



REPUBLIC OF KENYA

IN THE HIGH COURT KENYA

AT GARSEN

CRIMINAL APPEAL NO. 54 OF 2016

ABU ALI KALE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in the Principal Magistrate Court

at Lamu Criminal Case 328 of 2016 Hon. Njeri Thuku P.M

dated 16th November, 2016)

JUDGMENT

1. This appeal has been conceded by the State. Nonetheless I have taken time to consider and re-evaluate the evidence before the trial court as well as the grounds of appeal so as to arrive at my own conclusions as is expected of a first appellate court. See **Odhiambo vs. Republic (2008) KLR 565**.

2. The Appellant was charged with two counts. In count 1 he was charged with being in possession of narcotic drugs contrary to Section 3(1) as read with Section 3(2) (a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars of the offence were that on the 13th July 2016 at about 21:30 hours at Mkomani area near KANU House within Lamu County, was found in possession of narcotic drugs to wit half big cut roll of cannabis (bhang) of estimated prevailing market value of Kshs. 50/= in contravention of the Narcotics Drugs and Psychotropic Substance Control Act No. 4 OF 1994.

3. In count two, the Appellant was charged with resisting lawful arrest contrary to Section 253 (1) (b) of the Penal Code. He is stated to have willfully and unlawfully, resisted a lawful arrest by No. 74682 Cpl Ben Kiplagat, No. 67308 PC Leonard Kipkemei and NO. 101829 PC Felix Koono who were in their due execution of lawful duty.

4. The Appellant pleaded not guilty to both charges and after a full trial the court convicted him on the two counts.

5. In the appeal to this court, the Appellant set out nine grounds of appeal. The first three grounds are just factual statements on the case while the last two amount to mitigation. At ground 4 and 5, the Appellant states that he was arrested with another person yet they were each charged separately. That the other person was charged in criminal case No. 327 of 2016 with the outcome that the court convicted and fined him Kshs. 30,000/= or six months in default; while the Appellant was charged in criminal case No. 328 of 2016 with the outcome that he was convicted and sentenced to 10 years imprisonment without an option of a fine.

6. The Appellant also set out the ground that the exhibit belonged to the other person and that he did not resist arrest.

7. In his home grown written submissions dated 2nd December, 2018 and filed on 20th February, 2019 the Appellant submitted that he was discriminated when he was slapped with a 10 year jail term while the person he was with was fined 30,000/= or 6 months jail in default. He also submitted that he did not resist arrest but that he called people to witness that nothing had been recovered from him.

8. At the hearing of the appeal however, the appellant abandoned most of the grounds and submitted that he was discriminated. He pleaded with the court to exercise mercy and reduce his sentence.

9. As stated earlier, the State conceded the appeal on the ground that the Appellant ought not to have been treated differently from the other accused person. I have reviewed the evidence before the trial court. It is clear to me that the Appellant was properly convicted as the

prosecution proved through the evidence of PW1, PW2 and PW3 that the Appellant was searched and found with a substance which upon testing was confirmed to be cannabis a prohibited drug. I am satisfied that the evidence was sufficient to sustain a conviction.

10. In convicting the Appellant, the trial court decried the prevalence of the drug menace in its jurisdiction. Further, in sentencing the Appellant, the court set out and cited in extenso the sentencing guidelines.

11. The Appellant's contention that he was treated differently is borne by the record. In his testimony Cpl Ben Kiplagat (PW 1) of Lamu police station stated that they searched and arrested two people. That the other person submitted to the arrest while the Appellant resisted arrest but was overpowered after a struggle. Cross-examined by the Appellant, Cpl Kiplagat stated "we arrested two people and the other person is before this court. We found you with the other person".

12. The investigating officer No. 67308 PC Leonard Kipkemei (PW3) stated in cross – examination that the other person was one Ali Athman who pleaded guilty and was sentenced.

13. The question that lingers in the mind of the court is why the two persons having been arrested together on suspicion of committing the same offence, were not charged together. From PC Kipkemei's testimony however, it appears that the lenient sentence given to the other person might have been because he pleaded guilty.

14. The court in sentencing the Appellant made reference to the Sentencing Guidelines. Of interest in this appeal is the guideline quoted by the court that:- "this court wishes to lay particular emphasis on equality and accountability as set out in the sentencing policy guidelines. This is set out in part 3.2 and 3.3 as follows:-

Equity/uniformity/parity/consistency/ impartiality.

"same sentences should be imposed for same offences committed by offenders in similar circumstances"

It is apparent that despite setting out the above provision the court meted out the maximum sentence on the Appellant on count 1.

15. I have considered the sentence vis-avis the value of the drug in question. The charge sheet stated the value to be Kshs. 50/=. I find in this regard, that there was no proportionality and that the sentence was excessive.

16. In the premises, I find that the conviction was safe and thus uphold it. I however find that the 10 year jail term was disproportionate and must be set aside. From the record, the appellant has already served 2 ½ years imprisonment. I consider the period served sufficient.

17. The Appellant is set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Judgment delivered dated and Signed at Garsen on 26th day of June, 2019.

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R.LAGAT KORIR

JUDGE

In the presence of:-

Appellant present in person

S. Pacho – Court Assistant

Mr. Kasyoka – For the Respondent