



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 120 OF 2018

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 121 OF 2018

BETWEEN

ALICE MORAA MATHAYO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. R. Oanda, PM

dated 1st September 2016 at the Magistrates Court at Kilgorisin Criminal Case No. 599 of 2015

and

An appeal against the original conviction and sentence of Hon. R. Oanda, PM

dated 9th March 2017 at the Magistrates Court at Kilgoris in Criminal Case No. 541 of 2015)

JUDGMENT

1. The appellant, **ALICE MORAA MATHAYO**, filed these consolidated appeals contesting the respective sentences of imprisonment imposed on her following her guilty plea for the possession of cannabis sativa (bhang) contrary to **section 3(2)(b)** of the ***Psychotropic Substances Control Act, Act No. 4 of 1994*** (“the Act”) in both cases before the trial court.

2. In ***Kilgoris Criminal Case No. 599 of 2015***, the particulars were that on 31st May 2015 at 16.45 hours at Nyangusu Market, Nyangusu Sub-location, Nyamache District within Kisii County, she was found being in possession cannabis sativa (bhang) to wit 300gm valued at Kshs. 1,500/- in contravention of the Act. After pleading guilty, the appellant was sentenced to 3 years’ imprisonment with an option of paying a fine of Kshs. 300,000/-. In the sentencing remarks, the trial magistrate noted that she was not a first offender as she had been convicted in ***Kilgoris Criminal Case No. 860 of 16*** and was put on three-year probation.

3. In ***Kilgoris Criminal Case No. 541 of 2015***, the particulars of the charge were that on 15th May 2015 at 20.00 hours at Nyangusu Market, Nyangusu Sub-location, Nyamache District within Kisii County, she was found being in possession cannabis sativa (bhang) to wit 7 kg valued at Kshs. 6,000/- in contravention of the said Act. After pleading guilty, the appellant was sentenced to serve 5 years’ imprisonment. The trial magistrate noted that she was not a first offender as she had been convicted in ***Kilgoris Criminal Case No. 496 of 2014*** where she was fined Kshs. 100,000/- in default to serve 3 years’ imprisonment and also in ***Kilgoris Criminal Case No. 599 of 2015*** where she was sentenced to serve 3 years’ imprisonment in default of paying a fine of Kshs. 300,000/- while in ***Kilgoris Criminal Case No. 860 of 2016*** she was placed on probation for 3 years.

4. In both appeals, the appellant contends that the sentences imposed on her were harsh and excessive bearing in mind her disability. In her petition of appeal, the appellant contends that she is a person living with disability making her life in prison pathetic as she is forced to crawl to the toilet, bathroom and other places. She complained the trial magistrate failed to consider probation or another non-custodial sentence.

She also stated that she had to take care of two children who have now been left destitute.

5. The general principles upon which the appellate may interfere with a sentence imposed by the trial court are well settled. It has jurisdiction to interfere with a sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive (see *Wanjema v Republic* [1971] EA 493).

6. I have considered the sentencing notes and the evidence before the trial court. While I accept that the appellant is a person with disability, her condition was given due consideration when she was sentence to a three year probation term for the first time. She violated the terms thereof and proceeded to commit the same offence two more times. She thus forfeited the opportunity to be considered for a non-custodial sentence not only as a first offender but also as person with disability. I cannot fault the trial magistrate for imposing the two sentences in the manner he did.

7. I have however considered the nature of the offence as it concerns possession of bhang and the amount involved. While I decline to reverse the terms of imprisonment, I allow the appeal on terms that I reduce the sentences of imprisonment as follows:

(a) In *Kilgoris Criminal Case No. 599 of 2015* I reduce the sentence to 2 years imprisonment.

(b) In *Kilgoris Criminal Case No. 541 of 2015* I reduce the sentence to 3 years imprisonment.

DATED and DELIVERED at KISII this 27th day of MAY 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Otieno, Senior Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.