REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

LODWAR HIGH COURT CRIMINAL APPEAL NO. 15 OF 2016

WILLIAM WANYALA WAMBOYA ……..……APPELLANT

VERSUS

REPUBLIC ……..…RESPONDENT

(An appeal from the conviction and sentence in original Lodwar criminal case No. 278/2012 delivered on 11/5/2012 by H O Barasa Senior Resident Magistrate)

JUDGMENT

The appellant **William Wanyala Wamboya** was charged with the offence of **being in possession of Cannabis Sativa contrary to section 3(1) as read with section 3 (2) (a) of the Narcotic and Psychotropic substances (control Act) Act No. 4 of 1994.** The particulars of the offence are that on the 11th day of April, 2012 at Kakuma Refugee camp in Turkana West District within the Turkana County was found in possession of Cannabis Sativa (bhang) to wit one rode. The appellant pleaded guilty to the charge, was convicted and sentenced to ten (**10**) years imprisonment.

The appellant was dissatisfied with the sentence and preferred this appeal. His grounds of appeal which are in effect mitigation are that the trial magistrate failed to consider that he is the bread-winner; that he was a first offender, that he did not consider his mitigation and finally he suffered a stroke while serving sentence and has never received proper treatment todate.

Mr. Kimanthi for the state opposed the appeal on conviction. He however supported the appellant appeal as sentence. Mr. Kimanthi submitted that the sentence of ten (10) years is the maximum provided for under section 3 2(a) of the Act and that the appellant being a first offender, the sentence of ten (10) years was excessive. He urged the court to use its powers under section 354 to mete out an appropriate sentence.

The appellant was charged with the offence of being in possession of Narcotic drug contrary to section 3(1) as read with Section 3 (2) a of the Narcotics and Psychotropic substances Act which provides

> **"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.**
>
> **(2) A person guilty of an offence under sub-section (1) shall be liable**
>
> **(a) in respect of cannabis where the person satisfied 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 twenty years"**

When the appellant appeared before the trial magistrate on 11/4/2012 the charge was read to and every element explained to him to which he replied

Accused – 'true'

On 9/5/2012 the facts were read over to him and when asked whether he admits or denies the fact he replied

Accused – the facts are true.

The court then convicted him on his own plea of guilty and after detailed mitigation and address by the prosecution; the learned trial magistrate sentenced him to serve ten (10) years imprisonment.

I have perused the proceedings, the plea taking followed the directions in **Adan –VS – Republic 1973 EA 435** where the court stated that on taking plea

> **(i) The charge and all the essential ingredients o f the offence should be explained to the accused in his language or in a language he understands.**
>
> **(ii) The accused own words in response to the charge should be recorded and if they are an admission a plea of guilty**
>
> **(iii) The prosecution should immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.**
>
> **(iv) If the accused does not agree with the facts or raises any question as to his gilt his reply must be recorded and change of plea entered.**
>
> **(iv) If there is no change of plea, a conviction should be recorded and a statement of facts relevant to the sentence together with the accused's reply should be recorded.**

I therefore satisfied that the appellant plea of guilty before the trial court was unequivocal and the conviction on his own plea of guilty was proper. The appellant having been convicted on own plea of guilty cannot appeal to the High court except as to the extent or legality of the sentence. Section 348 criminal procedure code provides

> **348 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"**

This is an appeal from the Magistrate court in which the appellant submits that the sentence imposed on him is excessive. The principles upon which an appellate court can interfere with the trial courts discretion on sentence were well set out in **Nelson – VS – Republic 1970 EZ 599** following Ogalo Son of **Owuora – VS – Republic (1954) 21 EA 270** as follows.

> **"The Principle upon which an appellant court will act in exercising the jurisdiction to review sentences are fairly established". The court does not alter a sentence on the mere ground that if the member of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by the trial judge unless as was said in James – VS – Republic (1950) 18 E.A 147 in is evident that the judge had acted upon wrong principle or overlooked some material factor. To this we add the third criteria namely that the sentence is manifestly excessive in view of the circumstances of the case" (John Muendu Musai – VS – Republic NBI C.A 365/2011).**

Mr. Kimanthi for state supports the appeal on sentence. It is true as counsel submitted that the sentence of Ten years under section 3 (2) (a) is the maximum when the Narcotic drug is for own use. The

appellant was found in possession of one rod of bhang; he was a first offender and had compelling mitigation. Had the trial magistrate considered all these factors he would not have sentenced the appellant to the maximum imprisonment term. In my view these were factors he ought to have considered. I find that the sentence of ten (10) years imprisonment is manifestly excessive in view of the circumstances of the case.

In the result I dismiss the appeal on conviction but allow the appeal on sentence. I hereby set aside the sentence of Ten (10) years imprisonment imposed and substitute the same with a sentence of five (5) years imprisonment form the date of sentence on 11/5/2012. It is so ordered.

Dated and signed at Lodwar this 27th day of March, 2017.

S N RIECHI

JUDGE