



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 102 OF 2000

(From Original Conviction and Sentence in Criminal case No. 511 of 2000  
of the Chief Magistrate's Court at Mombasa –Mr. F. M. Kadima –SRM)

THERRY JEAN PRADEL ..... APPELLANT

VE R S U S

REPUBLIC ..... RESPONDENT

RULING

This is an appeal against sentence. The appellant is a 28 French National who on 7th February 2000 while visiting Kenya was charged with being in possession of Narcotic drugs contrary to Section 3(1) of the Narcotic and Psychotropic Substance Control Act No. 4 of 1994. He was found smoking an equivalent of 1 gram of cannabis around the P.C's Offices in Mombasa. On 24th February 2000 he pleaded guilty before the Senior Resident Magistrate F. M. O. Kadima Esq., and sentenced to 12 months imprisonment. It is against this sentence that Mr. Ghalia Learned Counsel for the appellant has argued on the four grounds preferred by the Appellant saying to the effect that a custodial sentence without option of a fine as was given is against the principle of sentence of first offender and further that the Learned Senior Resident Magistrate considered extraneous circumstances in awarding the same sentence. He suggested that community service sentence would have been very appropriate. But Mrs. Mwangi the Learned Senior State Counsel supports the sentence. She reasoned that the statutory maximum offence is 10 years when in fact the appellant got only 12 months. One of the complaints by Mr. Ghalia is that there ought to have been an option for a fine it is Section 24 of the Penal Code prescribes mode of punishment and imprisonment and fine are just any of the several modes of punishment prescribed. Generally imprisonment is limited where it is given as to its maximum limit and rarely at its minimum. In practice Courts usually do not impose imprisonment on first offenders, but this is only a mere consideration, where offences are grave or widespread within a given locality the courts should use imprisonment. Secondly as a second consideration, which is now unique, to our jurisdiction Magistrates ought now to apply community service order. Act as a mater of course but only where it applies in terms of that Act. For custodial offences below the period of 3 years as provided under Community Service Orders Act No. 10 of 1998 the Magistrate will not have correctly exercised his discretion unless he has considered the option and disqualified it for a given reason.

This is so because in matters of sentence the trial court has a very wide discretion. Now that about where

trial court imposes a sentence of imprisonment without option of a fine this again depends on his discretion but fines are to be preferred to orders of imprisonment and although there is no compulsion where the offence created does not outlaw it. Sentence of imprisonment without option of a fine is to be meted out on very exceptional circumstances. In this case the Learned Senior Resident Magistrate was concerned about the image of the country. Indeed I think he may be chagrined by a person smoking bhang in the P.C's compound at the set of authority as this appellant was caught doing. The Magistrate may just have been properly outraged but that may not be a proper consideration in not considering a fine.

At this point this being an appeal court the sentence of the Senior Resident Magistrate can only be interfered with if it was exercised on wrong principle or he overlooked some material factor or that the sentence was manifestly excessive in the circumstances or so low as to amount on wrong principle.

It should not be altered on mere ground that the appeal court would if it were the trial court done a better job. However, my only concern here is that the omission to give fine option was not given on stated grounds. Secondly, it ought to have been considered that he was a first offender and that he had pleaded guilty. I think this constituted disregard of principle against which I can review this sentence.

I think it may leave the 12 months imprisonment to stand but give a fine option of Kshs. 10,000/- in lieu of 12 months imprisonment.

That would be the order of the court.

*Dated this 4 th day of May 2000 in open court at Mombasa.*

A. I. HAYANGA  
JUDGE.