REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 297 of 2011

PETER NDUKI MUTURI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with 2 counts. Count 1 was creating disturbance in a manner likely to cause a breach of the peace contrary to Section 95(1) of the Penal Code *(Cap. 63, Laws of Kenya)*. The particulars were that on 9th November 2011, at Marmanet Location in Laikipia West District within Rift Valley District created a disturbance in a manner likely to cause breach of peace by chasing one Jane Njeri Muturi while armed with a piece of wood and abusing her. On the 2nd Count, the Appellant was charged with the offence being in possession of *cannabis sativa* (bhang) contrary to Section 3(1) as read with 3(2) of the Narcotic Drugs and Psychotropic Substances Control Act, 1994 *(Number 4 of 1994)*, the particulars thereof being that on 9th November 2011, he was found in possession of one role of *cannabis sativa* weighing about 20 grams which was not under medical preparation in contravention of the Act.

2. The Appellant accepted the above facts as true and was convicted on his own plea of guilty. In mitigation, he only stated that he did not like his mother and that his mother did not like his wearing of earrings. The learned Magistrate upon considering the above, called for probation officer's report to be filed before sentence. This was done and the probation officer made a finding that the Appellant was not suitable for a non-custodial sentence because the accused was not a first offender and that he was not willing to quit smoking bhang, and that releasing the accused on his current state would only aggravate the problem and it was prudent that he be kept away from the community in a place where he could not access drugs.

3. On considering the report, the learned Magistrate sentenced the accused to 1 year imprisonment on the fist count and 3 years imprisonment on the 2nd count. Both counts were to run concurrently.

4. Aggrieved by the conviction and sentence, the Appellant filed the following grounds of appeal against the sentence-

(1) that he was not given a chance to defend himself,

(2) that the cannabis sativa was put in his pocket,

(3) that he suspects that corruption played a big role in the conviction,

(4) that he stayed in custody for 3 days instead of 24 hours after he took himself to Marmanet Police Post,

(5) that he had been called back to Kenyatta National Hospital but the mother is still holding the re-admission letter,

(6) that his mother has been jealous of him and has held a grudge against him for a long time,

(7) that he had one acre of maize plantation which his mother intended to sell while he was in prison.

5. On ground 3 of his appeal, the Appellant stated that he was not brought to court within 24 hours and arraigned in court 3 days after his arrest contrary to Article 49 (1)(f) of the Constitution. According to the charge sheet, the Appellant was arrested on 9/11/2011 and then arraigned in court on 11/11/2011. Whereas the detention of the Appellant may have contravened his constitutional right to be brought to court within 24 hours, it did not vitiate his prosecution. I also find that such delay was not unreasonable as to cause prejudice to the Appellant. For this reason I find that this ground of appeal must fail.

6. It is noted that the Appellant pleaded guilty. The question is whether his appeal should be entertained in light of Section 348 of the Criminal Procedure Code which provides-

"348. No appeal shall be allowed in the case of an accused person who has pleaded guilty and who has

been convicted on that plea by the subordinate court except as to the extent and legality of the sentence."

7. It is now established that the above provision is not a complete bar or prohibition against an Appellant's right of appeal. The Court of Appeal in **Ndede v Republic [1991] KLR 567** held that-

"It has been held that the principle underlying the provision is that a plea of guilty by the accused person operates as a waiver of his right to question the legality of the conviction based on such a plea. It has been held further that before a bar of this section can apply against a convicted person, it must be clear that the plea of guilty is really such a plea and that the appellant is not prevented or debarred from showing that the plea was not really a plea of guilty and did not amount to a plea of guilt. See The Air Manual 3rd ed vol 8 p 569-70. we agree with and adopt these sentiments and principle. We would add that where as happened in this case at the time of taking the plea there appears to be unusual circumstances such as injury to the accused, the accused is confused or there has been inordinate delay in bringing the accused to court from the date of arrest, etc then an explanation of the circumstance must form an integral part of the facts to be stated by the prosecution to the court. The court should then put that explanation to the accused and inquire of him if it affects his plea."

8. Upon being arraigned in court, the Learned Magistrate caused to be read to the accused the charges against the accused and explained to him each element of the offences to which the Appellant replied- *"it is true." T*he Appellant did not say anything thereafter even during mitigation which would lead the trial court to conclude that he did not accept the particulars of the charge against him or cause the court to question his guilt. The allegations that the drugs were planted on him or that he had a strained relationship with the complainant were not raised during the trial and are clearly an afterthought. I find that the guilty plea was unequivocal and uphold the conviction as having been properly entered.

9. For this court to interfere with the discretion exercised by the trial court in sentencing, it has to be satisfied that the court acted upon some wrong principle or overlooked some material factors. *See* **Macharia V Republic [2003] KLR 115.**

10. As noted above the trial court considered the Appellant's mitigation. The Report of the Probation Officer further showed that the Appellant was not remorseful and said that he smoked bhang for inspiration and religious purposes and that he was not a first offender. In **JOSEPHAT MASAKU MUTUNGA VS. REPUBLIC** *(Criminal Appeal No. 100 of 2008)* the Court of Appeal observed *inter alia* -

"that the trial court should guard against relying upon a Probation Report, because it may contain factual errors and remains untested by way of cross-examination of the Probation Officer by the Accused or the Advocate for the accused. And that it would be good practice in the future for Probation Reports to be availed to the accused or their Advocates well in advance of sentencing where practicable, and that would … assist in enhancing the quality of justice in sentencing."

11. No prejudice was however caused to the Appellant as he received a fairly lenient sentence. This court will not therefore interfere with the discretion exercised by the trial court in sentencing on Count 1, as it is clear that the trial court did not act upon any wrong principle neither did it overlook any material

factors.

However Section 95 (1) provides-

95. (1) Any person who -

(a)

(b) brawls or in any other manner creates a disturbance in such a manner as is likely to cause a breach of the peace is guilty of a misdemeanor and is liable to imprisonment for Six months.

The learned Magistrate therefore erred in sentencing the Appellant to 1 year imprisonment whereas the maximum sentence prescribed for the offence by statute is 6 months. The sentence of 1 year is hereby quashed and substituted with 6 months.

With regard to Count II, the punishment for the offence of possession of cannabis sativa intended for personal consumption, unless for medical purposes, is liable to imprisonment for ten years.

The expression *"liable"* is permissive. It donates to the trial court a discretion to give any sentence which should not exceed ten years. The Appellant was found in possession of 20 grams of *cannabis sativa*, a minute quantity of what he admitted was "*cannabis sativa*". He was sentenced to three years imprisonment. That sentence was neither unlawful nor excessive and although lenient, it is in the circumstances not unreasonable. This court will not therefore interfere with the discretion. Save for the reduction of sentence on Count I, the appeal herein is dismissed.

Dated, signed and delivered at Nakuru this 26th day of April, 2013

M. J. ANYARA EMUKULE

JUDGE