REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 64 OF 2018

MOHAMED OMAR SAWUR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of the Learned trial Magistrate

Hon. Njeri Thuku in Lamu Criminal Case Number 38 of 2017)

Coram: Hon. Justice Nyakundi

Mr. Mwangi for State

Appellant in person

JUDGMENT

Background

The Appellant herein were charged with the offences of; trafficking in narcotic drugs contrary to section 4(a) of the Narcotic and Psychotropic Substance Control Act No.4 of 1994 (NPSA), a second count of being in possession of narcotic drugs contrary to section 3(1) as read with section 3(2)(a) of the Narcotic and Psychotropic Substance Control Act No.4 of 1994 (NPSA) and Count III of escape from lawful custody contrary to section 123 as read with section 36 of the Penal Code.

The particulars of the **first count** were that on 15.02.2017 at around 0100 hours at Pate Village, Faza Division, Lamu East Division within Lamu County he was found trafficking in narcotic drugs namely heroin to wit (8) stringed granules with a street value of Kshs. 1,600/- by conveying in contravention of the NPSA. Particulars of the second count were that on 11.02.2017 at around 0100 hours at Pate Village, Faza Division, Lamu East Division within Lamu County the Appellant was found in possession of narcotic drugs namely cannabis sativa (bhang) to wit two rolls of about 10grams with a street value of Kshs. 100/- which was not in the form of medical preparation in contravention of the said Act and Count three particulars were that on 11.02.2017 at around 0100 hours at Pate Village, Faza Division, Lamu East Division within Lamu County being in the lawful custody of PC Sulubu, PC Komoka and PC Marua escaped from the said custody.

He was charged on 13.02.2017 and granted bail of Kshs.200,000.00 which he was not able to secure as such trial proceeded while he was still in custody.

Evidence at Trial

At trial the prosecution called a total of 2 witnesses in support of their case while the accused person gave a sworn statement and did not call any witnesses.

The trial court found him not guilty on count one for trafficking in narcotic drugs, guilty on count two of being in possession of narcotic drugs and guilty on count three of escape from lawful custody and convicted him. The trial court also sentenced him on possession of drugs to 10 years imprisonment and on count III the court considered time taken in custody from the time of pela taking to the date of reading of the judgement as time served for the sentence in that count.

The Appeal

Being aggrieved by the decision of the lower court the appellant filed a memorandum of appeal on 31.08.2017 which are inter alia that; he had pleaded not guilty at trial, that he had been sentenced to 10 years imprisonment which judgement was unfair and unconstitutional as it was harsh and excessive, the fact that the arresting officer was also the investigating officer was a malpractice of the law, that the arresting officer failed to prove that the radio belonged to the accused as they searched him and took money from him Kshs. 14,450.00 which they denied and reduced it to Kshs.1,450/- and finally that the charges were not proved beyond reasonable doubt as the prosecution failed to prove that the radio and the drugs found in the radio indeed belonged to the appellant.

For reasons wherefore the appellant prayed that the appeal be allowed, the conviction quashed and sentence set aside.

Neither party filed submissions.

Determination

In determining this appeal, I am as a first appellate court minded of the duty to re-evaluate and analyze the evidence a fresh with a view of arriving at my own independent conclusion. This is done bearing in mind the fact that this court did not have the benefit of seeing the witnesses and their demeanour in particular. I shall deal with all grounds together.

From a cursory look at the appeal at hand I find that there are only two issues for determination:

1. Whether the prosecution proved its case to the required standard of proof.

2. Whether the 10 years sentence was harsh and excessive.

I will now proceed to evaluate and analyse the evidence on record.

1. Whether the prosecution proved its case to the required standard of proof.

The prosecution called two witnesses to buttress its case. **PW1, George Lawrence Ogunda**, a government analyst testified that he received exhibits from **PC Benson Marwa** in envelopes marked E1 and E2 which contained 8 sachets of brown crystal inside a matchbox and one roll of dry plant material wrapped in a sportsman packet respectively. He stated that the brown crystals were heroin and the dry plant was cannabis.

PW2, was P.C. Benson Marwa from Siyu Police Post in Lamu East who stated that he was both the arresting officer and the current Investigating Officer as the previous Investigating Officer had a kidney problem and was transferred to Mombasa where he can easily access treatment.

He stated that on 10.02.2017 he, together with P.C Fredrick Sulubu, now retired and **P.C Komora Yusuf** went on patrol to Pate after reports were made of theft. They met their informant who took them to places where the thieves might be hiding. One of the sites was an incomplete house structure near a dumping site. When they arrived they saw people leaving one by one at which point they forced their way in and arrested 3 people one of whom was the appellant.

He also testified that the accused at some point attempted to ran off and the officers gave chase and recaptured him. They searched him and found Kshs. 1,450 and a radio around his neck which he refused to hand over, when they finally managed to get it they discovered that instead of batteries they found paper which had wrapped a packet of cigarettes with 7 cigarettes, 15 sheets of rizzler paper, a cigarette like made of bhang, two matchboxes one of which had 3 razor blades and the other had 8 sachets of brownish substance in crystal form. He testified that it was at this point that he prepared an inventory of the items for the accused to sign which he refused to sign.

On cross examination PW2 testified that the Appellant had been charged with trafficking as there was the evidence of the money and drugs found in his possession. He however admitted that they did not find him in the course of the transaction.

The trial court then ruled that the accused had a case to answer and he put on his defence. He gave a sworn testimony. He testified that he was a fish broker and on that day he left his house to go to the beach to buy fish. While on the way he met the officers and recognised them as such. They asked him to stop which he did. They inquired about where he was going and he explained. They then searched him and found Kshs. 14, 450/- which they took from him. They then arrested him and cuffed him. He testified that he was taken to Siyu Police station where he spent the night. The next morning they gave him a document to sigh which he refused to and he was subsequently transferred to Faza Police Post where he explained about the missing money. He was then produced in court and charged with the current charges.

On cross-examination he testified that he was arrested in a village in Pate, and he was not arrested together with the other two suspects and that PW2 had lied to the court and that no one saw him get arrested.

The appellant was charged with trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act. **Section 2** of the Act defies trafficking as '**the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance or making of any offer in respect thereof.**'

According to Section 20(1) of the Penal Code, a person is deemed to have taken part in committing the offence as a principal offender in the following instances:

'(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence, and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.

Section 4(a) of the Narcotics Drugs and Psychotropic Substances Control Act which provides that:

'Any person who traffics 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;'

Even though the appellant pleads that he was not arrested in possession of any incriminating evidence, the evidence as pointed out above, creates a link between him and the seized drugs. In the current case the Learned trial Magistrate in her infinite wisdom found the Appellant guilty of possession and not trafficking and sentenced him to 10 years imprisonment.

In **Malingi v. Republic, [1989] KLR 225**, where the Court of Appeal had this to say about the doctrine of recent possession:

"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts.."

2. Whether the 10 years sentence was harsh and excessive.

On the issue of sentencing an offender, the sentence meted out on an accused person must commensurate to the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirely before settling for any given sentence. The Court of Appeal in **Thomas Mwambu Wenyi Vs Republic (2017) eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira Vs State of Mahareshtra** at paragraph 70-71 where the court held the following on sentencing: -

"Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

In **Francis Karioko Muruatetu & Another –Vs- R (Supra)** the Supreme Court stated the following guidelines as mitigating factors 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 and

(h) any other factor that the court considers relevant.

These factors are also applicable in a re-sentencing for the offence of robbery with violence. The Judiciary Sentencing Policy Guidelines lists the objectives of sentencing at page 15 paragraph 4.1 as follows:

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 demand 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.

Having said that, I shall now turn to case law and precedence. The Privy Council in **Spence vs. The Queen; Hughes vs. the Queen (Spence & Hughes) (unreported, 2 April 2001) (Byron CJ)** was of the view that:

> **"In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review…"**

Further in the case **R vs. Scott (2005) NSWCCA 152 Howie, Grove** and **Barr JJ** stated:

> **"There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed…One of the purposes of punishment is to ensure that an offender is adequately punished…a further purpose of punishment is to denounce the conduct of the offender."**

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 that:

> **"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"**

The Court of Appeal, on its part, 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 states is shown to exist."**

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

> **"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."**

Further in the case of **Ogolla s/o Owuor vs. Republic, [1954] EACA 270**, the Court 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"

Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

> **"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)"**

Section 333(2) of the Criminal Procedure Code provides that:

> **(2) Subject to the provisions of section 38 of the Penal Code 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.**

Section 382 of the Criminal Procedure Code Act provides for instances where finding or sentence are reversible by reason of error or omission in charge or other proceedings. It states that:

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:**
>
> **Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."**

I consequently find that the trial court gave the appropriate sentence in the circumstances of the case however I take cognisance of the fact that the Appellant herein has been behind bars for approximately 5 years for the offence of possession which in my view is more than adequate. I have considered the sentence in light of the fact that the accused was a first offender and I believe he has served sufficient time for the offence.

I therefore allow the appeal to the extent that the sentence is reduced for time served. The appellant is released unless otherwise lawfully held on condition that he commits no offence during the next twelve months from the date of this order.

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

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R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for the state

2. The appellant