

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 277 of 2004

(From original conviction and sentence of the Principal Magistrate's Court at Nyahururu in Criminal Case No. 2055 of 2004 – T. M. Mwangi [S.R.M.]

WINNIE MUKAMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Winnie Mukami was charged with two counts under the **Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994** (*hereinafter referred to as the said Act*). The particulars of the charges were that on the 6th of May 2004 at Oljoro Orok township, Nyandarua District, the appellant trafficked six sachets of heroin valued at Kshs 900/= and 40 tablets of diazapharm valued at Kshs 80/= contrary to **Section 4(a) of the said Act**. The appellant was further charged for being in possession of *cannabis sativa (bhang)* contrary to **Section 3(1)(2) of the said Act**. The particulars of the charge were that on the same day and the same place, the appellant was found in possession of two and a half rolls of *cannabis sativa (bhang)* which was not in medical preparation form. The appellant pleaded not guilty to all the charges and after a full trial was found guilty of the three counts as charged. In respect of the first count the appellant was sentenced to serve four years imprisonment. In respect of the second count, the appellant was sentenced to serve five years imprisonment and in respect of the third count the appellant was sentenced to serve two years imprisonment. All the sentences were ordered to run concurrently. Being aggrieved by her conviction and sentence the appellant appealed to this court against both conviction and sentence.

At the hearing of the appeal, the appellant abandoned her appeal against conviction and instead mitigated on sentence. She submitted that she was a first offender and had reformed in the two years that she has been in prison. She submitted that she had three children who had suffered while she is in prison as nobody was taking care of them. She further submitted that she had suffered from goitre that resulted in her being surgically operated. She urged this court to order for her release, as in her view, she had been sufficiently punished and had learnt her lesson.

Mr Koech learned counsel for the appellant submitted that there was overwhelming evidence by the prosecution which proved that the appellant was trafficking drugs. He submitted that some of the drugs which she was charged for trafficking was found in her person when she was searched after being arrested by the police. He submitted that the sentence which was meted out on the appellant was appropriate in the circumstances.

This being a first appeal, this court is aware that it is required to re-evaluate the evidence so as to reach an independent determination whether or not the sentence meted out on the appellant by the trial magistrate was merited in the circumstances. In reaching its determination, this court is aware that the sentencing of an accused person by a trial magistrate is an exercise of discretion by that magistrate and cannot be interfered with unless it can be proved that the sentence meted out was either illegal or was excessive and harsh considering the offence that was committed by such an accused person.

In this case the appellant was convicted of trafficking drugs of a value of Kshs 900/= and Kshs 80/= respectively. She was also found in possession of two and a half rolls of *cannabis sativa (bhang)* in her possession. Whereas I agree with Mr. Koech that the prosecution adduced overwhelming evidence which

proved its case against the appellant to the required standard of proof, the submission made by the appellant that the sentence that was meted on her by the trial magistrate was excessive in the circumstances cannot be overlooked.

I have perused the **Narcotic Drugs and Psychotropic Substances Control Act (Act No. 4 of 1994)** and note that the said Act was mainly targeted at persons trafficking large quantities of prohibited drugs and not the tiny amount that were found in possession of the appellant. That does not mean that the appellant was not guilty of the offence for which she was charged. On the contrary her business of purveying narcotic drugs to young members of the society is a business activity which should be discouraged by the courts. I have considered the mitigation offered by the appellant and also the amount of drugs that were found in her possession. In my view the sentences that were meted out on her were harsh and excessive in the circumstances.

I therefore set aside the said sentences and substitute it with an appropriate sentence of this court. I have considered the fact that the appellant has served one year and eight months of the sentence that was imposed on her by the trial magistrate. Having considered the mitigation of the appellant, I commute the said sentence to the period already served. The appellant is therefore set at liberty and ordered released from prison unless otherwise lawfully held. It is so ordered.

DATED at NAKURU this 10th day of May 2006.

L. KIMARU

JUDGE