

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 307 of 2007

ANTHONY NDUHIU GACHAI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the conviction and sentence of

B.M. Kimemia Resident Magistrate in Senior Resident Magistrate's

Criminal Case No. 1133 of 2005 at KARATINA)

JUDGMENT

The appellant, ANTHONY NDUHIU GACHAI was charged before the Senior Resident Magistrate's court at Karatina with one count of stealing contrary to section 275 of the penal code and one count of being in possession of Bhang contrary to section 3(1) as read with section 2(a) of the Narcotic & Psychotropic substances Control Act. He pleaded guilty to the two counts. The facts given by the prosecution in support of the charges were that:-

On 14/10/07 at Gachuiru village, the accused who used to stay with his aunt, the complainant went to where she had kept the women's group money and took Kshs.33,300/- and left to an unknown destination. She reported the theft and a search was mounted for the appellant. He was found in Naromoru and Kshs.3500/- was recovered from him. He was also found with 2 rolls of bhang and was taken to Kiamachimbi police station and charged with two counts.

The appellant admitted all these facts and the learned trial magistrate (B.M. Kimemia – RM) having convicted him on his own plea of guilty sentenced him to serve 2 years imprisonment on the 1st count and 3 years imprisonment on the 2nd count. The appellant was aggrieved by the conviction and sentence. Hence this appeal. When the appeal came up for hearing, the appellant abandoned the appeal on conviction and rightly so in my view and opted to pursue the appeal limited to sentence only. In support of his appeal on sentence, the appellant submitted that the sentence imposed was harsh and excessive. That further, the learned magistrate did not order that the sentence imposed do run concurrently or consecutively.

On his part, Mr. Orinda learned Senior Principal state counsel was of the view that the sentences imposed appeared to be harsh and excessive. In other words he was conceding to the appeal on sentence.

This court as a first appellate court has jurisdiction to interfere with sentence imposed by the trial court, such as the one before me now if it is satisfied that in coming to that sentence, the trial court did not take into account a relevant factor, or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate court should not lose sight of the fact that in sentencing, the trial court exercises some form of discretion and as long as the discretion is exercised judicially and not capriciously, the appellate court should hardly interfere with that exercise of discretion. See generally *Wanjema v Republic [1971] E.A. 493*.

The sentencing notes of the learned magistrate in this matter are of little assistance. So that this court is unable to tell whether in imposing the sentence, the learned magistrate took into account relevant or irrelevant factors. Further and as correctly pointed out by the appellant, the learned magistrate did not order the sentences to run concurrently or consecutively. However we all know pursuant to section 37 of the penal code that where a person is convicted of more than one offence, the sentences shall be executed consecutively unless the court otherwise directs that the sentences be executed concurrently. However in a situation like this in which the two offences were committed in the same transaction, the correct order to make on the sentences should have been that they be executed concurrently.

I am of the strong view, the foregoing notwithstanding that in all the circumstances of the case, the sentences imposed were manifestly harsh and excessive. Indeed, the learned senior principal state counsel agrees. I would on that premise allow the appeal against sentence, set aside the sentence of 2 and 3 years respectively and substitute therefore a sentence of two years on each count. I would further direct that the said sentences do run concurrently with effect from 18th October, 2007, that being the date when the appellant was convicted and sentenced.

Dated and delivered at Nyeri this 29th day of January 2009.

M.S.A. MAKHANDIA

JUDGE