



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 70 OF 2013
EPHRAIM GICHERU MWANGI.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT
CONSOLIDATED WITH
CRIMINAL APPEAL NO. 71 OF 2013
PETER MAINA THEURI.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(Appeal against sentence in Criminal case number 289 of 2013, R vs. Peter Maina Theuri & Ephraim Gicheru Mwangi at Nyeri Law Courts on 29.5.2013 by Hon. W.A. Juma C.M.).

JUDGEMENT

The appellants in this case pleaded guilty to the offence of being in possession of Narcotic Drugs contrary to Section 3 (2) (a) of the **Narcotic and Psychotropic Substances (Control) Act**^[1] and they were convicted on their own plea of guilty and sentenced to serve 10 years imprisonment each.

This appeal is against the sentence only. **Miss Chebet**, Prosecution counsel opposed the appeal, and urged the court to up hold the sentence. Counsel maintained that the appellants were convicted on their own plea of guilty and noted that law provides for ten years imprisonment, hence the sentence imposed is lawful.

It is important at this stage to recall the provisions of Section 3 (2) (a) of the **Narcotic and Psychotropic Substances (Control) Act**^[2] which provides as follows:-

“A person guilty of an offence under subsection (1) shall be liable-

(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 twenty years;”

Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into

account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously.^[3] In *Shadrack Kipchoge Kogovs Republic*,^[4] the court of appeal stated:-

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”

Section 3 (2) (a) cited above “A person guilty of an offence under subsection (1) shall be liable----- to imprisonment for ten years -----

Learned state counsel was of the view that the sentence imposed in this case lawful. I agree that the sentence is lawful, but the question that needs to be addressed is, “*What is the construction of the terms shall be liable?*” In searching for the intention of parliament, the first observation to make is that generally speaking, the penalty prescribed by a written law for an offence, unless a contrary intention appears, is the maximum penalty.^[5] This principle is contained in section **66 (1)** of the Interpretation and General Provisions Act^[6] which provides:-

“Where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punished by a penalty not exceeding the penalty prescribed”

My further observation is that the principle of law in Section **66** aforesaid is entrenched in Section **26** of the Penal Code^[7] which expressly authorizes a court to sentence the offender to a shorter term than the maximum provided by any written law and further authorizes the court to pass a sentence or a fine in addition to or in substitution for imprisonment except where the law provides for a minimum sentence of imprisonment. In particular, Section **26 (2)** and **(3)** of the Penal Code^[8] provides:-

(2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other shorter period may be sentenced to any shorter term.

(3) A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment.

There is however a proviso to Section **26(3)** that a fine cannot be substituted for imprisonment where the law concerned provides for a minimum sentence of imprisonment. In my view, from the wording and language of Section **26** and **28** of the Penal Code, it is clear that those are general provisions of law which apply not only to the offences prescribed in the Penal Code^[9] but to offences under other written laws.^[10]

The phrase used in penal statutes (*ie shall be liable to*) was judicially construed by the East African Court of Appeal in *Opoya vs Uganda*^[11] where the court said at page **754** paragraph **B**:-

“It seems to us beyond argument the words “shall be liable to” do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it”

I find that the sentence of ten years imprisonment prescribed under Section **3 (2) (a)** cited above is not mandatory, and that in determining the sentence, the court has to consider the facts and circumstances of the particular case and in particular be guided by the principles governing the imposition of punishments.

The Supreme Court of India in *State of M.P. vs Bablu Natt*^[12] stated that ‘the principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with.’ Moreover, in *Alister Anthony Pareira vs State of Maharashtra*,^[13] the court held that:-

“Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances”

Thus, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.^[14]

I have carefully considered the facts of this case, the severity of the offence and the above principles and the plea by the appellants to this court to reduce the sentence, the mitigating factors namely their age and their plea that they have young families and I have also considered the purpose of sentencing and the principles of sentencing under the common law^[15] and the sentencing policy guidelines and the fact that the appellants have been in jail since 29th May 2013 and that they are remorseful.

I hereby reduce the sentence of ten years imposed upon the appellants to the period already served and order that the appellants *Ephraim Gicheru Mwangi* and *Peter Maina Theuri* **be released forthwith unless otherwise lawfully held.**

Dated at Nairobi this 29th day of February 2016

John M. Mativo

Judge

^[1] Chapter 245, Laws of Kenya

^[2] Ibid

^[3] See *Makhandia J* (as he then was in *Simon Ndungu Murage vs Republic*, Criminal appeal no. 275 of 2007, Nyeri).

^[4] Criminal Appeal No. 253 of 2003 (Eldoret), *Omolo, O’kubasu & Onyango JJA*)

^[5] See *Daniel Kyalo Muemava vs Republic*, Court of Appeal Criminal appeal no. 479 of 2007 (Nairobi), *Githinji, Anganyanya & Nyamu JJA*.

^[6] Cap 2, Laws of Kenya

^[7] Cap 63, Laws of Kenya

^[8] Ibid

^[9] Ibid

^[10] Supra note 3

[\[11\]](#) {1967}E.A 752

[\[12\]](#) {2009}2S.C.C 272 Para 13

[\[13\]](#) {2012}2 S.C.C 648 Para 69

[\[14\]](#) See Somanvs Kerala {2013} 11 SC.C 382 Para 13, Supreme Court of India

[\[15\]](#) Regina vs MA {2004}145A