



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO.59 OF 2019**

**ISMAEL MZEE ISMAEL.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Ismael Mzee Ismael was convicted of the charge of **trafficking in narcotic drugs** contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Act**. He was sentenced to pay a fine of Kshs.5,534,100/- or in default to serve one (1) year imprisonment. In addition, he was sentenced to life imprisonment. This was on 18<sup>th</sup> June 2010. The Applicant's appeal to the High Court on both conviction and sentence was dismissed on 5<sup>th</sup> July 2012. The Applicant's appeal to the Court of Appeal was similarly dismissed. The judgment was rendered on 22<sup>nd</sup> May 2015.

That would have been the end of the matter but for the window opened by the Supreme Court decision of **Francis Karioko Muruatetu –vs- Republic [2017] eKLR**. The Applicant filed an application before this court seeking to be resentenced arguing that the court that heard his case misinterpreted the provisions of **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Act** as regard the sentence that ought to be meted in the event that an accused is convicted under that section. The Applicant argued that pursuant to the decisions of **Francis Karioko Muruatetu -vs- Republic [2017] eKLR**, **Anthony Mbithi Kasyula -vs- Republic [2015] eKLR** and **John Mugisha -vs- Republic [2017] eKLR**, the courts that tried his case erred when it held that **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Act** imposed a mandatory life sentence in the event that an accused was convicted under that section. The Applicant therefore urged the court to relook into his sentence and impose an appropriate sentence.

During the hearing of the application, this court heard oral rival submission made by Ms. Mwenesi for the Applicant and Ms. Sigei for the State. The Applicant's counsel submitted that the Applicant had been in custody since his arrest on 30<sup>th</sup> June 2007. He has been in lawful custody for a period of more than twelve (12) years. She explained that the Applicant's constitutional right to benefit from the least prescribed sentence as provided by the law was infringed when the Applicant was sentenced to serve life imprisonment. She submitted that the courts which heard the Applicant's case misapprehended the sentence that was to be imposed on the Applicant. The courts wrongly interpreted that the only sentence that was to be meted on the Applicant was a life sentence yet the court could have sentenced the Applicant to serve a less severe sentence. In that regard, learned counsel relied on the decision by Ngenye-Macharia, J in **John Mugisha –vs- Republic [2017] eKLR** where she held thus:

*“The trial court took the view that the provision is couched in mandatory terms in imposing the sentence of life imprisonment in addition to the fine of three times the market value of the seized cocaine. This was the approach taken by courts until recent past when the Court of Appeal has now taken a different view as expressed in various decisions. The position now is that the court can nevertheless exercise discretion in sentencing accused persons under this provision, which in its view, does not impose mandatory sentences. I wholly concur with holdings by the Court of Appeal given that the word ‘liable’ gives room to the trial court to exercise discretion in sentencing.*

*In the case of **Daniel Kyalo Muema v Republic Criminal Appeal No.47 of 2007**, the Court of Appeal advanced the view that the Act does not provide for mandatory sentences. The court also expressed that the main principles governing sentencing as prescribed under the Penal Code are also applicable to other written laws including this Act. The court's reasoning in this regard reads in part as follows:*

*‘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 **Kolongi 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 sentenced to 10 years imprisonment plus a fine for trafficking in eleven (11) bags of cannabis sativa.”*

Learned counsel further relied on the Court of Appeal decision of Anthony Mbithi Kasyula v Republic [2015] eKLR where the Court held thus in regard to whether a sentence under **Section 4(a)** of the **Act** were mandatory:

*“[27] In her judgment, the learned Judge made extensive reference to, and applied Kingsley Chukwu v R Criminal Appeal No.259 of 2006, a decision of this Court (differently constituted) in which the court held that the sentence as provided under section 4(a) of the Act is mandatory. In Caroline Auma Majabu v R [2014] eKLR, this Court (as presently constituted) addressed itself at length on the question whether section 4(a) of the Act provides a mandatory sentence that must be imposed upon conviction. In that case the appellant was tried and convicted by the Chief Magistrate at Malindi for the offence of trafficking in narcotic drugs contrary to section 4(a) of the Act. She was sentenced to pay a fine of Kshs.one million, and in addition to serve life imprisonment. Her appeal to the High Court was dismissed. On second appeal to this Court, we departed from the Kingsley Chukwu v R (supra) and held that section 4(a) of the Act does not provide mandatory sentence rendering ourselves as follows:*

*“...the use of the word “liable” in section 4 (a) of the Narcotic Drugs and Psychotropic Substances (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 this discretion, and are the exception rather than the rule, thus where applicable a mandatory sentence must be expressed in clear and ambiguous terms...”*

*In the case of section 4(a) of the Narcotic Drugs and Psychotropic Substance (Control) Act the provision does not contain such clear and ambiguous language with regard to the mandatory sentence. In our view this leaves room for judicial discretion and we would be reluctant to adopt an interpretation that would defeat or muzzle the exercise of such judicial discretion.”*

Ms. Mwenesi submitted that in light of the above decisions, the Applicant was prejudiced by the holding made by the courts that the sentence that was meted on him under **Section 4(a)** of the said **Act** was mandatory. She urged the court to be guided by the Supreme Court decision of Francis Karioko Muruatetu v Republic [2017] eKLR to arrive at an appropriate decision revising the Applicant’s sentence.

Ms. Sigei for the State opposed the application. She submitted that in as much as the court had jurisdiction to review the Applicant’s sentence, there were aggravating circumstances which made the sentence that was imposed upon the Applicant appropriate. She submitted that the Applicant was convicted of trafficking in narcotic drugs, which if he had succeeded in distributing to the public, it would have harmed many people. She urged the court to weigh the harm that the Applicant’s criminal activity would have caused to the society as compared to his mitigating circumstances. She submitted that the Applicant’s mitigation was not such that it would persuade this court to review the sentence that was imposed upon him by the court. She therefore urged the court to dismiss the application.

This court has carefully considered the submission made by the parties to this application. It was clear to this court that the Applicant has a case when he states that he was treated in a discriminatory manner when he was sentenced to serve the maximum sentence provided by **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Act** yet it was evident that he ought to have benefitted from a lesser custodial sentence. It was apparent that all the courts within the hierarchy that heard his case misapprehended the application of **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Act** in sentence. The courts seem to have proceeded on the assumption that once the Applicant was convicted, then the only custodial sentence that could be meted upon him was life imprisonment. The subsequent decisions of the Court of Appeal and this Court clearly shows that an injustice was occasioned on the Applicant when he was sentenced to serve life imprisonment which is the maximum sentence provided by that section of the law. That being the case, this court is persuaded that the Applicant has made a case for this court to revise his sentence.

In his mitigation, the Applicant stated that he had been in lawful custody for a period of twelve (12) years since the time of his arrest. He was a first offender. He was remorseful. He pleads with the court to exercise leniency on him in view of the fact that he is a father of three children. His wife had died during the period of his incarceration. The Applicant has been a model prisoner. He is a teacher of Islamic studies while in prison. He pleads with the court to give him a second chance at life. This court is of the view that in the period that the Applicant has been in prison he has reformed. However, taking into consideration the serious nature of the crime that he was charged with, this court is not persuaded that the sentence that he has served is sufficient.

In the premises therefore, the sentence of life imprisonment that was imposed on the Applicant is set aside and substituted by a sentence of this court. The Applicant is sentenced to serve five (5) years imprisonment with effect from the date of this Ruling. It is so ordered.

**DATED AT NAIROBI THIS 24<sup>TH</sup> DAY OF SEPTEMBER 2019.**

**L. KIMARU**

**JUDGE**