



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL REVISION NO.368 OF 2018

(From Original Conviction and sentence in Criminal Case No. 1166 of 2018

of the Senior Principal Magistrate's Court at Baricho)

WILSON KINYUA NJOGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The appellant was charged with being in possession of cannabis contrary to **Section 3(1)** as read with **Section 3(2) of the Narcotics Drugs & Psychotropic Substances Act No. 4 of 1994**. He was convicted of the offence and sentenced to 2years imprisonment to deter him from substance abuse.

Section 3(1) provides:

Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.

Section 3(2) (a)provides:

A person guilty of an offence under subsection (1) shall be liable— 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;

2. He sought revision of the sentence on grounds that he is remorseful and has since changed his ways. That he is 20 years old and ready to construct his life back and go back to school. That he has no other criminal record and prays for consideration of non-custodian sentence.

The jurisdiction of this court on revision is provided under **Sections 362, of the Criminal Procedure Code** as follows;

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court.”

3. This court has jurisdiction to review a sentence imposed by a sub-ordinate if the court has acted on some wrong principles or has overlooked some material factors or that the sentence is manifestly excessive.

The grounds upon which a sentence can be reviewed were set out in the case of BMN VS REPUBLIC [2014] eKLR the court held as follows;

The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of OGOLLA S/O OWUOR, [1954] EACA 270wherein the predecessor of this Court stated:

The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material

factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (*R - v- Shershowsky [1912] CCA 28TLR 263*)." See also *In Omuse - v- R (Supra)* while in the case of *Shadrack Kipkoech Kogo -v- R., Eldoret Criminal Appeal No.253 of 2003* the Court of Appeal stated thus:-

Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered

In the case of *KENNETH KIMANI KAMUNYU -VS- REPUBLIC [2006] eKLR* it is stated that an appellate Court can only interfere with the sentence if it is illegal or unlawful.

The above authorities demonstrate that sentence may only be reviewed on appeal where the appellant satisfies the court that the sentence was illegal, excessive or that the magistrate acted on the wrong principles or overlooked some material factors.

4. It is a principle of sentencing that the sentence must be proportionate to the offence. The sentence must be commensurate with the offence charged. The consideration is that the sentence must consider the nature of offence, the value of the subject matter and where appropriate the loss occasioned on the complainant or the victim. The character and the antecedents of the accused person must also be considered.

5. From the particulars of the charge the accused was found with being in possession of 2 rolls of cannabis with a street value of Kshs 20/-. The court called for a Probation Officer's report but it was not favourable for him to be placed on a non custodial sentence. The trial Magistrate sentenced him to imprisonment for two years.

6. Mr. Obiri Assistant Director of Public Prosecution who is the Prosecuting Counsel, submits that the sentence is manifestly excessive in view of the charge and the amount of the drugs.

7. The trial Magistrate called for a Probation Officer's report which I have considered. The report portrays the accused as a person who has been abusing drugs. He had a history of mental ills which is associated with drug abuse. A stint in prison would be for his own good to keep him away from accessing the drugs> considering that the maximum sentence for the offence is ten years, a sentence of two years is not manifestly excessive. The accused is a self confessed drug addict. The trial Magistrate considered all the relevant matters even the possibility of a none custodial sentence and passed a sentence which was within the confines of the law. I find that no reason to interfere with the sentence by the trial Magistrate. The application is without merits. I reject it.

Dated at Kerugoya this 23rd day of May 2019.

L. W. GITARI

JUDGE