



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL REVISION NO 3 OF 2017

WILLIAM MWANYUMBA MWASARU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No 7 of 2017 in the Senior Principal Magistrate's Court at Wundanyi delivered by Hon N.N. Njagi (SPM) on 24th January 2017)

RULING ON REVISION

1. By a letter dated 13th March 2017 filed on the same date, the Applicant moved the court for a revision of the sentence that was meted upon him on 24th January 2017 by the Learned Trial Magistrate, Hon N. N. Njagi, Senior Principal Magistrate in **Cr Case No 7 of 2017 Republic vs William Mwanyumba** at Wundanyi Law Courts.

2. The Applicant had been charged with the following offence:-

“On the 7th day of January 2017 at around 8.00 am at Mkiago Village within Taita Taveta County, (sic) was found to have cultivated narcotic drugs to wit thirty one (31) plants of seedlings of cannabis sativa valued at Kshs 1,000/= in contravention with (sic) the said act(sic).”

3. The Applicant pleaded guilty whereupon a plea of guilty was entered. After the facts were read to him, he stated that he was indeed found cultivating bhang. The Prosecutor asked that he be treated as a first offender. In mitigation, the Applicant sought forgiveness.

4. The said Learned Trial Magistrate directed that a Community Service Report be prepared with a view to considering if the Applicant could be committed for a Community Service Order. When the said Report was presented to the Trial Court, the Learned Trial Magistrate found the same not to have been favourable to the Applicant and thus sentenced him to four (4) years imprisonment.

5. The court carefully considered the submissions by both the Applicant and the State counsel and noted that the Applicant pleaded guilty to the offence. Further, the State pointed out that the Learned Trial Magistrate had discretion to either sentence the Applicant to prison or fine him.

6. It referred this court to Section 6(1) (a) of the Narcotic Drugs and Psychotropic Substance Cap 245 (Laws of Kenya) that provides as follows:-

“Any person who cultivates any prohibited plant shall be guilty of an offence and liable to a

fine of two hundred and fifty thousand shillings or three times the market value of the prohibited plant, whichever is the greater, or to imprisonment for a term not exceeding twenty years or to both such fine and imprisonment.”

7. Notably, under Section 362 of the Criminal Procedure Code Cap 75 (Laws of Kenya), the High Court has power to satisfy itself that a decision by a subordinate court is correct, legal and proper. The said Section provides as follows:-

“The High Court may call and examine any record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded, and as to the regularity of any proceedings of any such court.”

8. It is important to point out that sentencing is an exercise of discretion by a trial court and an appellate court ought not to interfere with such sentence unless the same is manifestly excessive, harsh and severe. Be that as it may, during an appeal, an appellate court is not prevented from considering other options of penalty that it can impose on a convicted person. Indeed the Sentencing Policy of the Judiciary has proposed that where options are provided for both custodial and non-custodial sentence, the court ought to consider the gravity of the offence and criminal history of the convicted person.

9. In this regard, this court had due regard to Section 26(3) of the Penal Code Cap 63 (Laws of Kenya) that provides as follows:-

“A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment”

10. Further, Section 28 (1) of the Penal Code stipulates that:-

“Where a fine is imposed under any law, then in the absence of express provisions relating to the fine in that law the following provisions shall apply-(b) in the case of an offence punishable with fine or a term of imprisonment, the imposition of a fine shall be a matter of discretion of the court(emphasis court).”

11. It is therefore clear that as Section 6(1)(a) of the Narcotic Drugs and Psychotropic Substances Act does not prescribe a minimum sentence and the option of fine can be considered herein as envisaged in Section 26(3)(i) of the Penal Code.

12. It was true as the Learned Trial Magistrate observed that the Community Service Officer’s Report was not favourable to the Applicant. However, the contentions regarding the Applicant’s drinking habits and talking ill of his daughters were irrelevant in the circumstances of the case herein.

13. However, the Applicant was found cultivating cannabis sativa valued at Kshs 1,000/=. He pleaded guilty at the very first instance thus saving court judicial time in hearing his case. The assertions in the Probation Report that the Applicant had a history of peddling drugs were diluted by the Prosecution’s request that the Applicant be treated as a first offender because there were no records of previous convictions.

14. Whereas the Learned Trial Magistrate imposed a sentence that was correct, legal and proper, it was the view of this court that it could impose a fine upon the Applicant for the reason that he was an elderly man, aged sixty five (65) years of age, he was a first offender and the penalty under which he was charged did not prescribe a minimum sentence but rather, it provided the maximum sentence. As has been seen herein, the Sentencing Policy of the Judiciary encourages imposition of alternative penalties for first offenders as opposed to meting out custodial sentences in the first instance.

DISPOSITION

15. Considering the value of the cannabis sativa, this court hereby allows the Applicant's application of Revision dated and filed on 13th March 2017 by setting aside the four (4) years imprisonment and replacing the same with a fine of Kshs 60,000/- or in default to serve twelve (12) months imprisonment.

16. It is so ordered.

DATED and DELIVERED at VOI this 27th day of July 2017

J. KAMAU

JUDGE

In the presence of:-

William Mwanyumba Mwasaru - Applicant

Miss Anyumba for State

Josephat Mavu- Court Clerk