



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 335 of 2008

KALUMU MUTHAMI GEORGE APPELLANT

- Versus -

REPUBLIC RESPONDENT

J U D G M E N T

The Appellant, Kalumu Muthami George, pleaded guilty in the Senior Resident Magistrate's Court, Kaloleni, to a charge of being in possession of narcotic drugs contrary to section 3(1) as read with Section 3(2) (a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. She was sentenced to serve 2 years imprisonment. She has appealed to this court against sentence.

Her grounds of appeal as set out in the memorandum of appeal are that –

1. *This sentence is harsh and excessive in the circumstances.*
2. *The learned trial magistrate failed to consider and appreciate the appellant's mitigation.*
3. *The learned trial magistrate failed to consider the appellants circumstances and station in life prior to passing sentence.*

Arguing all the three grounds together, Mr. Gunga for the appellant contended that in passing sentence, the magistrate had dealt with extraneous matters. He submitted that in mitigation, the appellant had stated that she was a first offender, which was conceded by the prosecution, and therefore a sentence of 2 years was extremely excessive. She pleaded guilty and the magistrate should have considered a non custodial sentence or the option of a fine. Finally, counsel submitted that the appellant is fairly old and thereupon urged the court to set aside the 2 years and substitute the same with a lesser sentence.

Opposing the appeal, the Assistant Director of Public Prosecutions, Mr. Ondari, argued that the appellant unequivocally admitted the charge and submitted that the learned trial magistrate was more than lenient to impose 2 years when the offence carries a maximum sentence of 10 years. He took into account the appellant's mitigation and could not have been more lenient that he was. He urged the court to dismiss the appeal.

I have considered the rival submissions of both counsel. Sentencing is a matter of discretion for a trial court. The principles upon which an appellate court can interfere with the exercise of that discretion are

epitomized in the authorities. In the early case of R. v. MOHAMEDALI JAMAL (1948)15 EACA 126, in delivering the judgment of that court Sir Barclay Nihill, Chief Justice (Kenya) said at page 126 –

“It is well established that an appellate Court should not interfere with the discretion exercised by a trial judge or magistrate except in such cases where it appears that in assessing sentence the judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive ...”

This view has been upheld and applied in subsequent cases. It was echoed by Trevelyan J. in WANJEMA v. REPUBLIC [1971]EA. 493 in which he said at page 494-

“A sentence must in the end, however, depend upon the facts of its own particular case ... An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case ...”

Before sentencing the appellant, the learned trial magistrate had this to say –

“Mitigation considered. Accused is a first offender. She is remorseful and repentant. She has pleaded guilty to the charge. She is fairly old. But the offence is serious and the quantity of bhang is fairly large. I will exercise lenience though a deterrent sentence is in order. Accused sentenced to serve two (2) years imprisonment.”

It is self evident from this statement that the learned trial magistrate took into account all the relevant issues before sentencing the appellant. He considered that she was a first offender who had pleaded guilty; that she was fairly old, and explicitly decided to be lenient. He did not overlook any material factor, and, given all the circumstances, a 2 year sentence is not manifestly excessive.

The appeal is accordingly dismissed.

Dated and delivered at Mombasa this 23rd day of March, 2009.

L. NJAGI

JUDGE