REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 111 OF 2013

WETENDE KHERA ..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

(Being an appeal against conviction and sentence by the Hon. Resident Magistrate G. Adhiambo in Kapsabet Principal Magistrate's Criminal Case No. 108 of 2013 delivered on 16th January, 2013)

JUDGMENT

The Appellant Watende Khera was charged with the offence of being in possession of narcotic drugs contrary to Section 3 (1) of Narcotic Drugs and Psychotropic Substances Control Act of 1994.

Particulars of the charge are that on the 14th day of January, 2013 at around 7.30 p.m. at Kamataragui Village, Meswo Sub-location, within Nandi County was found being in possession of 66 rolls and 50 grammes of bhang street valued at Ksh. 1,500/= which was not medically prepared.

The Appellant was convicted on his own plea of guilty and sentenced to five (5) years imprisonment. He has now appealed to this court only as against the sentence. His Petition of Appeal was filed in court on 20th June, 2013. It contains the following grounds of appeal.

- That the custodial sentence is excessively high.
- That he is over one hundred (100) years old.
- That he is of ill health.
- That he is an orphan.

The appeal was canvassed before me on 25th July, 2013. Mr. Omboto for the Appellant submitted

that the trial magistrate erred in both law and fact in not considering the age of the Appellant who is over 100 years old. That being a first offender, court failed to consider that for the last 100 years, he has never committed an offence. He also submitted that the court failed to consider the value of the drug which was only Ksh. 1,500/= and that he is sickly and he has a grandson who depends on him for support. He urged the court to set aside the sentence and impose on him a non-custodial sentence.

Mr. Wainaina for the State/Respondent submitted that he did not oppose the appeal given the age of the Appellant who is 100 years old.

In convicting the Appellants the trial Magistrate noted the following:-

"**I have considered the nature of the offence with which the accused person is convicted, his mitigation, the fact that he is a first offender. I have observed that during mitigation the accused confirmed that he was in possession of cannabis for purposes of sale. I have noted that the offence with which the accused is convicted is prevalent and do find that the accused deserves a deterrent sentence. I therefore sentence the accused to five (5) years imprisonment."**

In mitigation the Appellant had stated as follows:-

"I request the court to forgive me. I will not repeat the offence. I engaged in the offence to get money for food and other needs."

Sentence is an exercise of discretion of the trial court. But the trial court must treat each case individually, given the circumstances prevailing on each case. In my view, factors to be considered include, but are not limited to the nature of the offence, the prevalence of the offence, the penalty imposed by the law and of course the mitigation the accused offers.

In the case of **SHADDRACK KIPKOECH KOGO -VS- REPUBLIC – CRIMINAL APPEAL NO. 253 OF 2003 (unreported) –** Court of Appeal sitting at Eldoret, Omollo, O'Kubasu and Onyango Otieno, JJA said:-

" Sentence is essentially an exercise of discretion of the trial Court and for this Court to interfere, it must be shown that in passing the sentence, the sentencing Court took into account an irrelevant factor or failed to take into account a relevant factor or that a wrong principle was applied or short of those the sentence itself is so harsh and excessive that an error in principle must be inferred."

The Principles to be applied in sentencing were well laid down in the case of **OMUSE =VRS= REPUBLIC (2009), KLR, 214,** when Hon. O'Kubasu, Waki and Onyango Otieno, JJA, when relying on decided cases said;

In MACHARIA =VRS= R. (2003), E.A. 559 this Court stated:-

"The Principle upon which this Court will act in exercising its jurisdiction to review or alter a sentence imposed by the Court have been firmly settled as far back as 1954, in the case of OGOLA S/O OWUOR (1954) EACA, 270 wherein the predecessor of this Court stated:-

"The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with the discretion exercised by a trial Judge, unless as was said in JAMES -VRS- R (1950) 18 EACA 147, it is evidence that the Judge acted upon some wrong principles or overlooked some material factors. To this we would also add a third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case R-V- S SHERXHAWSKY (1912) CCA 28 TLR 263. Further, the Law is that sentence imposed on an

accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence. See AMBANI -VRS- R. (1990) KLR 161."

Moreover, an appellate Court is empowered by section 254 (3) (b) of the Criminal Procedure Code to alter the sentence when the appeal is only against the sentence. It provides thus:-

"**254 (3) The Court may then, if it considers that there is insufficient ground for interfering, dismiss the appeal or may -**

(b) In an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence."

No doubt that the offence with which the Appellant was charged is serious. Section 3 (2) (a) of the Narcotic Drugs and Psychotropic Substances Control Act provides that:-

"A person guilty of an offence under subsection (1) shall be liable -

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."

But the above notwithstanding, it imperative that, prima facie, the Applicant is a man of advanced age. The trial Magistrate ought to have noted this and suo moto inquired from him how old he is. It is not lost in my mind, that this is the first thing that attracted my attention when I saw the Appellant. I made an inquiry from him as to his age and he stated he is aged about one hundred and two (102) years. It is the reason why, in my view, the trial Magistrate ought to have considered a lesser penalty.

Moreover, the Appellant was a first offender. As rightly submitted by his counsel, for the last over 100 years he has never committed an offence. This should not have escaped the attention of the trial court. And as observed in **AMBANI -VS- REPUBLIC (Supra),** the moral blameworthiness must be considered vis a vis all other factors.

May I also note that the Appellant was charged under a law that did not exist. He was charged under what was referred to as the Dangerous Drugs and Psychotropic Substance Control Act of 1994 instead of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. Although this error was probably an oversight, the trial Magistrate in his sentencing noted that "**the law the accused is said to have contravened was named Dangerous Drugs and Psychotropic Substances Control Act of 1994 instead of Narcotic Drugs and Psychotropic Substances Control Act, Cap 245.**"

The fact is that the Dangerous Drugs Act, Cap 245 was repealed by Act No.4 of 1994, being the Narcotic Drugs and Psychotropic Substances (Control) Act. The same was assented to on 8th July, 1994 and its commencement date was 26th August, 1994. This is the law under which the charge sheet should have been drafted.

However, under S. 382 of the Criminal Procedure Code, which provides as follows:-

"**Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.**

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.", the omission of the word '**Narcotic**' which was replaced by the word '**Dangerous**' in the charge sheet did not occasion any injustice to the Appellant. After all, had it been raised earlier during the trial, the trial court would have addressed itself to the error.

Under Section 3 (2) (a) of the Narcotic Drugs and Psychotropic Substances Control Act, No. 4 of 1994, a person found guilty of the offence of being in possession of cannabis for use other than for his consumption, is liable to imprisonment for twenty (20) years.

However given the age of the Appellant and the fact he is a first offender, this appeal must succeed. I do accordingly set aside the sentence of five (5) years imprisonment imposed on him and consider that the period he has served of about seven (7) months is sufficient sentence. Had he not served any term in prison, I would have preferred a non-custodial sentence. I order that he be forthwith set free unless he is otherwise lawfully held.

It is so ordered.

DATED and **DELIVERED** at **ELDORET** this 8th day of August, 2013.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

Mr. Omboto Advocate for the Appellant

Wainaina for the State/Respondent