



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL APPEAL NO. 77 OF 2015

MOHAMED HASHIN MAALIM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Mandera SRM Criminal Case No. 405 of 2015 – P.N. Areri – SRM)

JUDGMENT

The appellant was charged in the magistrate's court at Mandera with being in possession of narcotic drugs contrary to section 3 (1) as read with 2 (a) of the Narcotic Drugs and Psychotropic Substances Act No. 4 of 1994. He was charged with four others. The particulars of the offence were that on 19th July 2015 at 1630hours at Bulla Ndana in Rhamu township within Mandera North Sub County, in Mandera County were jointly found in possession of 18 rolls of Cannabis Sativa (bhang) valued at Kshs. 700/= street value and 18 tablets of Cozepam 5 valued at Kshs. 400/= . The other four pleaded not guilty to the charge. The appellant however, pleaded guilty. He was convicted and sentenced to serve 4 years imprisonment.

He has now come to this court on appeal through counsel Ms. Wanjohi and Wawunda Advocates.

The grounds of appeal are that sentence was harsh and excessive, that the court did not consider that he was a first offender, that the court did not consider the mitigation of the appellant, that the court did not warn the appellant of the consequences of pleading guilty, and finally that the charge was defective.

Learned counsel for the appellant Mr. Wanjohi made oral submissions in court. Counsel submitted that the appellant was wrongly sentenced to 4 years imprisonment after pleading guilty without an option of a fine which was harsh and excessive, as the appellant had pleaded guilty and saved judicial time and stated in mitigation that he had children. Counsel emphasized that the record of the trial court did not indicate that the magistrate considered the mitigation of the appellant before sentencing.

Counsel also faulted the sentence on the ground that the co-accused who pleaded not guilty and were convicted after full trial, were sentenced to serve 2 years probation, which was lesser sentence than that imposed on the appellant. Counsel submitted that the appellant had already served a sentence of 1 year and should be released immediately. Counsel relied on the case of **Zacharia Mwangi Githiaka Vs. Republic [2008]eKLR**, a case decided by the High Court in Nyeri, and the case of **Charo Hamisi Vs. Republic [2009]eKLR**, an appeal decided by the High Court in Nairobi.

Counsel also submitted that the charge sheet was defective as section 3 (1) and (2)(a) of the Act only covered possession of bhang not other narcotic substances.

Mr. Okemwa counsel for the State, submitted that the appellant pleaded guilty and did not waste courts time. The court however sentenced him to 4 years imprisonment while his co-accused who pleaded not guilty were after a full trial sentenced to serve 2 years community service. Counsel stated that this was a serious anomaly and as such the State did not support the sentence.

Counsel also submitted that the substance other than bhang, should have been the subject of a separate charge. To that extent counsel said that there was an anomaly in the charge sheet.

I have considered the appeal and submissions on both sides.

The appeal herein is both on conviction and sentence because the charge sheet has been challenged. I agree with counsel who have appeared before me on both sides, that the section under which the appellant was charged did not cover the substance called “*cozepam 5*”. To that extent, the charge sheet was defective. However in my view that defect is curable under section 382 of the Criminal Procedure Code (Cap.75) as the other substance which is bhang was properly included in the charge sheet. Even if the part of the “*Cozepam*” is deleted, from the charge sheet, the appellant would still have answer to the charge in respect of possession of bhang. In my view therefore the charge in relation to possession of bhang was proper and was separable from the item called Cozepam. Since the appellant was not prejudiced, I find that he was convicted on his own plea on the element of possession of bhang and not Cozepam.

With regard to sentence, as was stated in the case of *Zacharia Mwangi Githiaka Vs. Republic [2008] eKLR (supra)*, sentencing is an exercise of discretion by a trial court. In our present case genuine concerns have been raised against the sentence imposed. Firstly the appellant who pleaded guilty to the charge was sentenced to 4 years imprisonment, while his co-accused who pleaded not guilty and went through full trial were put on probation for 2 years. Secondly, though the appellant stated that he had a family in his mitigation there is no indication that the magistrate considered the mitigation of the appellant, though the prosecution treated the appellant as a first offender.

In my view therefore, the trial court imposed an unnecessarily harsh sentence on a person who pleaded guilty to possession of a small quantity of cannabis sativa. The sentence too harsh, as ordinarily the appellant who pleaded guilty should have suffered a lesser punishment than those who pleaded not guilty made the court go through a long criminal trial. These co-accused were sentenced to short probation sentence of 2 years. In short the plea of guilty should have been a mitigating factor, but the magistrate failed to consider this aspect, I thus find genuine reason in interfering with the sentence imposed.

Consequently, I uphold the conviction for possession of cannabis sativa. As for the sentence, I set aside the sentence imposed and order that the appellant will be released forthwith, as the prison term he has already served is enough punishment.

It is so ordered.

Dated and delivered at Garissa this 12th day of October 2016

GEORGE DULU

JUDGE