



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL NO. 89 OF 2014

LESIIT, J

HASSAN ABDI NASSIR.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The Appellant was charged and convicted of two counts of being in possession of Narcotics Drugs (Cannabis sativa) contrary to section 9(1)(2)(A) of the Narcotic Drugs and Psychotropic Substances Control Act. In count 1 he was convicted of being in possession of 0.8 gm of Cannabis valued at Ksh. 60/- and in count 2 to possession of 780 gms valued at 2,340/-
2. The Appellant was sentenced to six months imprisonment in Count 1 and in Count 2 to 15 year's imprisonment.
3. Being aggrieved by the sentence the Appellant filed an application for Revision of sentence citing sections 362 and 364 of the CPC. He lined up nine mitigation grounds which are in summary a plea that the sentence was excessively harsh for reason one appellant was remorseful having pleaded guilty to the charge, was a first offender, the amount of cannabis recovered from him was small in quantity and finally that the learned trial magistrate failed to consider he was a young man and was sole bread winner of his siblings.
4. When the Revision came to me, I ordered that the Appellant's mitigation grounds be deemed as the grounds of appeal.
5. The Appellant was finally produced in court. He pleaded that he was 21 years old and urged the court to reduce his sentence.
6. The State, led by Mr. Moses Mungai the Prosecution Counsel did not oppose the appeal. He urged the court to consider a non custodial sentence considering the Appellant was a young person.
7. I have considered this appeal. The Appellant is pursuing his appeal only against the sentence.
8. I have noted from the proceedings that the Appellant informed the court during plea that he was 18 years old. The court even sent the Appellant for Age Assessment. That Report was never availed. Nevertheless the learned trial magistrate proceeded to sentence the Appellant to imprisonment.
9. Before sentence, the learned trial magistrate considered a Probation Officers Report. In that Report the Probation Officer indicated that the Appellant was 18 years old. The Report was however negative to the Appellant alleging the Appellant was unsuitable for a non custodial sentence. The reasons the Appellant was declared unsuitable are:

After considering the prevalence of the youths who are smoking bhang in Marsabit even in public places and the fact himself is not just a consumer but a merchant of cannabis, I think a more deterrent measure and probably a custodial sentence should be meted against this offender so as to send a clear message to his peers who are fond of smoking it even in the town oblivious of the fact that there is a law against it but this subject to the courts discretion.

10. Armed with that recommendation from the probation officer the learned trial magistrate ruled that through an interview the Appellant had admitted the cannabis he had was for sale and that therefore the cannabis he was found with was not for personal use.
11. The Appellant cannot disturb a sentence imposed by a lower court would have passed a different sentence was the case before them. However, the Appellant court should disturb a sentence. If it is found to be excessively lenient and therefore inadequate for the offence or where the sentence is excessively harsh; or where the sentence is illegal.
12. In this case the Appellant informed the court that he was 18 years old on 11th December, 2012 on the day the plea was taken. An order for Age Assessment seems not to have been complied with. The court was reminded of Appellants age being 18 years; the learned trial magistrate should have applied section 2 and 191 of the Children Court and dealt with the Appellant as prescribed therein.
13. The Appellant has informed court he is 21 years old. That means at the time of Appellant's arrest on 10th December, 2012, he was 18 years or below. It has been 1 year 10 months since Appellant first appearance in court.
14. The Children Act, Section 191 thereof is very clear that imprisonment is not an option when considering a suitable sentence for human being of 18 years or below the fact the learned trial magistrate did not bother to find out Appellants actual age means Appellants was not handled correctly. That means the learned trial magistrate failed to exercise its powers under S191 of the Children Act thus denying the Appellant his right to a non prison custody.
15. Having made these observations, I note the Appellant has been in prison serving sentence for almost 2 years. The sentence was illegal as court did not investigate Appellants submission that he was 18 years at time he first appeared in court.
16. I set aside the sentence of six months imprisonment in count 1 and 15 years imprisonment in count 2. In substitution I order the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

DATED SIGNED AND DELIVERED AT MERU THIS 23rd DAY OF SEPTEMBER, 2014.

J. LESIIT

JUDGE