



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
***(Coram: Ojwang, J.)***  
**CRIMINAL APPEAL NO. 428 OF 2006**

**BETWEEN**

**PAMELLA AKOTH OWUOR..... APPELLANT**

**-AND-**

**REPUBLIC.....RESPONDENT**

***(An appeal from the judgement of Principal Magistrate Mrs. Murage dated 31<sup>st</sup> July, 2006 in Criminal Case***

***No. 1322 of 2005 at Kikuyu Law Courts)***

**JUDGEMENT**

The appellant was charged with the offence of being in possession of narcotic drugs contrary to s.3(1) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 (Act No.4 of 1994) as read with s.2(1) of the same Act.

The particulars were that the appellant, on 26<sup>th</sup> November, 2005 at Rungiri Village in Kikuyu Township, in Kiambu District, in Central Province, was found being in possession of *cannabis sativa* (bhang), to wit 38 stones not in the form of a medicinal preparation.

PW1, Police Force No. 30670 **Police Constable Haidi Saidi** testified that he was in office on 26<sup>th</sup> November, 2005 when he received information about unlawful possession of narcotic drugs by the appellant herein; and, at 10.30 a.m. on the same day he visited the appellant's house. He found 34 stones of narcotic drugs kept inside the house, while two stones of the same drug were outside the house, kept under a stone. PW1 recovered the drugs kept outside, and, with fellow Police officers, approached the appellant who was inside the house; they introduced themselves to her as Police officers, and then arrested her; they brought her to the Police station with the drug-exhibits. The stones of bhang had wrappings eaten away by rats, and they now remained loose, inside a polythene bag. PW1 took samples of the drug to the Government Chemist for analysis. At the Government Chemist, the plant material submitted was found to be bhang.

PW2, Police Force No. 80155 **Police Constable Timon**, of CID Kikuyu office, testified that he was at the office on 26<sup>th</sup> November, 2005 at 10.30 a.m. when information was received that there was a person at

Rungiri selling bhang. PW2 was in the Police team which visited the appellant's house at Rungiri; they introduced themselves as Police officers, and indicated that they wanted to search the house. Two stones of bhang were found outside the house, while the rest were found inside the house.

On cross-examination, PW2 testified that the appellant had kept the bulk of the bhang in a bag, and hidden it in the ceiling.

PW3, Police Force No. 577730 **Police Constable Kennedy Mwacui**, of the CID office Kikuyu, was at his office on 26<sup>th</sup> November, 2005 and proceeded with PW1 and PW2 to Rungiri, acting on information received about someone thereat, selling bhang. PW3 was in the company of PW2 as the stones of bhang kept in the ceiling were recovered, at the appellant's house.

The appellant when put to her defence, elected to make an unsworn statement. She said she had gone to the salon at the material time, and was called by her child only to come and find two people inside her house. These two were Police officers, and they did a search of the house. One of the Police officers told her he had already found a red paper bag in the house, containing bhang, and the said bag was not in the ceiling, but on the floor. As the two Policemen took the appellant outside, they came up to a third Police officer who said he had also recovered two stones of bhang on the outside. The appellant said the Police officers had told lies, and they must be the ones who brought the bhang along, and planted it on her for the purpose of a stage-managed criminal case.

The learned Magistrate, in her consideration of the evidence, thus said of the testimonies made for the prosecution:

***“In their evidence PW2 and PW3 were [mutually] corroborative, that they recovered 36 stones of bhang from [the] accused’s house. The same was produced in Court, save that part of the wrapping had been eaten by rats, but the bhang was intact. PW1 himself recovered two stones [of bhang] hidden outside the accused’s house. PW1 testified that he recovered 36 stones, he himself having recovered two of them, while PW2 and PW3 stated that they recovered 38 in total. PW1 was outside and could not have known what was recovered [inside the house]. I find that contradiction immaterial. The three prosecution witnesses did not know [the] accused prior to the arrest. They therefore had no grudge with her. [The] accused’s defence is a mere denial. It does not challenge the prosecution case. I find that [the] prosecution has proved [their] case against the accused person.”***

The learned Magistrate convicted the appellant herein, and, after treating her as a first offender and taking her mitigation statement into account, committed her to jail for a three-year period.

In her grounds of appeal, it is clear the appellant is not challenging her conviction. She further volunteers the sentiment that she “[made] the mistake of being in possession of drugs due to frustrations.” She restates that she is a first offender, “and very remorseful and promise never to repeat the mistake.” She pleads that she is “a widow and a mother of five children [and is responsible for two other children] who were left [behind] by [her] late sister, [and all are suffering] since [she is] the sole bread-winner.”

The tone of the grounds of appeal is well reflected in the appellant's oral submissions in Court. She was seeking pardon, especially on the ground that she has children to care for, while she lacks the helping hand of a husband. These are the circumstances, the appellant urged, which led her to commit the offence; she was in quest of “small money for children's school fees.” She said she would not commit such an offence again, and she was pleading for pardon by “God, the Government, and the Court.” She said her children had suffered while she has been away in jail, and she did not even know where these children may be, at the moment.

Learned counsel **Mrs. Kagiri** for the respondent, quite correctly, with respect, restricted her submissions to the question of sentence. Counsel urged that on a strict application of the law, the three-year jail term imposed on the appellant was proper, and, indeed, the sentence was not harsh or excessive. Were it possible to interfere with the sentence, the only applicable ground in the circumstances of this case,

counsel submitted, was the applicant's remorsefulness; and **Mrs. Kagiri** chose to leave the question to the discretion of the Court.

This is a straightforward case. Would it be proper for the Court to interfere with a sentence imposed by the trial Court, on grounds of pure empathy, and because the appellant has shown a moving scale of remorsefulness?

A Court's discretion in sentencing is regulated by law. And where this discretion is judiciously and responsibly exercised within the scope defined by law, the correct stand in law, in my opinion, is that the sentence as imposed is right; and consequently it is the just deserts of the accused that he or she should serve that sentence.

It has not been contended in the instant case that the sentence awarded was unlawful, or was harsh and excessive. Therefore, in proper judicial practice, no basis exists for interfering with the sentence.

Besides, judicial authority is well recorded which indicates in what circumstances an appellate Court – such as this one, in the instant case – may interfere with a sentence meted out by the trial Court. The Court of Appeal for Eastern Africa, in the old case of **Ogalo s/o Owoura v. Reginam** (1954) 21 EACA 270 considered this question and thus held (p.270):

***“The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. 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 will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v. R, (1950) 18 EACA 147, ‘it is evident that the Judge has acted upon some wrong principle or overlooked some material factor.’ To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case...”***

The foregoing statement of the law, I would hold, applies to all Courts in relation to which there exists an appellate relationship, and thus, it applies as regards all appeals from the Magistrate's Courts to the High Court.

On the facts on record in the instant matter, the learned Magistrate had imposed sentence without any excess of jurisdiction; there is no evidence at all that the trial Court had acted on a wrong principle, in sentencing; it cannot also be said that any material factor was overlooked by the trial Court at the time of sentencing; and there has been no claim made that the sentence dispensed was by any means manifestly excessive.

The sentence complained about is, therefore, in all respects in accordance with the law, and it is the duty of this Court in its appellate capacity, to uphold the same, as a function of enforcement of the law, as an aspect of the administration of justice.

Consequently, I hereby dismiss the appellant's appeal; and confirm the sentence imposed by the trial Court.

***It is so ordered.***

**DATED and DELIVERED** at Nairobi this 14<sup>th</sup> day of April, 2008.

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court Clerk: Huka**

**For the Respondent: Mrs. Kagiri**

**Appellant in person**