



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 46 OF 2011

OMAR BAKARI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original sentence in the Senior Chief Magistrate Court at Mombasa Criminal No. 2454 of 2010 by Hon. T. Ole Tanchu (SRM) dated 14th January 2011)

Coram: Hon. R Nyakundi

Mr. Muthomi for Respondent

Appellant in Person

Judgment

The Appellant was charged with two counts of trafficking narcotic drugs contrary to section 4(a) and (b) of the Narcotics Drugs and psychotropic Substances Control Act No. 4 of 1994. The particulars of the offences were that on the 15th day of August 2010 at Shika Adabu area in Shika Adabu Location of Likoni District within Coast Province, was found trafficking in narcotic drugs by selling 24 sachets of heroin with a street value of Ksh. 2,400/- and; 71 rolls of cannabis with a street value of Ksh. 1,420/- in contravention of the said act.

The Appellant pleaded not guilty and after hearing, he was convicted and sentenced to 15 years imprisonment on each count to run concurrently. Aggrieved by the said sentence, the Appellant filed his amended grounds of appeal reproduced verbatim that:-

- 1. That I have been in custody for a period of about 10 years now and thus I am remorseful.**
- 2. That I feel the 15 years imprisonment that was imposed upon me is harsh regarding the gravity of the offence and the value of drugs in question; and thus beg for a lesser sentence.**
- 3. That I have suffered a psychological torture for years fighting to get my appeal heard before this Honourable court; this in itself is enough to see me changing for the better.**
- 4. That I beg for a non-custodial sentence so that I may rejoin my family which I have separated with for years.**
- 5. That I am a first offender and hence promise to remain being a law abiding citizen person in future.**
- 6. That I pray for forgiveness and promise to abide by the law all through my lifetime.**
- 7. That I promise to act as an ambassador advocating for a drug free society among the youth.**

The Appellant filed his written submissions on 2nd December 2019 in support of his appeal. The Appellant submitted that the sentence meted out was harsh with regard to the gravity of the offence and the value of drugs. He also contended that he was a first offender and that his family was suffering in his absence. Further, he submitted that while waiting for his appeal to be heard he spent 10 years in prison and had changed for the better and prayed for the leniency.

Mr. Muthomi advocate for the Respondent filed his submissions dated 10th February 2020 on the 12th February 2020. He submitted that the court would not interfere with the discretion of the trial court unless use of the term it acted on a wrong principle or overlooked some material factor or issued a sentence that was manifestly excessive. He cited the case of **Macharia v Republic [2003] EA 559; Bernard Kimani Gacheru v Republic [2002] eKLR** and **livingston Kakooza v Uganda SC Criminal Appeal No. 17 of 2003**.

Mr. Muthomi submitted that courts also considered the purpose of sentencing was a deterrent as well as to rehabilitate the offender and that it must be a reasonable proportionality between the sentence passed and the circumstance of the crime committed. He relied on **Republic v Jayani & Another [2001] KLR 593; Yusuf Dahar Arog v Republic Criminal Appeal 110 of 2006** and **Josiah Mutua Mutunga & Ano v Republic [2019] eKLR**.

Counsel submitted that taking into consideration the street value of the drugs found in his possession and being aware that the drug menace had affected the youth, the time served by the Appellant was sufficient punishment. He relied on the case of **Gaston January Stephen v Republic (2017) eKLR** where Appellant had been charged with being in possession of 6 stones of cannabis worth Ksh. 3,000/-. The court varied the trial court's sentence of life imprisonment to 2 years.

Analysis and determination

I have considered the submissions by both parties. It is clear that the appeal is against the sentence only.

It is well established that sentencing is at the discretion of the trial court and an appellate court can only interfere with the sentence under very specific circumstances as was emphasized by the Court of Appeal in **Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR** where it stated: -

“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v. Republic, Cr App No. 188 of 2000 this Court stated thus:

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.

(See also Wanjema v. Republic [1971] E.A 493.)”

The Appellant was convicted of trafficking in narcotic drugs contrary to section 4(a) of narcotic Drugs and Psychotropic Substances Control Act which provides that: -

Any person who trafficks 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;

I must confirm from the outset that the sentences on both counts were lawful and within the discretion of the court. The only question is whether in the face of the facts before it the sentence was excessive and manifestly harsh.

It is trite that the court should be guided by purpose of sentencing as was considered by Mativo J in **D M W v Republic [2015] eKLR** when he pronounced himself as thus: -

“I have also considered the purpose of sentencing and the principles of sentencing under the common law which are: -

- i. To ensure that the offender is adequately punished;**
- ii. To prevent crime by deterring the offender and other persons from committing similar offences;**
- iii. To protect the community from the offender;**
- iv. To promote the rehabilitation of the offender;**
- v. To make the offender accountable for his or her actions;**
- vi. To denounce the conduct of the offender**

vii. To recognize the harm done to the victim of the crime and the community prevent

Guided by the above principles, I hereby reduce the sentence from life imprisonment to forty years. The sentence shall run from the date of conviction by the lower court.

The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

i. Retribution: To punish the offender for his/her criminal conduct in a just manner.

ii. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

iii. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.

iv. 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.

v. Community protection: To protect the community by incapacitating the offender.

vi. Denunciation: To communicate the community's condemnation of the criminal conduct."

In **Dalmas Omboko Ongaro v Republic [2016] eKLR** the court stated that:

10. The principles of sentencing were summarized at page 86 paragraph B of the Judiciary Bench Book for Magistrates in Criminal Proceedings (published by the Kenyan Judiciary in 2004) as follows:

"In determining what is the appropriate sentence to mete out...The Court may also consider the value of the subject matter of the charge (Mathai v R [1983] KLR 442**) and whether there has been restitution of the property by the accused (**Hezekiah Mwaura Kibe v R [1976] KLR 118**)."**

The antecedents of an accused person also come into play when the Court is considering the appropriate sentence. **If an accused person is a first offender the sentence ought to reflect this fact as the aim of the Court is to encourage reform and discourage recidivism.**" (Emphasis mine).

In **Caroline Auma Majabu v Republic [2014] eKLR** the Appellant was convicted of trafficking 7 sachets of heroin, the Court of Appeal in reducing the sentence to 4 years pronounced itself thus: -

"We are somewhat disturbed by the apparent disparity in the sentencing given the minimal amount of the narcotic drugs which the appellant was found in possession of. Given the gravity of the sentence provided for trafficking, it would appear to us that the sentence for trafficking was a maximum sentence intended for drug barons and serious drug dealers dealing with drug worth thousands if not millions of shillings, and not small timers such as the appellant found in possession of a few sachets of heroin worth a few shillings. While we do not encourage small time trafficking in drugs, we are of the view that the sentences imposed in such cases should be realistic and should aim at rehabilitation rather than incarcerating and completely destroying the offenders."

The Court of Appeal upheld the sentence in **Kolongei vs. Republic [2005] 1 KLR 7**, where the Appellant was convicted of trafficking in 27.8 Kgs. of heroin was sentenced to 18 years imprisonment plus a fine.

In **Gathara vs. Republic [2005] 2 KLR 58** the appellant was sentence to 10 years imprisonment plus a fine for trafficking in eleven (11) bags of cannabis sativa.

In the instant case, the prosecutor intimated to the court that the Appellant had no previous criminal record and urged the court to treat him as a first offender. The Appellant was arrested with 24 satchets of heroin and 71 rolls of cannabis with a stated value of Ksh. 2,400/- and Ksh. 1,420/- respectively which is a small quantity in relation to the 15 years sentence imposed on the Appellant.

I would therefore agree with the Appellant that the 15 years sentence was too harsh. To date the Appellant has served 9 years and 10 months imprisonment. Taking the above facts into consideration, it is clear that the period that the Appellant has been in jail is more than sufficient punishment for the offence that he was charged with.

In the upshot, I find that the appeal is merited and the appeal on sentence succeeds to the extent that the sentence is reduced to the period already served. The appellant shall therefore be set free forthwith unless otherwise lawfully held.

Orders accordingly.

Right to appeal 14 days.

Judgment delivered, dated and signed at Malindi this 18th day of December, 2020.

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R. NYAKUNDI

JUDGE

In the presence of:

The Appellant in person

Mr. Onyango for the State