REPUBLIC OF KENYA

HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 105 OF 1999

BENVENTURE INYAIT OMUNY……. APPELLANT

VS

REPUBLIC …….... RESPONDENT

J U D G M E N T

The appellant was tried on a charge containing three counts. The first count relate to the offence of being in possession of Narcotic Drugs (Cannabis Sativa) contrary to Section 3 (a) of the Narcotic and Psychotropic Substances Control Act No. 4 of 1994. The particulars of this charge were that on the 5th day of May 1998 at Ongariama village in Teso District within the Western Province, was found in possession of 50 grammes of suspected Narcotic drugs namely Cannabis Sativa (bhang) valued at Ksh.500/=.

The second count relate to the charge of being in possession of a prohibited firearm without a firearm certificate contrary to Section 4 (2) (a) as read with sub-section 4 (3) (a) of the Firearms Act Chapter 114 Laws of Kenya. The particulars are that on the 5th day of May, 1998 at Amase market in Chakol Location Teso District within Western Province, with others not before court was found in possession of an AK-47 Assault rifle serial No. 56-128128648/28648 without a firearm certificate.

Finally the appellant was also charged with the offence of being in possession of prohibited ammunitions without a firearm certificate contrary to section 4 (2) (a) as read with sub- Section 4(3) (a) of the Firearms Act Chapter 114 Laws of Kenya. The particulars are that on the 5th day of May 1998 at Amase market in Chakol location in Teso District within the Western province, jointly with others not before court, was found in possession of 66 rounds of 5.56 mm ammunitions without a firearms certificate.

The appellant was convicted on all the counts and sentenced to serve 6 months, imprisonment in count 1, 10 years each in respect of counts 2 and 3. The sentences were ordered to run concurrently. Being dissatisfied the appellant has now come to this court to only challenge the sentence. The petition of appeal filed by the firm of Roselyne Aburili & Co. Advocates contained 8 grounds of appeal. However when the appeal came up for argument Mrs Aburili for the appellant abandoned all the grounds raised in the petition save for grounds Nos. 7 and8 whose contents are reproduced is follows:

> *"7. The sentence meted out to the appellant was excessive in the circumstances considering that he was a first offender.*
>
> *8. The learned Senior Resident Magistrate failed to take into account the appellant's mitigations in meting out the sentence."*

It is evident from the above grounds that the appellant did not intend to challenge the conviction. The senior state counsel did not indicate whether he was opposing the appeal or not. Mr. Kemo simply said he was leaving the matter to this court.

There are ample authorities on the subject to the effect that an appellate court should not interfere with a sentence which has been passed by a trial court unless there is evidence that the court passing the sentence overlooked some important factor or took into account some immaterial factor or acted on the wrong principle or that the sentence is manifestly excessive. In this appeal Mrs Aburili beseeched this

court to rule that the trial court erred by meting a sentence which was harsh and excessive. She further pointed out that the learned Senior Resident Magistrate failed to consider the appellant's mitigation and the mitigating circumstances.

I have perused the record of appeal and the same reveals that the trial magistrate considered the fact that the appellant was a first offender but was convinced that the offences was serious. Looking at the reasoning of the trial court it is clear that he was a live to the fact that the offences are serious.

It should be noted the appellant was in possession of both a narcotic drug commonly known as bhangi and a rifle with ammunitions. The trial magistrate was right to classify the offences as serious. He considered a material factor which was relevant. The custodial sentence meted out was therefore appropriate.

Mrs. Aburili further lamented that the sentences were harsh and excessive in the circumstances. It is clear from the record that the appellant was a first offender. Under Section 4 (3) (a) of the Firearms Act Cap. 114 Laws of Kenya the Law prescribes an imprisonment of a minimum of 5 years and a ceiling of 10 years in view of the amendment introduced in the year 2002. However at the time of passing the sentence the law prescribed a fine of Ksh.20,000/= or an imprisonment of a term not exceeding ten years for offences under Section 4 (2) (a) of the same Act.

It would appear then that the trial magistrate gave a maximum sentence. The record does not disclose the reasons for him to met out such a sentence on a first offender. I think I am persuaded to agree that the sentences slapped on the appellant in respect of counts 2 and 3 are harsh and excessive. The trial magistrate erred in failing to properly take into account that the appellant was a first offender, despite having noted that fact. Consequently, the sentence was manifestly excessive in the circumstances of this case which entitles me to interfere with the sentence. I will not interfere with the sentence meted out in count I.

In the final analysis therefore the appeal on sentence partially succeeds. The sentences meted out in counts 2 and 3 are set aside and substituted with a sentence of 6 years imprisonment on each count. The sentences are to run concurrently from the date of passing sentence in the trial court. It means the appellant has served the whole sentence. Consequently he should be set free forthwith unless lawfully held on other reasons.

DATED AND DELIVERED THIS 28TH DAY OF MAY 2004

J.K. SERGON

JUDGE