REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL 38 OF 2016

REPUBLIC.....PROSECUTOR

V E R S U S

DANIEL MUREITHI KABIRINGA.....APPELLANT

JUDGMENT

1. The appellant Daniel Muriithi Kabiringa was charged before the Principal Magistrate's court at Wang'uru Cr. Case No. 458 of 2015 with the offence of Trafficking in Narcotic Drugs contrary to **Section 4(a) of the Narcotic Drugs Control Act No. 4 1994.** It was alleged that on 30/8/2015 at Ndorome Village within Kirinyaga County was found trafficking, through selling of 285 grammes of Cannabis with a street value of Kshs 5,000/-. He denied the charge and a full trial was conducted. He was found guilty and convicted. He was sentenced to serve Ten (10) years imprisonment.

2. He was dissatisfied with the conviction and sentence and filed this appeal based on the following grounds:-

i) By convicting and sentencing him in reliance with doubt-ridden evidence of trafficking 285 grams of cannabis sativa

ii) By failing to consider the existing grudge between him and the assistant chief.

iii) By relying on shoddy investigation

iv) By failing to take into account his possible defence.

3. The State opposed the appeal and filed submissions through Geoffrey Obiri Assistant Director of Public Prosecution who urged the court to find that the prosecution proved its case to the required standards and proceed to dismiss his appeal.

4. I have considered the appeal. This being a first appeal, I have a duty to evaluate the evidence and come up with my own finding but bearing in mind that the trial Magistrate had the opportunity to see the witnesses and assess their demeanor and leave room for that. This is in line with the holding in ***Okeno –v- Republic (1972) E A 32.***

5. The prosecution called four witnesses. The PW-1- Geoffrey Nyagaka Anyona was a Government analyst at the Government Chemist. On 30/9/2015 he received a Khaki envelop containing 78 rolls of plant material from Inspector Abdo of Wang'uru Police Station marked Cr. 225/217/2015 accused Daniel Muriithi Kabiringa. It was accompanied with a Memo Form requesting him to ascertain whether the plant material was bhang. After analysis he concluded that the plant material was cannabis a banned substance. He prepared a report which he produced as exhibit -1-.

6. PW-2- David Mureithi Kungu Assistant Chief Ndorome Village. He received information that there was bhang in the homestead of the appellant. He proceeded to the home accompanied by two Administration Policemen. He found the appellant rolling bhang which were in black paper bag. He recovered the bhang and arrested the appellant. PW-3- is the Administration Police Officer who accompanied PW-2-. His testimony was that he knew the appellant as he had several cases of similar nature. He escorted him to the Police Station where he was charged.

7. PW-4- was the Investigating Officer who received the appellant at the Police Station and charged him. He also escorted the drug for analysis at the Government Chemist.

8. The appellant in his defence stated that he was framed because there was a man who wanted to buy their land and he had objected.

9. The issue for determination is whether the charge was proved beyond any reasonable doubts.

10. The appellant submits that the evidence was doubt – ridden and Investigations were shoddy.

11. The prosecution tendered by the prosecution was well corroborated and was devoid of any doubts.

12. PW-1- testified that apart from 78 rolls of cannabis, they recovered there was also a bundle of bhang which had not been rolled. The rolls which were sent to Government Chemist were 78. The total drug is stated to have weighed 285 grammes. There was no material contradictions.

13. The evidence by PW -2- & 3 proves beyond any reasonable doubts that the appellant was arrested and drugs were recovered. The amount of the drugs shows that the drug was meant for commercial purpose. The appellant's defence was a mere general denial. The allegation that he was framed was denied. The exhibits produced by PW 2 & 3 which were recovered from the appellant are prove that the accused was arrested for the offence and not that he was framed.

Section 4(a) provides:

> **Any person who traffics 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 — 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;**

14. The charge preferred was proved beyond any reasonable doubts. The finding by the trial Magistrate was supported by the evidence tendered. I find no reason to fault the finding by the trial Magistrate. The trial Magistrate did consider the defence of the accused and gave reasons for rejecting it and reaching a verdict of guilty. The appellant has pointed out minor errors which I find that they do not affect the finding by the trial Magistrate. **Section 382 of the Criminal Procedure Code** provides:-

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

This cures what I consider to be minor errors.

Sentencing

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.

15. The penalty under **Section 4(a)** above is 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. The appellant herein was sentenced to 10 years imprisonment and the prosecution filed notice of enhancement.

Daniel Kyalo Muema v Republic [2009] eKLR

The Court of Appeal advanced the view that the Act does not provide for mandatory sentences and stated;

> **Thirdly, the preamble to the Act does not show that one of the purposes of the Act is to provide for mandatory sentences. Indeed, for the more serious offence of trafficking in narcotic or psychotropic substances in Section 4, for example, the Parliament uses the phrase – "shall be guilty of an offence and liable" – which phrase does not import a mandatory sentence. That is why in Kolongei vs. Republic [2005] 1 KLR 7, the appellant who was convicted of trafficking in 27.8 Kgs. of heroin was sentenced to 18 years imprisonment plus a fine and not to the prescribed life imprisonment plus a fine (see also Gathara vs. Republic [2005] 2 KLR 58 where the appellant was sentence to 10 years imprisonment plus a fine for trafficking in eleven (11) bags of cannabis sativa.'**

Caroline Auma Majabu v Republic [2014] eKLR

The Court of Appeal reasoned as follows:

> ***On her part, the learned Judge of the High Court followed Kingsley Chukwu v R Criminal Appeal No. 69 of 2010 (actually Criminal Appeal No. 257 of 2007 cited as Kingsley Chukwu v R2010 eKLR), where the Court differently constituted held that a person convicted for an offence under* Section 4(a) *of the Act shall be fined Kshs.1000,000/- or three times the value of the drug whichever is greater and in addition to imprisonment for life. With respect, that is not the purport of* section 4(a). *We find it appropriate to revisit the question whether* section 4(a) *of the Narcotic Drugs and Psychotropic Substance Control Act states provides for a mandatory sentence.....***
>
> ***In our view, the word "shall" is used in relation to the guilt of the offender and the word used in relation to the sentence is***

"liable". The Concise Oxford English Dictionary 12th Edition defines the word "liable" as

"(i) Responsible by law, legally answerable, (liable to) subject by law to;

(ii) (Liable to do something) likely to do something;

(iii) (Liable to) likely to experience (something undesirable).

Black's Law Dictionary defines "liable" as

(i) Responsible or answerable in law; legally obligated,

(ii) Subject to or likely to incur (a fine, penalty etc.)

Applying the above definition, the use of the word "liable" in section 4(a) of Narcotic Drugs and Psychotropic Substance Control Act merely gives a likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentence with the maximum limit being indicated. It should be noted that sentencing is an exercise of judicial discretion, and therefore provisions which provide for mandatory sentence compromise that discretion, and are the exception rather than the rule. Thus, where applicable the mandatory sentence must be expressed in clear and unambiguous terms.'

16. The trial Magistrate passed a sentence of Ten years but did not impose a fine. ***Section 4 a of the Narcotic Drugs and Psychotropic Substances Control Act*** provide for a custodial sentence and a fine. The trial Magistrate ought to have imposed a custodial sentence and a fine.

Section 354(3)(b) of the Criminal Procedure Code provides:-

"The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may -

in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;"

17. This court has power to interfere with the sentence on appeal. This being the first appellate court it has discretion to interfere with the sentence where the sentence has irregularities. For this reason, since the court was supposed to impose a custodial and in addition a fine, I order that in addition to the custodial sentence of Ten years, the appellant is fined Kshs 20,000/- i/d serve Six Months imprisonment. The sentence passed by the trial Magistrate cannot be termed to have been excessive or harsh considering that the appellant was not a first offender. All in all, I find that the conviction was proper. The appeal is without merits and is dismissed.

Dated at Kerugoya this 24th Day of July 2019.

L. W. GITARI

JUDGE