



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 173 OF 2013

ESTHER EKAI:::APPELLANT

VERSUS

REPUBLIC:::RESPONDENT

(An Appeal from the original conviction in Criminal Case No. 2513 of 2013 in the Resident Magistrates Court at Kapsabet by Hon. B. Limo, Resident Magistrate, dated 9th September, 2013)

JUDGMENT

The appellant herein Esther Ekai was convicted of the offence of being in possession of narcotic drugs C/s 3(1) as read with S. 3(2) of the Dangerous Drugs and Psychotropic Substance Control Act, 1994. Upon her plea of guilty, she was sentenced to serve seven (7) years imprisonment. The particulars of the charge were on 4th September, 2013 at Kapsabet Law Courts in Nandi County, she was found in possession of 49 rolls of bhang with a street value of Kshs. 980/- which was not medically prepared.

The appellant has on 18.9.2013 filed an appeal for the said sentence by way of a document headed, "Mitigation Grounds". A reading of the same confirms that the document raises only issues of mitigation. A total of 6 grounds have been listed as follows: -

1. That my Lordship, I pleaded guilty when the charge was read to me due to ignorance.
2. That I am a remorseful and apologetic and pray for the sentence reduction and pardon.
3. That my Lordship, I am a mother of three children who depend on me for their survival and basic needs and their father in prison for life sentence for case of rape.
4. That my Lordship, prior to my arrest, I used to be a good abiding citizen and the current matter emanated from ignorance as I was cheated to ferry cannabis sativa packed in cigarettes packet thing they were cigarettes.
5. That Lord I pray to be available in person upon the hearing of the appeal before your Honourable Court.

The relief sought therein is that the appeal be allowed and sentence be reduced. Indeed at the hearing of the appeal on 9.2.2017, the appellant only made submissions that the sentence be reviewed and reduced. No submissions were made on the first ground listed which seemed to challenge the plea of guilty as

entered. I take it that the appellant has abandoned this ground and only wishes to pursue the issue of length of the sentence meted out.

In opposing the appeal, Ms. Oduor for the state, submitted that accused was charged under 3(2) of the Act and sentenced to serve 7 years imprisonment. That whereas the first limb of the Section 3(2) gives a sentence of 10 years if a party shows that the drugs are for his own use, the 2nd limb gives a sentence of 20 years if the drugs are for any other purpose. In her submissions, it is the 2nd limb that applies in this case since she was sneaking the drugs to a remandee at Kapsabet, and that the penalty ought to be 20 years. She maintained that the trial magistrate was lenient in sentencing the appellant to 7 years imprisonment and that the sentence was within the law. Counsel urged that the appeal be dismissed and the sentence be retained.

I have carefully considered the 2 opposing submissions, narrowed down basically to the issue of length of the sentence of 7 years. This is a first appeal. This court is minded of the provisions of S. 348 of the Criminal Procedure Code, Cap 75, thus;

“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.”

The accused was sentenced on her own plea of guilty. As directed by the above provisions, this court can only interfere with the lower court’s determination on 2 issues. First, the extent of the sentence and second, the legality of the sentence, I shall deal with the 2 issues in that order.

On the first issue of extent of the sentence, it is noted that the accused was charged under S.3(1) as read with S.3(2) of the Dangerous Drugs and Psychotropic Substance Control Act, 1994. Of course, there is no such statute in Kenya, passed by the legislature. I shall come back to this later. However, if it was meant to be the Narcotic Drugs and Psychotropic Substance (Control) Act, 1994, S.3(1) of the Act provides;

S. 3(1) “Subject to sub-section (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.”

This is the general provision that creates the offence of possession. The accused in addition charged with sub-section 2 of the S.3, which has 2 limbs as follows: -

S. 2(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 20 years; and”.

The 2nd limb deals with narcotic drugs other than cannabis and which are not relevant to our instant case. From the foregoing, it is clear, as confirmed by her own admission that indeed the accused was in possession of the cannabis, a narcotic drug. She never claimed the same to be for her own consumption, leaving her case to properly fall under the 2nd limb of S.3(2)(a) i.e. “every other case”, for which the sentence is prescribed to be 20 years. If the sentence provided is 20 years imprisonment, the issue therefore, is whether the 7 years imprisonment term as ordered by the Honourable Trial Magistrate was inordinately excessive as claimed by the accused. On this score, I agree with counsel for the state, that the 7 years imprisonment term is reasonable in the circumstances. I therefore decline to interfere with that sentence in terms of its extent.

This court is otherwise also required to consider the legality of the sentence. As noted above, the charge that accused pleaded guilty to was under S. 3(1) as read with S. 3(2) of Dangerous Drugs and Psychotropic Substance Control Act, 1994. There is no such statute in the Laws of Kenya. In effect therefore, the accused pleaded guilty to a charge based on a non-existent Law. An offence must be

known to law and a non-existent law cannot create an offence (Act. 50 (1)(n)). It follows also that no sentence or punishment can be meted out based on non-existent law. It is for this reason that I find an err on the part of the Honourable Trial Magistrate in sentencing accused on a non-existent statute. The sentence was accordingly not proper and the appeal of the appellant must succeed on this ground. I allow the same, set aside the sentence of 7 years and order that accused be accordingly set free unless lawfully held. Orders accordingly.

DATED, SIGNED and DELIVERED at ELDORET, this 23rd day of February, 2017.

D.O. OGEMBO

JUDGE

Judgment read out in open court in presence of: -

1. *Ms. Kegehi for the State and*

2. *The Accused*

D.O. OGEMBO

JUDGE