



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Criminal Appeal 301 of 2007

KIHAGI MACHARIA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's Court at Karatina in Criminal Case No. 859 of 2007 by B.M. KIMEMIA – RM)

J U D G M E N T

This appeal is against sentence only. The appellant, **Kihagi Macharia** was charged in the Senior Resident Magistrate's Court, 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 Narcotic drugs and psychotropic control substances Act.

Upon arraignment in court on 18th October, 2007 and the charges having been read to him, the appellant pleaded guilty to the same and was accordingly convicted on his own plea of guilty. Upon conviction he was sentenced to two (2) years imprisonment. On count I and 3 years imprisonment on count II. The learned magistrate did not indicate whether the sentence would run concurrently or consecutively. That being the case, it is deemed in law that the sentences would run consecutively. The appellant was aggrieved by the sentence and hence lodged the instant appeal limited to sentence only.

In his petition of appeal, the appellant claims that the sentence imposed was harsh and manifestly excessive and that extraneous issues were considered by the learned Magistrate in arriving at the sentence.

When the appeal came up for hearing before me on 8th October, 2009, the appellant in support of his appeal on sentence merely reiterated that the sentence imposed was harsh and excessive.

Mr. Orinda, learned Senior Principal State Counsel was of the view that the sentence imposed was legal but lenient. It should therefore not be interfered with.

Sentencing is generally a matter for the discretion of the trial court. The discretion must however, be

exercised judicially and not capriciously. The trial court must be guided by evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is illegal or is so harsh and excessive as to amount to a miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously. See generally, **OGALO S/O OWUORA VS REPUBLIC (1954) 19 EACA 270, JAMES VS REPUBLIC (1950) 10 EACA 147, NILSON VS REPUBLIC (1970) EA 599 and WANJEMA VS REPUBLIC (1971) EA 493.**

The trial court's notes on sentence in this matter went along way in justifying the sentence that was eventually imposed. In my view the sentence imposed was justified particularly if one considers that the appellant had a record of previous conviction meaning that he was not a first offender. Indeed he had previously been sentenced to 1 year imprisonment for being in possession of bhang same as in count 2 herein. It appears that the appellant is unrepentant. I observed him in court during the hearing of this appeal and appeared to me to be unremorseful. He does not seem to understand the consequences of his actions.

There is no guarantee that if the sentence is reduced, he is likely to change his wayward ways and be good person capable of living in peace and harmony with his people. The sentence imposed was legal. In arriving at the sentence imposed, the learned Magistrate was alive to the principles of sentencing. He took in to account relevant factors and eschewed extraneous or irrelevant considerations contrary to the allegations by the appellant. However the only correction I will make is that the sentences imposed ought to have been ordered to run concurrently as the offences were committed in the same transaction.

The upshot of the foregoing is that the sentence imposed was well deserved. I have no reason to interfere with it save to the extend that the same shall run concurrently. Otherwise the appeal on sentence fails.

Dated and delivered at Nyeri this 30th day of November, 2009.

M.S.A MAKHANDIA

JUDGE