



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI**

MILIMANI LAW COURTS

Criminal Appeal 326 of 2005

(From original conviction (s) and Sentence(s) in Criminal case No. 3896 of 2002 of the Chief Magistrate’s Court at Kibera (Ms. Mwangi - PM)

**ELIZABETH WANJIKU MURIA alias DEBORAH.....
.....APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

ELIZABETH WANJIKU MURIA alias **DEBORAH SHISIA WANDERA** was convicted for three offences as follows: -

Count 1: **TRAFFICKING ON NARCOTICS DRUGS** contrary to **section 4(a)** of **Narcotic Drugs and Psychotropic Substance (Control) Act** to wit 2.1 kilogammes of heroin. In count 2 **BEING IN POSSESSION OF A FORGED PASSPORT** contrary to **Section 13(1) (D)** of the **Immigration Act** and in count 3 **USING A PASSPORT ISSUED TO ANOTHER PERSON** contrary to **Section 13(1) (f)** of the same Act. The Appellant was then sentenced to 3 years imprisonment and ordered to pay a fine of Kshs.1 million in default 3 years imprisonment.

The Appellant did not challenge the conviction. When the Appeal came up for hearing before this court, the Appellant submitted that she was appealing only against the sentence on grounds that it was excessive in the circumstances. The Appellant submitted that she had fully reformed and would never repeat the offence and that she was seeking courts forgiveness. The Appellant submitted that she got a child while in custody and that she had other children all who needed her care.

Mr. Makura, State Counsel represented the State in this appeal. He opposed the appeal and submitted that the learned trial magistrate erroneously omitted to sentence the Appellant for the 2nd and 3rd counts and he urged the court to correct the error. Counsel also submitted that the sentence passed was neither harsh nor excessive.

The learned trial magistrate convicted the Appellant in three counts. However, when it came to sentence, the learned trial magistrate did not indicate for which offence the sentence passed was intended and **Mr. Makura** was speculating when he said that the sentence was in respect of count 1. As **Mr. Makura** observed the offence in count 1 called for a maximum sentence of life imprisonment together

with a fine of 1 million shillings or three times the market value of the drugs whichever was greater. The prosecution must however adduce evidence as to the value of the drug before the court can order a fine of three items the value of the drug. In this case no evidence was adduced to establish the value of the drug and the fine called for in the circumstances was Kshs.1 million. The default sentence should not have exceeded 12 months imprisonment as prescribed under **Section 28(b)** of the **Penal Code**. The entire sentence passed by the learned trial magistrate was therefore illegal in the circumstances. In counts 2 and 3, sentence prescribed for each offence is a fine of Kshs.200,000/- or two years imprisonment or both.

The Appellant seeks a reduction of sentence on grounds that she has since reformed and that she was remorseful and that she had a child to care for.

As I have already stated the sentence passed in this case was illegal for having an illegal default sentence and in addition for failing to give any sentence in counts 2 and 3.

I set aside the sentence of 3 years imprisonment with a fine of Kshs.1 million in default three years imprisonment. In substitution thereof I order sentence as follows: -

In count 1 – Three years imprisonment together with a fine of Kshs. 1 million default 12 months imprisonment with prison terms running consecutively.

In counts 2 and 3 – 12 months imprisonment in each count with the prison terms running concurrently with prison terms of 3 years imprisonment in count 1.

Dated at Nairobi this 11th day of October 2006.

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LESIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant present

Mr. Makura for the .State

CC: Wambui

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LESIT, J.

JUDGE