



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL DIVISION
CRIMINAL APPEAL NUMBER 141 OF 2017

BETWEEN

SYLVESTER ANDUVATE ADIGOLA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against sentence passed by Hon. J. Ruguru, SRM ON 3.10.2014 in Mombasa CMC Cr. Case no. 1776 of 2014)

JUDGMENT

Introduction

1. The appellants pleaded guilty to the charge of *being in possession of narcotic drugs contrary to section 3(1) as read with section 2(b) of the Psychotropic Substances Act number 4 of 1994*. It had been alleged that on 25.9.2014 at 4.30 pm [at] Santana area, in Changamwe within the Republic of Kenya, they were found in possession of six(6) Sachets of heroin in his room [with an] estimated street value of kshs. 1,200/-.

The Appeal

2. Being aggrieved by the 20-year term of imprisonment, the Appellants filed amended Petitions of Appeal filed on 12.10.2017 against sentence only on the following grounds:-

SYLVESTER ANDUVATE ADIGOLA

- 1. That the 20 years imprisonment imposed upon me by the Hon. Learned trial magistrate was harsh and excessive putting into account the alleged possessed narcotic drugs valued at Kshs. 1200/=.*
- 2. That I am first offender who is very remorseful now.*
- 3. That I beg for forgiveness from this Court promising to abide to the laws of the land given the opportunity of rejoining the society out here.*
- 4. That I vow to look to the future and discover new possibilities of trust and commitment to the law as it has been before.*
- 5. That I pray for review of the sentence by means of substitution to a lesser sentence, probation and/or acquittal and that to allow my mitigation grounds.*

Jamal Kanyingi Kamau

- 1. That the Learned trial Court magistrate erred in law and fact in sentencing me the Appellant to 20 years imprisonment without considering that the said sentence was harsh, excessive, unjust, unfair and unproportional to the offence committed.*
- 2. That the learned trial court magistrate erred in law and fact in sentencing me the appellant to 20 years imprisonment without considering i the appellant pleaded guilty and thus saving the courts time and deserved a lenient sentence.*

3. That the Learned trial Court magistrate erred in law and fact in sentencing me the Appellant to 20 years imprisonment without considering my mitigation.

4. That I the Appellant is fully reformed due to the rehabilitation programme initiated by the prison authority and seek to be given a second chance to re-join the society.

5. That I the Appellant vows to be an ambassador against drugs and substance abuse and help eradicate the vice if given a second chance to re-join the society.

6. That I the Appellant humbly begs that the time served be considered sufficient enough for one to reform.

Submissions

3. The Appellants filed their written submissions and relied on the same. The appellants contended that the mandatory sentence under Section 3(2) Narcotic Drugs and Psychotropic Substances (Control) Act was declared unconstitutional in Muruatetu. Therefore, the 20 years sentence meted upon them was manifestly excessive, harsh and the trial Court failed to take into account several factors such as proportionality, rehabilitation, mitigating factors and the fact that the Appellants pleaded guilty thus saving the Court time and reduced the expense of calling witnesses. In the circumstance as to amount to a miscarriage of Justice.

4. The Appellants submit that they are fully reformed thanks to the rehabilitation programmes initiated by the prison authorities.

5. **Mr. Muthomi** Learned Counsel for the D.P.P submitted that it is trite law that a Court on Appeal will not normally interfere with the discretion of the trial Court unless the sentence is manifestly excessive in the circumstance of the case , or the trial Court overlooked some material factor, or took into account some wrong material or acted on a wrong principle. See Court of Appeal case of **Bernard Kimani Gacheru v Republic [2002]eKLR**.

6. **Mr. Muthomi** further submitted that considering the time served by the Appellant's of more than six (6) imprisonment, considering the street value of the Narcotic drugs that was found in their possession, and considering the street value of the narcotic drugs that was found in their possession, the time served is sufficient punishment to the Appellant herein.

DETERMINATION

7. This Court is under a duty to consider whether the sentence imposed upon the appellant was too harsh in the circumstances as to warrant an interference with the trial court's discretion of sentencing. Unless and until the above issue is resolved by this court, there would be no basis for either upholding or setting aside the trial court's finding. *See Okeno versus Republic [1972] EA 32.*

8. Under *Section 3(1) as read with 3(2) (a) of the Act No. 4 of 1994. (2) A person guilty of an offence under subsection (1) shall be liable—*

(a) in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years; and

(b) in respect of a narcotic drug or psychotropic substance, other than cannabis, where the person satisfies the court that the narcotic drug or psychotropic substance was intended solely for his own consumption, to imprisonment for twenty years and in every other case to a fine of not less than one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, or to imprisonment for life or to both such fine and imprisonment.

9. From the sentence, it is clear that even after the Appellant had submitted their mitigation, the trial Court noted that the issue of narcotics was a thorny one in the coastal region and went ahead to sentence each of the accused persons to twenty (20) years in imprisonment.

10. The mandatory nature of any sentence is now unconstitutional as per the constitutional test in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015**, since they do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances. If the learned trial magistrate felt bound to impose the said sentence as a mandatory sentence, then, it is up for review, and on the other hand if the court was of the view that that was appropriate, then it is still up for review.

11. The Supreme Court in the **Francis Karioko Murwatetu** case (supra) set out guidelines to assist the courts in the determination of the sentence where mitigation was not considered prior to the said case. The guidelines are as follows:

“As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. 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.

We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

GUIDELINE JUDGMENTS

Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bound by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.”

12. I have considered the mitigation by the Appellants especially in the light of the aforesaid **Muruatetu case**. It is noteworthy that the Appellants were first offenders, they pleaded guilty thus saving the Court's time and resources and they have already served 6 years imprisonment from the time of their sentence. It is therefore my view that the sentence meted upon the Appellants was manifestly excessive and harsh in the circumstances of the case, considering the fact that the street value of the heroine they were found in possession of was only KShs. 1200 and that by pleading guilty the Appellants saved judicial time and resources.

13. Accordingly, I hereby set aside the mandatory minimum sentence of 20 years and in place thereof, I jail the Appellant for a term of ten (10) years from the date of arrest 25.9.2014.

Right of appeal in 14 days.

Dated, signed and delivered online by MS TEAMS, this 17th day of December 2020

HON. LADY JUSTICE A. ONG'INJO

JUDGE