal but an area of law in which the trial court reigns supreme harsh and excessive cannot be implied without elaborative specificity. It is not reason to disturbs the sentence imposed by the trial court. (See **Pandya Florina v R (SCA 7 of 2009**).

In order to resolve this specific grievance on sentence, I have to go back to the record. It is clear from the perusal of the record and what transpired at the trial a pre-sentence report was one of the tools conserved before sentencing. Further its acknowledged that the appellant entered into a negotiated plea-bargaining agreement. He was initially charged with four counts namely; breaking into a building and stealing contrary to section 306 (a) of the Penal Code, trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act, Conspiracy to commit a felony contrary to section 393 of the Penal Code and finally, the count which carried the day that of being in possession of narcotic drugs contrary to section 3(1) as read with section 3(2) of the Narcotic Drugs and Psychotropic Substances Control Act.

This is the only count the appellant was allowed to plead guilty to as the rest of the counts remained withdrawn by the State. Therefore, in exercising discretion to arrive at a sentence of 5 years. The learned trial magistrate had to balance the mitigation by the appellant, the aggravating factors and the cumulative effect thereof surrounding the commission of the offence. The mitigation by the appellant I am only carry the day if they tilt the scale sufficient enough in his favour. That does not seem to be the case in the matter before the trial court. This appeal is also to be underpinned under section 382 of the Criminal Procedure Code. I would have considered the plea on sentence if the appellant demonstrated that order by the learned trial magistrate was irregular that it occasioned a failure of justice.

Following the above reasoning grounds that weigh against the sentence of 5 years for the court to interfere with it. In conclusion the appeal against sentence is hereby dismissed

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF MARCH, 2021.

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Alenga for the State

2. The Appellant