



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

HIGH COURT CRIMINAL APPEAL NO 1 OF 2016

REPUBLIC.....APPELLANT

VERSUS

FREDRICK WANDERA WESONGA.....RESPONDENT

(Appeal against the sentence in Criminal Case No 2609 of 2015, Republic v Fredrick Wandera Wesonga at Busia on 27th November 2015 by Hon. J.N Maragia, RM)

JUDGMENT

1. The Appellant in this case is the State. The Respondent herein Fredrick Wandera Wesonga pleaded guilty to the charge of being in possession of uncustomed goods contrary to Section 185(1)(d)(iii) of the Customs and Excise Act, Cap 47, Laws of Kenya.
2. The Appeal is against the sentence only.
3. Mr. Owiti for the Appellant urged this Court to enhance the sentence as the provisions of the Section under which the Respondent was charged with provided for a minimum penalty.
4. He further submitted that the penalty under the said statute was very clear that once a person is found guilty, the punishment to be meted out by the Court is a minimum fine of up to three times the value of the duty. His case is that the uncustomed goods being valued at Kshs. 23,025/=, the appropriate fine ought to have been Kshs. 69,075/= instead of the Kshs. 20,000/= imposed by the magistrate.
5. The Respondent's response is that the price of the cigarettes as shown in the charge sheet is for goods already taxed and that the value of the same quantity of uncustomed cigarettes would be lower.
6. Sentencing is a judicial discretion which ought to be exercised judiciously and not impulsively. A trial court is often guided by the facts and evidence before it.
7. An appellate court on the other hand should be slow to interfere with the judicial discretion of the trial court unless the sentence passed is illegal, harsh, excessive as to amount to miscarriage of justice; and or that the trial Court acted upon wrong principles.
8. In the case of **Wanjema v Republic (1971) E.A. 493** at page 494 this Court (Trevelyan, J) held as follows:

“An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in

the circumstances of the case.”

9. Learned state counsel was of the view that the sentence imposed is illegal and should be enhanced.
10. The construction and meaning of the term ‘*liable*’ comes into play here.
11. This court has to ask itself what the intention of the Parliament was when it created the offence and prescribed the penalty.
12. Section 66 of the Interpretation and General Provisions Act provides that:

“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 punishable by a penalty not exceeding the penalty prescribed.”

13. The phrase ‘*shall be liable*’ as used in various statutes was discussed in **Opoya v Uganda [1967] E.A. 752** at page 754, where the court observed that:

“It seems to us beyond argument that 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’re not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it.”

14. Further in **Daniel Kyalo Muema v Republic [2009] eKLR** the Court of Appeal in adopting the opinion in **Opoya** (supra) had this to say:

“We respectfully adopt that construction which conforms with the opinion of Mr. Kaigai and which is supported by our preceding observations. We have no doubt that the sentences of 10 years imprisonment and 20 years imprisonment prescribed in Section 3(2)(a) of the Act for the possession *cannabis sativa* are the maxima and that the court can lawfully impose any shorter term of imprisonment. Furthermore, although Section 3(2) (a) of the Act does not expressly provide for a fine, the court can lawfully in accordance with Section 26(3) of the Penal Code sentence the offender to pay a reasonable fine in substitution for imprisonment.”

15. In the very recent case of **Mohamed Famau Bakari v Republic [2016] eKLR** the Court of Appeal after citing a number of cases concluded that:

“This Court...has reiterated that the word “*liable*” in section 4(a) of the Act merely provides for a likely maximum sentence and allows a measure of discretion to the court in imposing a sentence with a maximum limit being indicated.”

16. In the cited cases of **Daniel Kyalo Muema** and **Mohamed Famau Bakari** the Court of Appeal was interpreting the sentences provided by sections 3 and 4 of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994. For example, Section 4(a) of that Act provides:

“Any person who trafficks in narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence and liable-

(a) in respect of any narcotic or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and in addition, to imprisonment for life; or

(b)”

17. In the appeal before this Court the provision in contention is Section 185(1) (d) (iii) of the Customs and Excise Act. It reads:

“185(1)A person who-

(a)....

(b)....

(c)....

(d) acquires, has in his possession, keeps or conceals, or procures to be kept or concealed, goods which he knows, or ought reasonably to have known to be-

(i)....

(ii)....

(iii) uncustomed goods,

shall be guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine equal to three times the amount of duty and any other taxes payable on the goods in respect of which the offence is committed subject to a maximum of one million five hundred thousand shillings or to both such fine and imprisonment.”

18. The penalty provided in Section 185(1) of the Customs and Excise Act use similar language with the penalty in Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act save for the fact that in the Customs and Excise Act the inclusion of the value (three times) in the fine comes before the words **“subject to a maximum of one million five hundred thousand shillings”**. That means whatever value of the uncustomed goods the Court cannot impose a fine in excess of 1.5 million shillings. The Narcotic Drugs and Psychotropic Substances (Control) Act does not appear to impose a maximum fine leaving the fine to be a maximum of one million for substances of small value and three times the market value for substances with a higher market value.

19. This appeal begs the question as to whether Parliament intended to impose a minimum fine of three times the amount of duty for those found with small quantities of uncustomed goods and cap the fine at a maximum of 1.5 million shillings for those with uncustomed goods whose duty would run into millions. I do not think so. That would mean applying different standards to the same offence. It would go against the spirit of the Constitution to impose different sentences for the same offence.

20. In my view what Parliament intended to achieve was to ensure that the small scale offenders found in possession of uncustomed goods should not pay a fine exceeding three times the amount of duty and any other taxes payable on the goods. For instance, a suspect found with uncustomed goods whose duty is say Kshs. 10,000/= should not pay a fine exceeding Kshs. 30,000/= but can pay anything below that amount depending on the discretion of the magistrate upon applying the sentencing principles. For repeat offenders found with small quantities of uncustomed goods imprisonment without an option of a fine can be imposed.

21. In view of my finding above, I find nothing illegal in the sentence imposed on the Respondent by the magistrate’s Court. Consequently, this appeal lacks merit and the same is dismissed.

Dated, signed and delivered at Busia this 28th day of July, 2016

W. KORIR,

JUDGE OF THE HIGH COURT