REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO E004 OF 2021

JOSEPH OCHIENG OSUGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the sentence of Hon C.I. Agutu, SRM in Ukwala SRM Cr Case No 139 of 2021 delivered on 10th March, 2021)

JUDGMENT

1. **Joseph Ochieng Osuga**, the appellant herein was charged with the offence of being in possession of cannabis [bhang] contrary to section 3(1)(a) as read with section 3(2) of the Psychotropic Substances Control Act No. 4 of 1994 (sic). It was alleged that on 9th day of March, 2021, at Silago Village, within Ugunja Sub county within Siaya County, the appellant was found in possession of one broom of cannabis sativa valued at Kshs 200 in contravention of the Act.

2. The appellant was arraigned before Hon C.I Agutu, SRM at Ukwala Law Courts on 10/3/2021 and upon the charge and particulars of the offence being read out to him, he admitted the same to be true. He was accordingly sentenced to serve three (3) years imprisonment.

3. Aggrieved by the said "conviction" and sentence, the appellant filed this appeal vide a petition of Appeal dated 16th March 2021 setting out the following grounds of appeal, summative:

1. that the conviction was without sufficient evidence on record;

2. that the evidence relied on was not corroborated and lacked probative value and therefore unsafe for a conviction;

3. that the trial court failed to appreciate the fact that the appellant was a first offender;

4. that the sentence was excessive in the circumstances;

5. that the plea of guilty was not unequivocal;

6. that the trial magistrate failed to take into account mitigation by the appellant before sentencing.

4. The appellant urged this court to quash his "conviction" and set aside the sentence and that he be set free.

5. Simultaneous with the filing of the appeal herein, the appellant's counsel Mr. Rakewa also filed an application for bail pending appeal or in the alternative that the appellant who is critically ill be taken to Siaya County Referral Hospital for medical treatment as he had undergone an operation and requires more operations to handle his medical condition which appears to be serious as shown by the medical documents annexed.

6. However, when the application came up for hearing both counsel agreed that it was a brief appeal that could be handled or argued simultaneous with the application for bail. The appellant's counsel also withdrew the appeal against "conviction" that challenged the plea of guilty and urged the court to only consider the severity or appropriateness of the sentence imposed on the appellant, having regard to his medical or health condition as supported by the medical reports annexed to the affidavit in support of the application for bail.

7. Mr. Rakewa submitted that the sentence of three years' imprisonment as imposed on the appellant was too harsh and inordinate having regard to the fact of the appellant being a first offender and that the value of the recovered cannabis sativa was only Kshs 200. Further, that the trial court did not apply herself to the principles of sentencing in that she could have ordered for a pre -sentence report since the appellant

mitigated saying he was sick following a medical operation.

8. The prosecution counsel, Mr. Ngetich submitted that sentence imposed was lawful and that the trial magistrate exercised her discretion in sentencing. He had however earlier on submitted that given the health situation of the appellant whereby he will require constant medical attention in the wake of this Covid 19 situation, the appellant could be released on bond to enable him seek medication on his own.

9. The principles guiding interference with sentencing by the appellate Court were properly set out in **S vs. Malgas 2001 (1) SACR 469 (SCA)** at para 12 where it was held:

> ***"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court…However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"***

10. Similarly, in **Mokela vs. The State (135/11) [2011] ZASCA 166**, the Supreme Court of South Africa held:

> ***"It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."***

11. The predecessor of the Court of Appeal in the case of **Ogolla s/o Owuor vs. Republic, [1954] EACA 270,** pronounced itself on this issue as follows:-

> ***"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."***

12. Odunga J whom I have extensively cited with approval in **Josiah Mutua Mutunga & another v Republic [2019] eKLR stated, citing the Ogolla(supra case):**

> ***"To this, I would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case". (R - v- Shershowsky (1912) CCA 28TLR 263) while in the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-***
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> ***"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 (see also Sayeka –vs- R. (1989 KLR 306)"***

13. The power of this court to interfere with sentence imposed by the trial court is therefore limited by precedent except where certain conditions are met. The Court of Appeal in **Bernard Kimani Gacheru vs. Republic [2002] eKLR** restated 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."***

14. In **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015** the Supreme Court stated:

> **"[71] 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.

15. The Supreme Court in ***Muruatetu Case*** (supra) further stated:

> ***"Comparative foreign case law has also shown that the possibility of review of life sentences and the fixing of minimum terms to serve a life sentence before parole or review, is intrinsically linked with the objectives of sentencing. In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR, where the High Court held that the objectives include: "deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim." The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:***
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> ***"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.***
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> ***5. Community protection: To protect the community by incapacitating the offender.***
>
> ***6. Denunciation: To communicate the community's condemnation of the criminal conduct."***
>
> ***The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict."***

15. I have examined the record of proceedings from the lower court. The trial magistrate imposed a sentence of three years on a "***plea of guilty"*** for possession of cannabis sativa being one broom valued at Kshs 200. The penalty section, being **Section 3 (2) (a) of the Act**, provides for imprisonment for a period of 10 years in cases where the person had the *cannabis sativa* for his/her own consumption. The section provides thus:

> ***"A person guilty of an offence under subsection (1) shall be liable to, in respect to cannabis sativa, where the person satisfied the court that the cannabis was intended solely for his own consumption, to imprisonment for 10 years and in any other case to imprisonment for 20 years."***

16. The Court of Appeal in **Criminal Appeal No. 479 of 2007 Daniel Kyalo Muema v. R (2009) eKLR** referred to the phrase "*shall be liable*" in regard to its construction. The court cited **Section 66 (1)** of the *Interpretation and General Provisions Act* (Cap 2 Laws of Kenya) which provides:

> ***"Where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punishable by a penalty not exceeding the penalty prescribed".***

17. **Section 26 (2) and (3)** of the Penal Code seems to capture the spirit of the above section when it provides:

> ***"(2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other shorter period may be sentenced to any shorter term.***
>
> ***(3) A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment."***

18. See also **Kolongei vs. Republic [2005] 1 KLR 7**, where the appellant who was convicted of trafficking in 27.8 Kgs. of heroin was sentenced to 18 years imprisonment plus a fine and not to the prescribed life imprisonment plus a fine and **Gathara vs. Republic [2005] 2 KLR 58** where the appellant was sentence to 10 years imprisonment plus a fine for trafficking in eleven (11) bags of *cannabis sativa*.

19. The phrase "*shall be liable to*" as used in Penal statutes was judicially construed in **Opoya vs. Uganda [1967] EA 752 at 754** paragraph B as follows:

> ***"It seems to us beyond argument the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it".***

20. In **Danied Kyalo Muema case**, above, the Court of Appeal stated:

> ***"We have no doubt that the sentence of 10 years imprisonment and 20 years imprisonment prescribed in Section 3 (2) (a) of the Act for the possession of cannabis sativa are the maxima and that the court can lawfully impose any shorter term of imprisonment. Furthermore, although Section 3 (2) (a) of the Act does not expressly provide for a fine, the court can lawfully in accordance with Section 26 (3) of the Penal Code sentence the offender to pay a reasonable fine in substitution for imprisonment."***

21. I have said enough to demonstrate that the trial court was not in error in sentencing the appellant to 3 years imprisonment for being in possession of one broom of *cannabis sativa* where the sentence is 10 years. That sentence, in view of the cases above is lenient, considering the maximum sentence under **Section 3 (2) (a)** of the Act.

22. However, before concluding this matter, I wish to point out that the manner in which the proceedings were done in the lower court is not without serious fatal errors. Firstly, the language of the court is not clear in the sense that albeit the charge is said to have been read out to the appellant in Kiswahili language and he said **"Ni Ukweli",** after the brief facts were read out to the appellant in a language that is not indicated, and one broom produced as exhibit one without indicating one broom of what, the trial court recorded in English the response by the appellant, also to be in English, by asking the appellant: ***"Are facts right***" and the appellant is said to have said: ***"Facts are right."***

23. Secondly, after the appellant said ***"Facts are right,"*** the trial magistrate straight on moved to ask for mitigation before sentence without even convicting the appellant for pleading guilty to the charge and facts. In addition, after the charge was read out to the appellant and he said "***Ni Ukweli,"*** no plea of guilty was entered. No doubt, the trial magistrate ought to have stated: ***"Plea of guilty entered."*** before proceeding to take the facts of the case and after the appellant has admitted those facts to be correct that she should have convicted him by saying ***"Accused person convicted on his own plea of guilty."*** There is no entry of a plea of guilty and neither is there any conviction of the appellant for the offence charged. Third, is that the trial court would have called for the previous records of the accused/appellant and asked for mitigation from the accused after which she would have proceeded to sentence him. No such request for previous records was made. Last but not least is that the law under which the appellant was charged does not exist. In other words, the appellant was charged and sentenced on a fatally defective charge which contravenes the principal of legality. The charge reads:

> ***"being in possession of cannabis [bhang] contrary to section 3(1)(a) as read with section 3(2) of the Psychotropic Substances Control Act No. 4 of 1994"***

24. There is no such law called Psychotropic substances Act. The trial magistrate should have rejected the charge or demanded for amendment thereof. The existing law is **Narcotic Drugs and Psychotropic Substances (Control) Act, 1994.**

25. I reiterate that the trial court record as it stands does not show that a plea of guilty was entered or that the trial magistrate convicted the appellant. For that reason, it is clear that the appellant has been serving an illegal sentence at a police station in Sigomere, since the prisons are not directly admitting new inmates on account of Covid 19 protocols. The sentence that the appellant has served from 10/3/2021 is an illegal sentence as no plea of guilty was entered against him and he was never convicted for the offence as charged.

26. ***In the circumstances of this case, the application for bail pending appeal dated 16th March 2021 is hereby spent. The sentence of three years being an illegality, it must be set side. For that reason, I hereby set aside the three years imprisonment imposed on the appellant Joseph Ochieng Osuga.***

27. ***Having set aside the illegal sentence, consequently, I hereby unconditionally discharge Joseph Ochieng Osuga and order that unless otherwise lawfully held, he shall forthwith be set at liberty. This judgment be send to Hon. C.I.Agutu, Senior Resident Magistrate at Ukwala Law Courts forthwith for noting of the serious errors of omission and commission in the proceedings in Ukwala SRM Cr Case No. 139 of 2021.***

28. Orders accordingly.

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

R.E.ABURILI

JUDGE

In the presence of:

Mr. Rakewa Advocate for appellant virtually

Mr. Ngetich Prosecution Counsel for Respondent

CA: Modestar and Mr. Mboya