REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NUMBER 28 OF 2018

MICHAEL MURIITHI SARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant herein was charged with the offence of Being in Possession of Narcotic Drugs Contrary to Section 3(1) as read with Section 3 (2) (a) of the Narcotic Drug and Psychotropic Substances (Control) Act No. 4 of 1994.

The particulars of the offence were that; on the 23rd day of July, 2016 at about 7.30pm at Gichiche Sub Location within Embu County was found being in possession of 3 rolls of Narcotic Drugs "Bhang" worth kshs. 60/= in contravention of the said Act.

The case proceeded for full hearing and at the end of the trial, he was convicted and sentenced to serve five (5) years imprisonment.

In support of the case, the prosecution called four (4) witnesses.

PW1, James Munyi the Senior Assistant Chief, Gicheche Sub-Location, testified that on the 23rd July, 2016 at 7.30pm he was in the company of Daniel Ndwiga, who is the Chief of Kagaari South East Location and Mituri Sub-Area of Gicheche Village, Karanja of Nyumba Kumi and Julius Njue. They were on Patrol in Gicheche market when they received information that the Appellant sells bhang. They found the Appellant in Gicheche market and arrested him and upon carrying out a search they found 3 rolls of bhang on his right back of trousers pockets. They took him to Runyenjes Police Station.

Daniel Ndwiga who testified as PW2 stated that on the 23rd July, 2016 at 7.30pm he was on patrol at Gicheche market in the company of Senior Chief Nyaga (Rtd Samuel Ndwiga and Njue). They had intelligence that the Appellant was peddling drugs following which, they apprehended him and upon carrying out a search on him they recovered 3 rolls of bhang in his right hand side of his trousers.

They arrested him and took him to Runyenjes Police Station and the charges were preferred against him.

PW3 was the Investigating Officer. He stated that the Appellant was taken to Runyenjes Police Station by the Assistant Chief of Gicheche and the Chief of Kagaari South, with three (3) rolls of bhang which had been recovered from the appellant on that day. He recorded witness statements and charged the Appellant with this offence.

He prepared an exhibit memo to escort the three rolls to government chemist following which, a report was prepared by the government analyst.

The Appellant gave unsworn statement in defence. He stated that he had a Previous matter related to this one. He further stated that he was arrested for stealing a phone but the present charges were preferred against him. He stated that he has similar matters instigated by the Chief of Gichehe and the Chief is malicious in the matter.

Upon hearing the case, the trial Court convicted the Appellant and sentenced him to serve five (5) years imprisonment. Being dissatisfied with the conviction and the sentence, the Appellant has appealed to this court and has listed down five grounds of appeal in his petition of appeal filed on the 24th August, 2018 as follows: -

1. That the learned trial Magistrate erred in law and facts when he passed a harsh sentence on the appellant considering the quantity of the alleged recovered bhang was only 3 rolls.

2. The Learned Magistrate erred in law and in fact when he failed to consider the period that the Appellant had served in custody when passing the sentence.

3. The Learned Magistrate erred in law and in fact when he tried the Appellant in this case yet the same Magistrate had handled another of this case which is contrary to the law.

4. The Learned Magistrate failed to consider the mitigation offered by the Appellant.

The Appellant has urged the court to review the sentence downwards and to consider the period that he spent in custody as part of the sentence.

From the grounds of Appeal, it is clear that the Appeal is on sentence only.

In determining this Appeal, this court being the first appellate court is alive to and takes into account the principles laid down in the case of ***Okeno vs. Republic (1972) EA 32*** where the court for Eastern Africa stated as follows: -

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya vs R. 1975) EA 336 and to the Appellate court's own decision on evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the Lower Courts findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."**

Pursuant to the above principles, the court has re-evaluated the evidence on record. It has also considered the written submissions by the Appellant and the counsel for the Respondent.

The court notes that though the Appeal is on the sentence only, the appellant's submissions have challenged the conviction which essentially means that his submissions do not support his grounds of Appeal.

On the part of the Respondent, it was submitted that the sentence meted out by the trial court is appropriate, adequate, just and commensurate with the nature and gravity of the offence and the manner in which it was committed.

Counsel further submitted that the Appellant was not a first offender and had been convicted and sentenced multiple times and as such, he is not willing to reform and rehabilitate. She stated that the sentence of five (5) years meted out by the trial court is therefore to act as deterrence measure and protect the community from the Appellant as per the sentencing guidelines of 2016.

The Appellant herein was charged with the offence Under Section 3(1) and 3(2) of the Narcotic Drug and Psychotropic Substances (Control) Act No. 4 of 1994.

The penalty provided for under that Section 3(2) is imprisonment for ten years in respect of cannabis, where the person satisfies the court that the cannabis was intended solely, for his own consumption and in every other case to imprisonment for twenty years.

The Appellant therein was charged with Being in Possession of Narcotic Drug which upon examination by a Government Analyst was found to be cannabis sativa which attracts a sentence of 10 years imprisonment.

The Appellant was convicted to serve five (5) years imprisonment and in meting out the same the trial court noted that the Appellant is a serial offender for being in possession of bhang and that apart from asking for a concurrent sentence, which in any event is not applicable in this case, the Appellant had not expressed remorse for his actions.

The record shows that the Appellant was charged in criminal case number 14/2017 for being in possession of bhang and was sentenced to serve 18 months imprisonment.

He was also charged in criminal case number 613/2016 with the same offence of being in possession of bhang and was sentenced to serve three (3) years imprisonment.

From the foregoing, it is evident that the Appellant is not willing to reform and rehabilitate. The learned Magistrate stated that he preferred a deterrent sentence. I wholly agree with him.

On the fourth ground of Appeal, I have perused the record and as stated hereinabove the learned magistrate considered the mitigation offered by the appellant before sentencing him. He noted that apart from asking for a concurrent sentence which in any case is not applicable, the Appellant has not expressed remorse for his actions.

Finally, the Appellant in his ground 2 of Appeal stated that the learned Magistrate did not consider the period that he was in custody which he stated was from the year 2016 to the date of conclusion of the trial which was on 22nd August, 2018.

In this regard, the record of the proceedings shows that he was arraigned in court on the 25th July, 2016 when he was charged with this

offence. He was released on bond of Kshs. 30,000/= or cash bail of kshs. 10,000/=. There is no indication that he was released from custody on either the bond or cash bail upto the date of the judgment and sentence.

The Learned Magistrate's judgment is silent on the period that the Appellant was in custody which means that the same was not taken into account. In that regard, the Learned Magistrate erred in failing to take that period into account as this is Contrary to Section 333 (2) of the Criminal Procedure Code.

In the end, the court finds that the Appeal has no merits and the same is hereby dismissed. The sentence imposed by the trial court is upheld. However, the period spent in custody from the date of 23rd July 2016 to the 22nd August, 2018 when he was sentenced shall be taken into account to constitute part of the sentence.

It is so ordered.

Dated, Delivered and signed at EMBU this 23rd day of October, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent