REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 192 of 2006

EUNICE MUTHONI WACHIRA……..……....APPELLANT

VERSUS

REPUBLIC……...…..……..…RESPONDENT

(Appeal from original conviction and sentence of the Resident Magistrate's Court at Mukurweini in CR. No.434 of 2005 by V.W. NDURURU Ag. SRM)

J U D G M E N T

Eunice Muthoni Wachira, hereinafter referred to as "*the appellant"* was convicted after trial for the offence of being in possession of bhang contrary to *section 3(2)* of the Narcotic Drugs and Psychotropic Substances Control Act and was sentenced to serve 10 years imprisonment. This was on 14th October, 2006.

Being aggrieved by the conviction and sentence, the appellant preferred this appeal setting out 3 grounds of appeal to wit.

1. **The evidence was not cogent to warrant a conviction.**

2. **The alleged exhibits were not properly marked and produced.**

3. **Failure to consider the appellants defence.**

The prosecution case was that on 30th June, 2005 **Boniface Kihara** (PW1) and **Simon Maina Itugu**, the Assistant Chief and Chief of Kiharo respectively were on patrol duties at Ithanji, when they were tipped off that the appellant was peddling bhang. They proceeded to her homestead and on seeing them approach, a man dashed from the appellant's house and disappeared. In the meantime the appellant came from the kitchen and stood at the door. PW1 saw a sufuria placed upside down. He turned it up whereupon he found a woolen cap in which it was concealed 85 rolls of bhang. The appellant was apprehended and handed over to **William Migwi** PW3, a Police Officer at Mukurweini police station together with the recovered bang. PW3 later submitted the bhang to Government Analyst for chemical analysis. Later he received the government analyst report confirming that the exhibit was bhang. The accused was then charged.

Put on his defence, the appellant in unsworn statement stated that on the material day, PW1 and PW2 were outsprinted by some boys in her compound whom she did not know. The two came back and demanded to be shown where the boys had disappeared to. It was then that PW2 searched her bedroom

but recovered nothing. He later discussed some issue in English with PW3 and thereafter she was escorted to Mukurweini police station where PW2 produced the exhibit and claimed that it had been recovered from her. She maintained her innocence.

When the appeal came up for hearing, the appellant elected to pursue the appeal on sentence only. She abandoned the appeal on conviction. **Mr. Orinda**, learned Principal State Counsel, did not object to position adopted by the appellant in this appeal. Accordingly the appeal proceeded on sentence only. In support of the appeal the appellant submitted that the sentence imposed was harsh and excessive. She was remorseful and that her husband had died 5 years ago. **Mr. Orinda** conceded that indeed the sentence imposed was manifestly harsh and excessive.

It is trite law that sentencing is a matter of discretion by the sentencing court. Like every discretion an appellate court will be slow to interfere with such exercise unless it is demonstrated that in undertaking the exercise, the sentencing court:-

(1) Acted capriciously and not judicially.

(2) Imposed an illegal sentence.

(3) Imposed a sentence that was manifestly harsh and excessive.

(4) Failed to take into account relevant considerations.

(5) Took into account irrelevant considerations.

See Generally **Ogola S/O Owoura V. Republic (1954) 19 EACA 270 Nilson V. Republic (1970) EA 599 & Wanjema V. Republic (1971) EA 493.**

In this case, the offence for which the appellant was convicted of carries a maximum penalty of 20 years imprisonment. The appellant was sentenced to 10 years imprisonment. The sentence it would appear was manifestly excessive. The sentencing notes of the learned Magistrate do not show why he deemed it necessary to impose the said sentence. The court of appeal has had occasion to express its disapproval of the current trend where manifestly excessive sentences are routinely being handed down by sentencing courts on no factual basis or on wrong factual basis. See **Geroge Otieno Oloo V. Republic, CR.APP. No.137 of 2004** (unreported).

This is one such case where the sentence was imposed on a willy nilly basis. The record does not show that the appellant was a serious drug peddler. Indeed the prosecutor did not even tender the previous records of the appellant before the sentence was imposed. It must therefore be taken that he had no such records meaning that the appellant was a first offender. Further I do not think that 85 rolls of bhang was so substantial amount of bhang as to attract the said sentence. Taking all these into account, I have no doubt in mind that the sentence imposed was manifestly harsh and excessive and must of necessity invite my intervention.

The appellant was sentenced on 14th October, 2006. Accordingly she has served close to 2 years of the prison term. I consider this to be sufficient punishment. In the premises, I commute the appellant's prison term to the term so far served with the consequence that the appellant shall forthwith be set at liberty unless otherwise lawfully held.

Dated and delivered at Nyeri this 30th day of June, 2008.

M.S.A. MAKHANDIA

JUDGE

Delivered by;

MARY KASANGO

JUDGE