



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 55 OF 2017

ZAKAYO WAMBUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 14 of 2017 in the Senior Principal Magistrate's Court at Voi delivered by Hon M. Onkoba (SRM) on 21st February 2017)

JUDGMENT

1. The Appellant herein, Zakayo Wambua was charged with the offence of being in possession of narcotic drugs contrary to Section 3 (1) as read with Section 3(2) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars of the charge were that on the 5th day of January 2017 at Maungu area within Taita Taveta County, he was found in possession of cannabis (bhanga) to wit twenty one and a half (21 ½) small stick rolls with a street value of Kshs 440/=.
2. The Learned Trial Magistrate Hon M. Onkoba, Senior Resident Magistrate convicted him and sentenced him to three (3) years imprisonment.
3. Being dissatisfied with the said judgment, on 26th July 2017, the Appellant filed a Notice of Motion application seeking leave to file his appeal out of time, which application was allowed and his Petition of Appeal deemed to have been duly filed and served. He relied on one (1) Ground of Appeal, which appeared to have been an appeal against the sentence only. His Written Submissions were filed on 22nd November 2017. The State's Written Submissions were dated 15th January 2017 and filed on 17th January 2017.
4. When the matter came up on 18th January 2018, both the Appellant and the State asked this court to deliver its judgment based on their respective written submissions. The judgment is therefore based on the said written submissions.

LEGAL ANALYSIS

5. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

6. As can be seen hereinabove, the jurisdiction of an appellate superior court is limited to analysing the evidence that has been adduced in a trial court afresh with a view to establishing whether or not such trial court erred on fact or law or both. However, where an accused person has pleaded guilty to an offence, its jurisdiction is limited to considering the legality and extent of a sentence.

7. This is in line with the provisions of Section 348 of the Criminal Procedure Code Cap 75 (Laws of Kenya) that stipulates as follows:-

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”

8. In this case, this court noted that the Appellant pleaded guilty to the offence. His admission of the charge that had been preferred against him was reflective of his guilt. No value then would be added in analysing the evidence that was adduced during trial as this court is limited to looking at the extent and legality of the sentence that he was given only.

9. However, whereas this court appreciated that its jurisdiction was limited to interrogating the extent and legality of the sentence herein, it took cognisance of the fact that this was a *pro se* trial. The Appellant represented himself during the trial in the Trial Court and was not expected to know all the finer details of the law.

10. This court therefore deemed it fair to address itself to the defectiveness or otherwise of the Charge Sheet and the legality, propriety and correctness of the sentence. Indeed, a court of law has inherent powers to make such orders as are necessary for the ends of justice and to prevent the abuse of the process of court. This court therefore dealt with the issues that had been raised herein under the following heads.

I. PROOF OF THE PROSECUTION'S CASE

11. The Appellant stated that he was persuaded by the Chief and Arresting Officer to plead guilty to the offence as he would only be given a fine which he subsequently established was not the case when he was sentenced to prison as it became evident that they were avoiding a full trial.

12. It was his argument that the Prosecution failed to prepare a Memo for transmission to the Government Analyst for examination of the exhibit through what he referred to as fast blue "B" test and Duqueriolis-levire test. He submitted that it was not known whether or not the exhibit that was adduced as evidence in court was actually bhang, cigarettes or something else.

13. On its part, the State submitted that the Appellant's plea was unequivocal and that the procedure for taking plea was properly followed as the Charges and facts were read to him in Kiswahili, a language that he understood as he had not informed this court that he did not understand Kiswahili. It pointed out that there was no factual proof that the Appellant was coerced into pleading guilty as he had contended.

14. It is important to point out right at the outset that the court was not persuaded by the Appellant's submissions that the lack of the said Government Analyst Report rendered his admission of the facts inapplicable in the circumstances of the cases herein.

15. Indeed, he was fully aware that he had been charged for being in possession of *cannabis sativa*, a narcotic drug. The particulars in the Charge showed that the offence he was said to have committed was contrary to Section 3(1) as read with Section 3(2) of the Narcotics Drugs and Psychotropic Substance (Control) Act Cap 245 (Laws of Kenya).

16. On pleading guilty, the facts that were read to him were also clear that he was found in possession of bhang. There was no ambiguity in the manner he pleaded to the charge and in the manner the facts were read to him as the Charge and facts were read to him in a language that he understood.

17. This was in line with the holding in the case of **Kariuki vs Republic [1954] KLR 809** that Wendoh J referred to in the case of **Fredrick Musyoka Nyange vs Republic [2012] eKLR** wherein it was held as follows:-

“2. The manner in which a plea of guilty should be recorded is:

(a) the trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands;

(b) he should then record the accused's own words and if they are an admission, a plea of guilty should be recorded;

(c) the prosecution may then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

(d) if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused's reply – Adan v Republic [1973] EA 445”

18. This court was not therefore persuaded that there was any merit that the Appellant was coerced to plead guilty to the charge or that the Prosecution ought to have adduced a Report from the Government Analyst to demonstrate that the exhibit was bhang. This is because he himself admitted that the said exhibit was bhang. The situation would have been different had he pleaded not guilty to the offence. His argument had no merit and the same is hereby dismissed.

I. SENTENCE

19. Grounds of Appeal Nos (2) and (3) were dealt with under this head.

20. The Appellant averred that the sentence was too excessive considering that in **Cr Case No 841 of 2016 Voi Republic vs Francis Mwangogo Mkandoo**, the very same Learned Trial Magistrate fined the accused person therein Kshs 50,000/= or in default to serve twelve (12) months imprisonment.

21. On its part, the State referred this court to the case of **Shadrack Kipchoge Kogo vs Republic, Eldoret Criminal Appeal No 253 of 2003 (quoted in Arthur Muya Muriuki vs Republic (2015) eKLR)** where the Court of Appeal stated the following on principles of sentencing:-

“Sentencing is essentially an exercise of the trial court and for the court to interfere, it must be shown that in passing sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was so harsh and excessive that an error in principle must be inferred.”

22. However, it was its submission that whereas the maximum penalty for possessing *cannabis* for own consumption is ten (10) years imprisonment and where it is for other purpose it attracts a maximum penalty of twenty (20) years imprisonment, the sentence of three (3) years imprisonment that was meted upon the Appellant herein was harsh and excessive in the circumstances of the case.

23. It referred this court to the case of **Lawrence Mitelian vs Republic [2017] eKLR** where this very court upheld a sentence of five (5) years imprisonment where the appellant herein had been convicted of trafficking bhang worth Kshs 360,000/= and in the case of **Juma Issa Mohamed vs Republic [2017] eKLR** where this very court reduced the life sentence penalty to four (4) years where the appellant therein had been convicted of trafficking four (4) sacks of bhang worth Kshs 160,000/=.

24. In addition to the cases that were cited by the State herein, in the case of **Linnet Wekota Malenya vs Republic [2018] eKLR**, this very court reduced a fine of Kshs 300,000/= or in default to serve four (4) years to a fine of Kshs 200,000/= or in default to serve two and a half (2 ½) years' imprisonment.

25. In the case of **Lennox Gabriel Mutundu vs Republic [2015] eKLR**, this very court also upheld a sentence of four (4) months where the applicant therein had been found in possession of 100 gms with a street value of Kshs 40/= in contravention of the said Act.

26. This court therefore concurred with both the Appellant and the State that bearing in mind the sentences it had dealt with previously, the penalty of three (3) years for twenty one and a half (21 ½) rolls of bhang was manifestly excessive.

27. Doing the best that it could, this court came to the conclusion that although the Appellant was in possession of narcotic drugs not intended for his own consumption, a sentence of one (1) year imprisonment as had been proposed by the State was fair. Indeed, penalty ought not to be so excessive as to defeat the objective of reforming a convicted person.

DISPOSITION

28. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 26th July 2017 was partially successful to the extent of the sentence only. Accordingly, the conviction is hereby upheld as the same was lawful and fitting.

29. However, this court hereby sets aside and/or vacates the sentence of three (3) years imprisonment and replaces the same with a sentence of twelve (12) months. In view of the fact that he has since completed his default sentence of one (1) year imprisonment by the time of delivery of the decision herein, this court hereby orders that he be set free forthwith unless held or detained for any other lawful reason.

30. It is so ordered.

DATED and DELIVERED at VOI this 20th day of April 2018

J. KAMAU

JUDGE

In the presence of:-

Zakayo Wambua-Appellant

Miss Anyumba for State

Josephat Mavu- Court Clerk