



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 208 of 2006

SIMON WAMBUGU NDERITU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence in the Chief Magistrate's Court at Nyeri

in Criminal Case No. 4613 of 2006 by Mr. R. N. Nyakundi – C.M.)

J U D G M E N T

This appeal is on sentence. The appellant was convicted on his own plea of guilty for the offence of being in possession of Narcotic Drugs contrary to section 3(2) of the Narcotic Drugs and Psychotropic substances control Act. The Particulars of the charge were that “Simon Wambugu Nderitu on the 28th day of September 2006 at Wandubi Sub-location in Nyeri District of the Central Province was found trafficking in 24 rolls of cannabis which was not in its medical preparation in contravention of the said Act.

The facts of the case as narrated by the prosecution and which the appellant admitted and to which he pleaded guilty were that, “On 28/9/2006 police officers from Anti Narcotics based in Nyeri actively (sic) on information that there was a suspect at Wandumbi sub-location where he sells cannabis Saliva to average youth. The police moved to the area. They commenced investigations. The investigations led them to the house of the accused. In the house a search was conducted where 24 rolls of bhang were recovered. The 24 rolls were taken to the Government analyst. The bhang was analysed and confirmed to be bhang within the description of the Nairobi (sic) Drugs and Psychotropic substances control Act. I have the report as Exh. 1. The bhang recovered is placed (sic) before court as Exh. 1 and exhibit memo exhibit 3. The accused was accordingly charged”.

Upon being convicted on his own plea of guilty, the appellant was sentenced to 20 years imprisonment. In sentencing the appellant, the learned magistrate remarked “..... I have considered the charge visa viz (sic) the particulars. The particulars do satisfy the ingredients of the offence under section 2 (a) other than 4 (a). In the premises I would convict the accused for the lesser charge of being in possession and sentence him to 20 years imprisonment.....”

The appellant was aggrieved by the sentence imposed and hence preferred this appeal limited as aforesaid to sentence only. In his petition of appeal the appellant lamented that he pleaded guilty to the charge as he had nothing to say as he was caught red handed, that he was the sole bread winner of the family and that the sentence imposed was harsh and excessive.

When the appeal came up for hearing the appellant reiterated the above grounds which in my view are really pleas in mitigation. Mr. Orinda, learned principal state counsel who appeared for the state agreed with the sentiments of the appellant that the sentence imposed was harsh and excessive. He even opined that the said sentence was illegal.

Sentencing is a matter for the discretion of the sentencing court. Like any other exercise of discretion, an appellate court will not interfere with such exercise unless it is shown that in undertaking the exercise, the sentencing court:-

- (1) Acted capriciously
- (2) Imposed an illegal sentence
- (3) Imposed a sentence which was manifestly harsh and excessive
- (4) Failed to take in to account relevant consideration
- (5) Took into account irrelevant considerations

See generally *Ogola s/o Owuora v/s Republic* (1954) 21 EACA 270, *Nilson v/s Republic* (1971) E.A. 599 and *Wanjema v/s Republic* (1971) E.A. 493.

In the circumstances of this case, the offence for which the appellant was convicted and sentenced carries a maximum sentence of 10 years where the person found in possession thereof satisfies the court that the cannabis was intended solely for his own consumption and in every other case to imprisonment for 20 years. Now, from the facts as narrated by the prosecution, it is not possible to tell whether the cannabis sativa that was found in possession of the appellant was intended for his own consumption or for some other person's use. It behoved the prosecution to lead facts as would show that the cannabis sativa was for the appellant's consumption in which event he would have been liable to imprisonment of upto 10 years or that the cannabis sativa was for some other purpose, in which case the appellant would have been liable to a jail term of upto 20 years. The prosecution having failed to lead proper facts as to the two limbs of the sentence, a doubt arises as to whether the learned magistrate was right in assuming that the facts disclosed an offence under the 2nd limb and proceeded to impose the sentence permissible under the said limb. As is the practice in our criminal jurisprudence, that doubt must be resolved in favour of the appellant. In my view because of the doubt created, the learned magistrate should have invoked the limb with the most lenient sentence. Accordingly, the learned magistrate should have sentenced the appellant under the first limb that carries a maximum sentence of 10 years.

From the proceedings, the appellant was a first offender and not a serial drug peddler. The appellant also pleaded guilty the moment he was arraigned in court. In the process he saved the trial court valuable judicial time. Further I do not think that 26 rolls of bhang are such substantial haul that should have attracted heavy sentence. All these factors taken into account show irresistibly that the sentence was illegal if not manifestly harsh and excessive. It therefore calls for my intervention.

I note that the appellant has almost served 2 years of the prison term imposed. I believe that the appellant has been sufficiently punished. In the result I would commute the prison term of the appellant 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 Hon. Lady Justice Kasango this 30th day of June 2008

MARY KASANGO

JUDGE