



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 140 OF 2017**

**MERCY AWOUR.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the conviction and sentence delivered on 14<sup>th</sup> August, 2017*

*by Hon. E.M Kagoni (SRM) in Mombasa Criminal Case No. 2425 of 2016)*

**JUDGMENT**

1. The Appellant was charged with 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. The particulars of the offence were that on the 10<sup>th</sup> day of December, 2016 at Migadini area in Changamwe sub-county within Mombasa County, the Appellant was found trafficking in narcotic drugs by storing narcotic drugs to wit 1089 big rolls of cannabis sativa of street value Kshs. 217, 800/= . In contravention to the said Act.
2. Appellant was convicted and sentenced to life imprisonment of the offence of trafficking in Narcotic drugs, after a full trial that commenced on 8<sup>th</sup> February, 2017 and ended on 19<sup>th</sup> August 2017.
3. The Appellant being aggrieved by both the conviction and the sentence lodged this appeal on the following grounds:
  - a) **THAT the learned magistrate erred in law and in fact in committing the Appellant.**
  - b) **THAT the learned magistrate erred in law and in fact in not finding that the prosecution had not proved their case beyond any reasonable doubt.**
  - c) **THAT the learned trial magistrate erred in law and in fact in convicting the Appellant on the evidence of PW1 and PW2, police officers whose evidence was different and amounted to contradiction.**
  - d) **THAT the learned trial magistrate erred in law in not finding that being married, the Appellant did not have exclusive control of the house in which she lived with her husband.**
  - e) **THAT the learned trial magistrate erred in law and in fact in proceeding with the case whereby the Appellant was not participating in the trial as she was not cross examining the witnesses.**
  - f) **THAT the learned trial magistrate erred in law and in fact in convicting the Appellant when a valuation report was not produced in court.**
  - g) **THAT the learned trial magistrate erred in law and in fact in not giving the Appellant the benefit of doubt.**
  - h) **THAT the learned magistrate erred in law and in fact in treating the Appellant's defence perfunctorily.**
  - i) **THAT the learned trial magistrate erred in law in sentencing the Appellant to life imprisonment, a sentence which was extremely excessive in the circumstances.**

**j) THAT the learned trial magistrate erred in law and in fact in passing an illegal sentence.**

4. The Appeal was canvassed by way of written submissions. The Appellant filed her submissions on 22<sup>nd</sup> May, 2018 while the Respondent filed its submissions on 8<sup>th</sup> August, 2018.
5. The Appellant through her learned Counsel Mr. Wameyo submitted that the conviction was premised on the preposition that the Appellant was in possession of the cannabis sativa. Counsel contended that the prosecution did not prove beyond reasonable doubt that the Appellant was in a position to deal with the cannabis sativa as the owner at the exclusion of others. Counsel opined that the issue of physical control and legal possession of the cannabis sativa was crucial to prove that indeed the Appellant was the owner of the drugs.
6. Mr. Wameyo faulted the prosecution for imputing possession of the drugs to the Appellant simply because the Appellant lived in the house where the drugs were found. Counsel also suggested that there was evidence to show that there were other people who lived in the house including the Appellant's husband, who paid the rent and therefore as in control of the house but was never arrested. Further, Counsel argued that the Appellant had informed the police that the drugs belonged to her sister but the police failed to pursue this line of investigation.
7. The Respondent through M/s Ocholla, counsel for the state submitted that the Appellant was in possession of the drugs as there was proof that the Appellant lived in the house where the drugs were found and further that the Appellant had prior knowledge of where the drugs were located in the house.
8. As to whether the Appellant participated in the trial, the Respondent submitted that the Appellant chose not to cross examine witnesses even after she was warned by the trial court of the severity of the charges that she was facing.
9. The Respondent submitted that a valuation was not necessary to secure a conviction in this matter. The Respondent cited the case of **Kabibi Kalume Katsui v. R [2015] eKLR** where the Court of Appeal dismissed an appeal that was based on the ground that a valuation report was not prepared.
10. As first appellate court, the duty bestowed before it is to examine afresh the evidence and facts on record, analyze the same and arrive at its own independent conclusion. This is the portion as found in the case of **OKENO –VERSUS- REPUBLIC (1972) E.A 32**.
11. The prosecution adduced evidence of five(5) witnesses whose evidence was that on 10<sup>th</sup> December, 2016 PW1, PC Geoffrey Maina and PW2, Vincent Onkoba were on patrol duties at Migadini area at about 11:30pm when they got information that there was a cannabis in a house within the area. They proceeded to this house, knocked and were ushered in by a lady who introduced herself as the owner of the house. They then requested that they search the house and they were allowed.
12. PW2 proceeded to search the metallic box and a bag under which were under the bed. On opening them, they found rolls of what they suspected to be narcotic drugs. They arrested the lady (herein referred to as the appellant) and escorted her to Chagamwe police station after counting the rolls and found they were 1098 in number. He prepared a search sheet which they all signed, and an inventory of the exhibits and seizure certificate which they signed and the appellant counter signed.
13. PW2 prepared an Exhibit memo form and forwarded the 1098 rolls on 19<sup>th</sup> December 2016 to the Government Analyst for examinations PW4, GEORGE OGUTU, a gazette Government Analyst received the dry plant material whose number she gave as 766 in a blue metal box and 323 in a black bag together with the exhibit memo form. He examined the dry plant material that had been handed over to him and found it to be cannabis in the 1<sup>st</sup> schedule of the Narcotic Drugs and Psychotropic Substances Control Act. He prepared a report which he signed on 19<sup>th</sup> December, 2016 and produced it as Exhibit P5.
14. The accused person, MERCY AWOUR was placed on defence and she opted to give a sworn statement denying the charges and stated that the narcotics were found in her husband's house. She said that her husband, BENARD OCHIENG, was a bus conductor on the Dreamline Bus Company and was away on duty on the day the police went to her house. She said that she had not known when the bag containing the rolls were brought to the house and by who. She said that the rolls were not hers.
15. The accused person, MERCY AWOUR was placed on defence and she opted to give a sworn statement denying the charges and stated that the narcotics were found in her husband's house. She said that her husband, BENARD OCHIENG, was a bus conductor on the Dreamline Bus Company and was away on duty on the day the police went to her house. She said that she had not known when the bag containing the rolls were brought to the house and by who. She said that the rolls were not hers.
16. In his judgment, the trial had this to say:

**“I am not therefore satisfied that the accused person did not know that there were 1089 rolls of cannabis in her house, she knew and played along and she cannot hide under the guise of being married to the owner of the consignment to escape culpability. I am satisfied that the prosecution has proved that the accused person trafficked in cannabis by storing 1089 rolls in her house....”**

**The Determination**

17. I have analyzed the evidence that was adduced before the trial court, considered the grounds of appeal and the submissions by both parties. In my view, only two issues arise for determination, being whether the Appellant was in possession of the cannabis sativa and whether the sentence imposed on the Appellant was excessive.

18. Section 4 (a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 provides as follows:

**“Any person who trafficks 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—**

**(a) 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; or**

**(b) in respect of any substance, other than a narcotic drug or psychotropic substance, which he represents or holds out to be a narcotic drug or psychotropic substance to a fine of five hundred thousand shillings, and, in addition, to imprisonment for a term not exceeding twenty years.**

The term “trafficking” is defined in section 2 of the Act to mean *“the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance or making of any offer in respect thereof”*

18. In this case the Appellant was charged with the offence of trafficking the cannabis sativa by storing the cannabis sativa. The Appellant does not dispute that the cannabis sativa was stored in the house that she lived in but contends that the cannabis sativa was not in her possession.

19. PW 1 and PW2 testified that they were police officers who were tipped off by members of the public that there was cannabis in a house within Migadini. PW1 and PW2 proceeded to the house where they found the Appellant and her child. PW1 and PW2 requested to search the house, to which the Appellant agreed. The witnesses testified that before commencing the search, the Appellant told them that what they were looking for was under the bed in a box and bag. PW1 and PW2 retrieved a metal box and black suitcase from under the bed and recovered the 1098 rolls of dry plant material which they suspected to be cannabis sativa. In her defence the Appellant gave a sworn statement. The Appellant denied the charges and insisted that she did not know how the bag containing the cannabis sativa got to the house. She also claimed she lived in the said house with her husband who was never arrested.

20. The Black’s Law Dictionary 10<sup>th</sup> Edition defines the term possession to mean *“the fact of having or holding property in one’s power, the exercise of dominion over property. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object. Something that a person owns or controls”*.

Section 4 (a) of the Penal Code offers the following definition for “possession”:

**(a) “be in possession of” or “have in possession” includes not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;**

**(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.**

21. PW1 and PW2 testified that it is the Appellant who directed them on where the cannabis sativa was stored in the house. The Appellant did not dispute this assertion. Was the Appellant in possession of the cannabis sativa? The Appellant contended that she was not in a position to deal with the drugs as the owners at the exclusion of others. However, the definition of possession is not limited to dealing with the item as the owner. Possession includes what is termed as “constructive possession” where the item is not on the person, but is within the person’s area of control, such as inside a house with the person. In this case, the drugs were found inside the house where the Appellant lived. Further, it is the Appellant who directed PW1 and PW2 on where to find the drugs. In my view, the Appellant was in constructive possession of the cannabis sativa.

22. Also, possession becomes a major issue where the accused person is charged with an offence under Section 3 (1) as read with 3 (2) of the Narcotic Drugs and Psychotropic Substances (Control) Act. In the instant case, the Appellant was charged with trafficking of the cannabis sativa. The prosecution had to prove the mode of trafficking which in this case was trafficking by way of storing. The evidence led by the prosecution did prove this offence. I therefore find no reason to set aside the conviction on this ground.

23. As to whether the sentence meted out by the trial court was excessive, Section 4 of the Act provides for a sentence of 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 or in respect of any substance, other than a narcotic drug or psychotropic substance, which he represents or holds out to be a narcotic drug or psychotropic substance to a fine of five hundred thousand shillings, and, in addition, to imprisonment for a term not exceeding twenty years.

24. In this case, cannabis sativa is a narcotic drug according to the First Schedule to the Narcotic Drugs and Psychotropic Substances (Control) Act. Further, PW4, an analyst from the government chemist confirmed that the plant material that was retrieved from the house was in deed cannabis. The Appellant was therefore liable to a fine of Kshs. 1,000,000/= or three times the market value of the narcotic drug and in addition imprisonment for life. The Appellant was sentenced to life imprisonment. The Appellant contended that there was no valuation certificate to authenticate the value of the narcotic drug. In the case of **Kibibi Kalume Katsui v. Republic [2015] eKLR**, the Court of Appeal opined that the failure to produce a valuation certificate was not fatal. The Court held as follows:

**“There was therefore no real basis for ascertaining the value of the drugs so as to justify the sentence imposed. The valuation certificate whose importance cannot be gainsaid as it conquers the awkward position the court is put in to second guessing the value, was not produced. However all is not lost, we take note that PW4 and PW2 were part of the Anti-narcotic Police Unit that recovered the drugs. It can be safely presumed that as they frequently interacted with drug-users or even dealers they brushed on the minute idea of the retail value of the drugs as at that time. We shall take the value to be as stated but with caution, we are not giving the police a free-hand by doing this, no! They must pull-up their socks”.**

The failure to produce the valuation report, although important, could therefore not invalidate the conviction herein. PW2 estimated the street value of the cannabis seized to be Kshs. 217,800/=.

25. Is the life imprisonment sentence provided under Section 4 (a) mandatory? In **Kibibi Kalume Katsui v. Republic (Supra)** the court cited the case of **Carolyne Auma Majabu v Republic [2014] eKLR** where it was held that:-

**“[12] Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, sets out the penalty for trafficking in the following terms ...**

**...Any person who trafficks in any narcotic drug or psychotropic substance ..... shall be guilty of an offence and liable –**

**(a) in respect of any narcotic drug or psychotropic substance to a fine ..., and in addition, to imprisonment for life”**

**[13] In our view, the word “shall” is used in relation to the guilt 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 Responsible or answerable in law; legally obligated Subject to or likely to incur (a fine, penalty etc.)**

**[14] 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...”**

The Court went on to state that:

**“In the premises, we shall state without tiring, that under the Narcotic Drugs and Psychotropic Substances (Control) Act, sentence is still discretionary. We are of course in no way suggesting that under this Act this Court or the High Court has an automatic duty to interfere with the exercise of discretion by the trial court as sentencing is discretionary. That an intervention on discretion is only justified when it is wrongly exercised such as when the court takes in irrelevant facts or leaves out relevant ones and it is automatic when the wrong sentence is imposed which is legally erroneous. See *Wanjema v Republic [1971] EA 493* and *Diego v Republic [1985] KLR 621*. The trial court and High Court meted out a life imprisonment sentence inclusive of a one million fine, on the premise that such sentence was mandatory hence they misdirected themselves. That misdirection calls for our intervention. In arriving at the appropriate sentence that we should substitute we are bound to consider the quantity of the drugs, its value, the mitigation canvassed by the appellant and her antecedents if at all relating to the same offence”.**

26. The sentence of life imprisonment is therefore the maximum sentence. The trial court in sentencing is required to exercise its discretion while bearing in mind the quantity of the drugs, the value of the drugs and the mitigation of the accused person. In her mitigation, the Appellant stated that she was a remorseful first offender, she prayed for a non-custodial sentence. The street value of the narcotic drugs was estimated to be Kshs. 217, 800/=. Taking this into consideration, I find the sentence imposed by the trial court to have been excessive.

27. I therefore uphold the conviction but set aside the sentence of life imprisonment and substitute it with a term of 10 years imprisonment effective from the date of conviction and sentence in the trial court.

**Dated, Signed and Delivered in Mombasa this 30<sup>th</sup> Day of November, 2018.**

**D. CHEPKWONY**

**JUDGE**