



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 200 OF 2017

NASORO YUSUF.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the decision of E. Kagoni, Senior Resident Magistrate, in Mombasa Chief Magistrate's Court Criminal Case No. 1100 of 2017)

JUDGMENT

1. The appellant was charged on 19th July, 2017 with the offence of being in possession of Narcotic drugs contrary to Section 3(1) as read with subsection 2(a) of the Narcotic drugs and Psychotropic Substances Control Act No. 4 of 1994.
2. The particulars of the charge were that on the 18th day of July, 2017 at Tudor area in Mombasa within Mombasa County, he was found in possession of narcotic drugs to wit forty rolls and thirteen (13) stones of Cannabis with a street value of Kshs. 1,060/= in contravention of the said Act.
3. The appellant pleaded guilty to the said charge and a plea of guilty was entered. The facts were read out to him on 20th of July, 2017 which was a day after the plea was taken. He stated that the facts were correct. He was convicted on his own plea of guilty. He was sentenced to 6 years imprisonment.
4. On 23rd August, 2017, the appellant filed an application for leave to appeal out of time. The same was allowed. An appeal file was opened in the same year. When the appeal came up for mention on 22nd January, 2019 before this court, the appellant was directed to file a petition of appeal. He filed the same on 18th February, 2019.
5. He filed amended grounds of appeal on 30th October, 2019 with leave of the court. These were that-
 - (i) The Learned Trial Magistrate erred in law and fact by giving a harsh and excessive sentence to the appellant for being in possession of cannabis sativa worth Kshs. 1,060/= (sic) when given the facts that-
 - (a) He is a first offender and a family man with 4 children who depend on him; and
 - (b) He did not waste the court's time by pleading guilty to the charge and facts.
 - (ii) That the Learned Trial Magistrate erred in law and fact by giving a harsh and excessive sentence by failing to see that he told the court the truth that he was found in possession of the said cannabis sativa.
6. In his written submissions and while seeking a reduction of his sentence from 6 years to the time already served, the appellant relied on the case of **Wellington Mwamburi vs Republic**, Mombasa High Court Criminal Appeal No. 245 of 2012, where the sentence of the appellant therein who was found in possession of 79 rolls of cannabis was reduced to 3 years from 7 years imprisonment. The appellant also relied on the Court of Appeal decision in **Omar Mohamed Shebana vs Republic**, Mombasa Appeal No. 54 of 2016 where a sentence of life imprisonment for the offence of trafficking in cannabis worth Kshs. 33,200/= was substituted with the prison term the appellant therein, had already served.
7. The appellant stated that at the time of filing his submissions on 30th October, 2019, he had already served 2 years and 5 months in prison. He indicated that he had been of good conduct and was remorseful. He further stated that he had reformed and would not repeat a similar

offence. He submitted that he was a 1st offender and prayed to be allowed to reunite with his family.

8. Mr. Muthomi, Prosecution Counsel filed submissions on 5th November, 2019. On the principles of sentencing, he relied on the cases of **Gaston January Stephen vs Republic** [2017] eKLR, **Macharia vs Republic** [2003] EA 559, **Livingstone Kakooza vs Uganda**, Supreme Court Criminal Appeal No. 17 of 1993.

9. On the objectives of sentencing and the discretionary powers of the court, he cited the authorities in **Republic vs Jayani and Another** [2001] KLR 593, **Yusuf Dahar Arog vs Republic**, High Court Criminal Appeal No. 110 of 2006 and **Bernard Kimani Gacheru vs Republic** [2002] eKLR.

10. In making reference to the case of **Gaston January Stephen vs Republic** (supra), Mr. Muthomi pointed out that the High Court reduced the sentence of the appellant who had been found in possession of 6 stones of cannabis worth Kshs. 3,000/= from life imprisonment 2 years.

11. It was also submitted that the Trial Magistrate in this case misdirected himself when he found that the quantity of cannabis found on the appellant was not for his own consumption, but for sale. It was indicated that no such evidence was adduced before the said Magistrate and as such, there was misapprehension of fact on his part. The Prosecution Counsel conceded to this appeal and urged this court to mete out a sentence that was suitable in the circumstances.

12. This court has considered the submissions made by the appellant and the Prosecution Counsel. In light of the fact that the appeal in this case is against sentence only, this court is enjoined to consider the principles that guide courts when faced with appeals of this nature.

13. In the case of **Macharia vs Republic** [2003] EA 559 the Court of Appeal held as follows on the issue of review of sentence –

“an appellate court will not review or alter a sentence imposed by the trial court on the mere ground that if the appellate court had been trying the appellant it would have passed a somewhat different sentence, and will not ordinarily interfere with the discretion of a trial Judge unless the Judge acted on the some wrong principle or overlooked some material factors or issued a sentence that was manifestly excessive.”

14. Mr. Muthomi submitted that the Hon. Magistrate misdirected himself by finding that due to the quantity of the cannabis sativa the appellant was found in possession of, it was not for his own consumption. This court is of the view that the said finding was not a misdirection. It is apparent that it is the quantity of narcotic drugs in issue which led the Magistrate to make an inference that the cannabis sativa was not for the appellant’s own consumption.

15. In the present appeal, this court has no hesitation in concurring with the appellant and the Prosecution Counsel that the sentence of 6 years imprisonment was not commensurate with the quantity of cannabis sativa the appellant had in his possession or the value of the same. The appellant was found in possession of 40 rolls and 13 stones of cannabis sativa. The street value of the same was Kshs. 1,060/=.

16. In the circumstances of this case, I hereby reduce the appellant’s sentence from 6 years to the period already served. The appellant shall be set at liberty unless otherwise lawfully held.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 13th day of March, 2020.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

.....prosecution Counsel, for the DPP

Mr. Oliver Musundi- Court Assistant