



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.20 OF 2015

(An Appeal arising out of the conviction and sentence of HON. E.O. JUMA - SPM delivered on 21st January 2015 in Kibera CM. CR. Case No.256 of 2015)

ASIMBO BELLANGE ATONDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Asimbo Bellange Atondi was charged with **possession of cannabis sativa** contrary to **Section 3(1)** as read with **Section 2(a)** of **The Narcotic Drugs and Psychotropic Substances Control Act**. The particulars of the offence were that on 16th January 2015 at Jomo Kenyatta International Airport, the Appellant trafficked, by conveying a narcotic drug namely bhang (cannabis sativa) concealed in her private parts a total of 100 rolls with a market value of Kshs.2,000/- in contravention of the provisions of the said **Act**. When the Appellant was arraigned before the trial magistrate's court, she pleaded guilty to the charge. She was convicted as charged and sentenced to pay a fine of Kshs.1 million or to serve life imprisonment. The Appellant was aggrieved by her conviction and sentence. She has appealed to this court.

Although the Appellant challenged her conviction in her petition of appeal, during the hearing of the appeal, her advocate Mr. Kangahi, abandoned the appeal on conviction and instead made submission urging the court to review the sentence that was imposed on the Appellant. He was of the view that the sentence was harsh and excessive and did not take into account the law when it was meted on the Appellant. He explained that the Appellant had possession of the cannabis sativa for personal consumption and therefore the sentence should have reflected that fact. He cited **Section 3(2)(a)** of the **Act** which prescribed a lighter sentence for a person found in possession of narcotic drugs for his own use as compared with a person trafficking in narcotic drugs for sale to others. He urged the court to take into account the value of the drugs found in the Appellant's possession when determining the sentence to be meted on the Appellant.

Ms. Wario for the State opposed the appeal. She submitted that the manner in which the Appellant was found with the narcotic drugs i.e. by concealing it in her private parts, clearly showed that the Appellant intended to traffick the said narcotic drugs. She was of the view that the Appellant was properly charged and convicted under **Section 4(a)** of the **Act**. She urged the court not to interfere with the sentence.

This court has carefully considered the rival submission made by the parties to this application. When the

trial magistrate sentenced the Appellant to serve the custodial sentence, she was exercising judicial discretion. This court can only interfere with such exercise of discretion if it is established, either that the sentence was too harsh or was too lenient in the circumstances. The court will also interfere with the imposition of the custodial sentence if it is established that the trial magistrate applied the wrong principles of the law in sentencing the Appellant.

In the present appeal, it was clear to this court that the trial court applied the wrong section of the law when she sentenced the Appellant. In her mitigation, the Appellant had this to say:

“I am a musician. I said I use the drugs to enhance my confidence on stage. I wish to apologize to the country. I will not repeat the offence. I sincerely apologize for having committed the offence. I have three children in Congo aged 12 years, 3 years and 1 year respectively. I plead for pardon.”

Section 3 of the Narcotic Drugs and Psychotropic Substances Control Act prescribes the penalty of anyone found guilty of being in possession of narcotic drugs. It provides thus:

“3 Penalty for possession of narcotic drugs etc.

- 1. Subject to subsection (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 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.”***

In the present appeal, the Appellant told the court that she had possession of the narcotic drug for her personal use. The court should have investigated whether the allegation made by the Appellant was true. Since the court did not undertake such investigation, this court is of the opinion that the Appellant has a case when she says that she was sentenced to serve a harsh and excessive sentence that was not anticipated by the law. It was clear to this court that the Appellant was not trafficking in the said narcotic drugs. If she was doing so, then the risk that she undertook to traffick the said drugs was not worth the effort in monetary terms. The financial reward that she would get was not worth the risk.

In the premises therefore, this court finds the Appellant’s appeal on sentence has merit. It is hereby allowed. The sentence imposed on her of life imprisonment and a fine of Kshs.1 million is hereby set aside. It is substituted by a sentence of this court commuting the Appellant’s custodial sentence to the period served. She is ordered released from prison but handed over to the Immigration Department to deport her to her country of origin. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF MAY 2016

L. KIMARU

JUDGE