IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 187 OF 2011

CORAM: D. S. MAJANJA J.

BETWEEN

AWADH SAID.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon .J. Gandani, PM dated 11th August 2011 at Chief Magistrates Court at Mombasa in Criminal Case No.657 of 2011)

JUDGMENT

1. The appellant, **AWADH SAID**, was charged with and convicted of the offence of being in possession of narcotic drugs contrary to **section 3(1)** as read with **section (2)(a)** of the ***Narcotic and Psychotropic Substances Control Act, No. 4 of 1994*** ("the ***Act***"). The particulars of the offence were that on 22nd February 2011 at Mashomoroni area of Kisauni Area within Coast Province, he was found in possession of narcotic drugs to wit 20 sachets of heroin with a street value of Kshs. 2,000/- in contravention of the said ***Act***. He was sentenced to 20 years' imprisonment and now appeals against conviction and sentence.

2. The appellant does not contest the conviction. He urges the court to exercise leniency. Counsel for the State opposes the appeal on grounds that the sentence was not excessive and was considerate in light of the circumstances which the trial magistrate considered.

3. Sentencing is an exercise of discretion and the appellate court will not interfere in the sentence unless it is shown that the trial court took into account an irrelevant factor, or that a wrong principle was applied or short of that, the sentence was so harsh or excessive that it manifests an error of principle (see ***Ogalo s/o Owuora v R*** **[1954] EACA 270**, ***Nilsson v R*** **[1970] EA 599** and ***Wanjema v R*** **[1971] EA 493**). In imposing a sentence, the court should always bear in mind the principles of proportionality, deterrence and rehabilitation and in considering these factors, the court ought to weigh both mitigating and aggravating factors (see ***Arthur Muya Muriuki v R*** **NYR HCCRA No, 31 of 2010 [2015]eKLR**).

4. **Section 3** of the ***Act*** provides that a person guilty of the offence of possession of narcotic substances, *"shall be liable to …….. a term of imprisonment of 20 years."* In the sentencing notes the trial magistrate stated that the ***Act***, *"prescribes mandatory sentence."* In my view this was a misdirection as the use of the word, *"liable to"* imports discretion so that the 20 years' imprisonment is the maximum sentence. In ***Opoya v Uganda*** **[1967] EA 752,754**, the East Africa Court of Appeal expressed the view that:

> *It seems to us beyond argument the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it.*

5. Consequently, the trial magistrate imposed the maximum sentence on a person the prosecution admitted was a first offender. I note what was stated in ***Josephine Arissol v R*** **[1957] EA 447** that, *"The general rule is that a maximum sentence should not be imposed on a first offender"*.

6. For the reasons I have outlined, the trial magistrate erred in principal in imposing the sentence of 20 years' imprisonment. Considering the amount of heroin, the appellant was found with, I allow the appeal, quash the sentence and substitute it with **ten (10) years** imprisonment to run from the date of conviction before the trial court.

DATED and DELIVERED at MOMBASA on the 30th *day* of *August 2018.*

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Masila, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.