REPUBLIC OF KENNYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.25 OF 2017

(An appeal from original conviction and sentence of OGEMBO PM'S C Criminal Case No. 1692 of 2016 by Hon. N. WAIRIMU - Principal Magistrate dated 20th September, 2016)

SAMUEL MOGOYI NYANGAU…….....APPELLANT

VERSUS

REPUBLIC….....RESPONDENT

JUDGMENT

1. The appellant herein, SAMUEL MOGOYI NYANGAU was charged with the offence of being in possession of narcotic drugs contrary to **Section 3(1) (a)** as read with Section **3 (1) (b) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 2010**.

2. The particulars of the offence were that on 28th August 2016 at Riokindo sub-location in Kenyenya sub-county within Kisii County was found in possession of narcotic drug (Bhang) to wit seventeen (17) stick roll valued at Kshs. 350/= in contravention of the said Act.

3. The appellant pleaded guilty to the said charge and was consequently convicted and sentenced to 10 years imprisonment.

4. Aggrieved by the said sentence, the appellant filed his appeal to this court on 24th March 2017 and highlighted his main ground of appeal to be that the sentence passed on him was harsh and he pleaded with the court to reduce the sentence to enable him reunite with the members of his family to whom he was the bread winner.

5. When the appeal came up for hearing, the appellant reiterated the grounds of appeal listed in his petition of appeal and pleaded with the court to consider reducing his sentence while stating that his long stay in prison had made positive impact on his life as he had reformed after getting the necessary counseling.

6. Mr. Otieno, learned counsel for the state, on his part did not oppose the appeal and argued that the sentence was manifestly harsh considering the circumstances of the case the amount of bhang that he appellant was found to be in possession of, and the sentence provided for in the **Narcotic and Psychotropic Substances Control Act** (hereinafter, **"the Act"**).

7. According to Mr. Otieno, the trial magistrate misapprehended the law when she stated that 10 years imprisonment was the minimum sentence provided for under the Act, while the said Act merely provides that a person guilty of the offence is liable to 10 years imprisonment. Mr. Otieno observed that the word

liable does not connote a minimum sentence but only provides the trial court with the discretion to pass a sentence of up to 10 years imprisonment. Mr. Otieno therefore conceded to the appeal on sentence only.

8. I have carefully considered the instant appeal and the arguments presented by both the appellant and the state. Indeed, it is clear that the appeal herein is only on the sentence passed on the appellant for being in possession of bhang valued at Kshs. 350/=.

9. **Section 3 (1) (a) and 3 (1) (b)** of the Act stipulates as follows:-

> **"(1) Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.**
>
> **(3) Subsection (1) shall not apply to—**
>
> > **(a) a person who has possession of the narcotic drug or psychotropic substance under a licence issued pursuant to section 16 permitting him to have possession of the narcotic drug or psychotropic substance; or**
> >
> > **(b) a medical practitioner, dentist, veterinary surgeon or registered pharmacist who is in possession of a narcotic drug or psychotropic substance for any medical purposes."**

10. In the instant case, as I have already stated in this judgment, he appellant's appeal is against the sentence. A reading of the above sections of the Act shows that the sentence proposed for the offence of being in possession of narcotics is not couched in mandatory terms which means that the trial court has a discretion on which sentence to pass on the person convicted of the offence. I note that in this case, the trial court even called for the probation officers report before sentencing which means that at the time that the trial court ordered for the said report, it was cognizant of it the trial court could pass a non-custodial sentence on the appellant. One then wonders what informed the trial court's decision to pass a sentence of 10 years on the appellant even considering that the probation officer's report may not have favoured a non-custodial sentence.

11. As a general rule, sentence is a matter that rests in the desecration of the trial court and an appellate court can only interfere with it under specific circumstances. In the case of **Benard Kimani Gacheru vs Republic [2002] eKLR**, the Court of Appeal pronounced itself on the subject of appeal on sentence as follows:

> ***"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."***

12. Similarly in the case of **Dalmas Omboko Ongaro v Republic [2016] eKLR it was stated** that:

> ***"10. The principles of sentencing were summarized at page 86 paragraph B of the Judiciary Bench Book for Magistrates in Criminal Proceedings (published by the Kenyan Judiciary in 2004) as follows:***
>
> ***"In determining what is the appropriate sentence to mete out, the Court has to consider such factors as the nature of the offence, the attitude of the accused person, prevalence of the type of offence, the seriousness of the offence, the circumstances under which the offence was committed, the effect of the sentence on the accused person, the fact that the maximum sentence***

is intended for the worst offenders of the class for which the punishment is provided, etc. (Makanga v R. Criminal Appeal No. 972 of 1983 (unreported)). The Court may also consider the value of the subject matter of the charge (Mathai v R [1983] KLR 442) and whether there has been restitution of the property by the accused (Hezekiah Mwaura Kibe v R [1976] KLR 118).”

The antecedents of an accused person also come into play when the Court is considering the appropriate sentence. If an accused person is a first offender the sentence ought to reflect this fact as the aim of the Court is to encourage reform and discourage recidivism.”

13. In the instant case, the prosecutor intimated *to* the court that the appellant had no previous criminal record and urged the court to treat him as a first offender. The appellant had been in remand for close to one month while awaiting his sentence which period the trial court ought to have taken into account during sentencing and the record shows that the court made no mention of the remand period when passing the prison sentence. The quantity of bhang that the accused had was reported to be of the street value of Kshs. 350/= which to my mind is a small quantity of bhang in relation to the 10 years sentence imposed on the appellant.

14. To date the Appellant has served ten months imprisonment. Taking all the mentioned facts into account, it is clear to me that the period that the appellant has been in jail is sufficient punishment for the offence that he was charged with.

15. Consequently, the appeal on sentence succeeds to the extent that the sentence is reduced to the period already served. The appellant shall therefore set free forthwith unless otherwise lawfully held.

Dated, signed and delivered in open court this 31st day of July, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

Mr. Otieno for the State

Appellant in person

Omwoyo court clerk