



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**CRIMINAL APPEAL 30 OF 2017**

**ABU SABURI SHALI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal seeking sentence revision against the sentence in the Principal Magistrate Court at Lamu criminal case 443 of 2016, Hon. Njeri Thuku (PM) dated 22<sup>nd</sup> August 2017)*

**JUDGEMENT**

1. The Appellant was charged with two counts of the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.
2. The particulars of the offence were that on the 6<sup>th</sup> November 2016 at Langoni location in Lamu West Sub-County within Lamu County, the Appellant was found trafficking in narcotic drugs by selling to wit seven sachets of heroin in a clear polythene of estimate value of Ksh 2,100/- and half a roll of cannabis (bhang) of a street value of Ksh 200/- in contravention of the said Act.
3. After hearing, the trial court found that the prosecution had failed to prove the offences of trafficking by selling. It reduced the charges to two counts of possession and sentenced the Appellant to 10 years imprisonment on each count to run concurrently.
4. Aggrieved by the said sentence, the Appellant filed his appeal on the homemade grounds that the prosecution case was full of loopholes and contradictions; the police officers framed him and; that the sentence was harsh and excessive.
5. On the 6<sup>th</sup> June, 2019, the Appellant filed amended grounds of appeal in which he abandoned the grounds of appeal against conviction and only sought for reduction of his sentence on the grounds that it was harsh and excessive, and; that the trial magistrate failed to consider that he was the sole bread winner in his family.
6. At the hearing of the appeal, the Appellant reiterated that he had abandoned his grounds of appeal against conviction. He pleaded that his sentence be reduced.
7. In oral submissions, Mr. Kasyoka, learned counsel for the Respondent, conceded the appeal in part. He submitted that the sentence in count 2 was harsh and excessive considering that the value of the drugs was Ksh. 200/- only. He however submitted that the sentence in the count 1 though harsh was legal but left it to the decision of the court. In response to the Respondent's submissions, the Appellant prayed for leniency
8. I have considered the grounds of appeal and the submissions by both parties. It is clear that the appeal was against sentence only.
9. It is trite that sentencing is at the discretion of the trial court and an appellate court can only interfere with the sentence under very specific circumstances. This position was re-emphasized by the Court of Appeal in **Benard Kimani Gacheru vs Republic [2002] eKLR** where it stated that:-

**“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. 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. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any**

one of the matters already stated is shown to exist.”

10. In the instant case, the Appellant was convicted for possession of narcotic drugs under section 3(1) as read with subsection (2) of the NPSCA which states that:-

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

**(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.**

11. On the first count, the quantity of heroin the Appellant was found with had a street value of Ksh. 2,100/- while; on the second count the quantity of bhang that the accused had was reported to have a street value of Kshs. 200/=. During sentencing, the prosecutor informed the trial magistrate that the Appellant was a second time offender having been previously convicted to 6 months' probation for a similar offence.

12. I have considered that on count 1, the 10-year imprisonment was not a mandatory sentence to be imposed in every case. See **Caroline Auma v. Republic Criminal Appeal no 65. Of 2014 (2014) eKLR** and **Daniel Kyalo Muema v. Republic, Criminal Appeal no 479 of 2007 (2009) eKLR**.

13. Additionally, the 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:-

**1. Retribution: To punish the offender for his/her criminal conduct in a just manner.**

**2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.**

**3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.**

**4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.**

**5. Community protection: To protect the community by incapacitating the offender.**

**6. Denunciation: To communicate the community's condemnation of the criminal conduct.”**

14. In **Caroline Auma Majabu V Republic (supra)** the Court of Appeal pronounced itself as thus:

**“While we do not encourage small time trafficking in drugs, we are of the view that the sentences imposed in such cases should be realistic and should aim at rehabilitation rather than incarcerating and completely destroying the offenders.”**

15. I have considered the sentence vis-à-vis the sentencing principles and authorities cited above. I have considered the Appellant's submissions on the sentence as well as the mitigation he offered and the value of the drugs. I agree with the trial court that the Appellant being a repeat offender deserves a stiff sentence. Nonetheless, I find that the 10 year sentence was manifestly excessive in the circumstances of the case.

16. In the premise, I reduce the prison term from 10 years on each count to 3½ years imprisonment on each count from the date of conviction and sentence. The sentences shall run concurrently.

17. Orders accordingly.

**Judgment dated delivered and signed at Garsen on this 30<sup>th</sup> day of September, 2019.**

.....  
**R. LAGAT KORIR**

**JUDGE**

**In the presence of:**

**S.Pacho, Court Assistant**

**Appellant in person**

**Mr. Mwangi for the Respondent**