Mwangi v Republic (Criminal Appeal E041 of 2024)
[2025] KEHC 4480 (KLR) (7 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4480 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E041 OF 2024

DKN MAGARE, J

APRIL 7, 2025

BETWEEN

DAVID MWANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The accused person was charged with the offence of being in possession of narcotic drugs contrary to Section 3(1) as read with Section 3 (2) (a) of the Narcotic Drugs and Psychotropic Substances Control *Act No. 4 of 2022*.

2. The particulars related to trafficking in 46 rolls and another unprocessed cannabis all weighing 300 grams with a street value of Ksh. 15,000/-. A Plea Agreement was entered on 2.5.2024 whereupon the Appellant pleaded guilty to the offence. There was also an initial count of trafficking in narcotic drugs contrary to Section 4(a) (ii) as read with Section 3 (2) (a) of the Narcotic Drugs and Psychotropic Substances Control *Act No. 4 of 2022*. Upon plea bargain, the Respondent substituted the initial charge and undertook, among others not to proceed with this initial count.

3. Having entered into a Plea Agreement, the Appellant urged the trial court to give him a noncustodial sentence on assurance that he would reform.

4. The trial court proceeded to sentence that Appellant to serve 4 years imprisonment from 21.12.2023. Aggrieved, the Appellant lodged the Petition of Appeal dated 4.7.2024 on the grounds thus:

    a. The learned trial magistrate erred in law and fact by not considering that the Appellant had pleaded guilty.

    b. The learned trial magistrate erred in law and fact in imposing a harsh and excessive sentence.

c. The learned trial magistrate erred in law and fact in convicting the Appellant to serve 4 years without considering his mitigation.

5. The appeal was argued through very brief submissions. The Prosecution was not opposed to the review of sentence downwards. It was however, opposed to a noncustodial sentence.

Analysis

6. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

7. Therefore, this court will not interfere with the exercise of judicial discretion by the court below unless it is satisfied that its decision is clearly wrong. The first appellate court must itself weigh conflicting evidence, make its own findings and draw its own conclusions. The principles that apply in the first appellate court were also set out in the case of Okeno Vs Republic [1972] EA 32 where it was stated as follows:-

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"

8. It is thus beyond peradventure that this court dealing with the instant appeal is entitled to consider the evidence in the trial court as a whole as being submitted a fresh to be subjected to exhaustive examination to guide the court towards its own decision on the evidence. Further, in Kiilu & Another vs. Republic [2005]1 KLR 174, the Court of Appeal stated as follows:-

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

9. The issue is whether the sentence was excessive and not justified. The issue arises not out of legality of the sentence but excessiveness and mitigation.

10. Sentencing is one of the most intricate aspects of trial. It complements the trial. The sentencing should be one that meets the ends of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. The objectives of sentencing as set out in the 2023 Sentencing Guidelines are as follows:-

> " 1. 3.1 Sentences are imposed to meet the following objectives. There will be instances in which the objectives may conflict with each other – insofar as possible, sentences imposed should be geared towards meeting the objectives in totality.
>
> i. Retribution: To punish the offender for their criminal conduct in a just manner.
>
> ii. Deterrence: To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.
>
> iii. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.
>
> iv. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender's contribution towards meeting those needs. Community
>
> v. Protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts.
>
> vi. Denunciation: To clearly communicate the community's condemnation of the criminal conduct.
>
> vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
>
> viii. Reintegration: To facilitate the re-entry of the offender into the society"

11. This appeal revolves solely around the interpretation of Section 3 (1) as read with 3 (2) (a) of the Narcotic Drugs and Psychotropic Substances Control Act, 2022. I reproduce the entire Section 3 of the Act as doth:

> (1) Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.
>
> (2) A person guilty of an offence under subsection (1) shall be liable—
>
> (a) in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment to a term of not more than five years or to a fine of not more than one hundred thousand shillings;

(b) in respect of a narcotic drug or psychotropic substance, other than cannabis, where a person is in possession of less than one gram, to a fine of not less than five million shillings, or to imprisonment to a term of not less than five years, or to both such fine and imprisonment; and

(c) to, in addition to the sentences in paragraph (a) and (b) respectively, committal to appropriate court appointed treatment programme or to voluntary submission to a rehabilitation programme for a period not less than six months, where the court deems fit

(3) Subsection (1) shall not apply to—

(a) a person who has possession of the narcotic drug or psychotropic substance under a licence issued pursuant to section 16 permitting him to have possession of the narcotic drug or psychotropic substance; or

(b) a medical practitioner, dentist, veterinary surgeon or registered pharmacist who is in possession of a narcotic drug or psychotropic substance for any medical purposes; or

(c) a person who possesses the narcotic drug or psychotropic substance for medical purposes, from, or pursuant to a prescription of, a medical practitioner, dentist or veterinary surgeon; or

(d) a person authorized under the regulations to be in possession of the narcotic drug or psychotropic substance.

12. In the case of Daniel Kyalo Muewa – vs- Republic (2009) eKLR the Court of Appeal considered this very question of whether Section 3(2) provided for a mandatory minimum ten (10) year sentence. In that case the court cited with approval the meaning ascribed to the term 'shall be liable' in the case of Opoya – vs- Uganda [1967] E.A 752 where it was held:

> " It seems to us beyond argument that the words 'shall be liable to' do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it"
>
> ... "We have no doubt that the sentence of 10 years imprisonment and 20 years imprisonment prescribed in Section 3 (2) (a) of the Act for the possession of 'cannabis sativa' are the maximum and that the court can lawfully impose any shorter term of imprisonment. Furthermore, although Section 3 (2) (a) of the Act does not expressly provide for a fine, the law can lawfully in accordance with Section 26 (3) of the *Penal Code* sentence the offender to pay a reasonable fine in substitution for imprisonment"

13. The sentence also had to be one that was hinged on retributive justice for the secondary victims. If the court did not take into account the three (3) objectives of deterrence, retribution and denunciation of his offence at the time of sentencing him, chances of the accused person being reintegrated in the society would be next to impossible as there were possibilities of being harmed.

14. The Appellant was found with 46 rolls of bhang and another unprocessed bhang all weighing 300 grams with a street value of Ksh. 15,000/-. He pleaded guilty following a plea bargaining agreement. To impose on him a 4 year sentence without option of a fine was in my view unwarranted and excessive. As the adage goes, 'one does not require a hammer to kill a mosquito'.

15. Having considered the facts of this case and his mitigation, this court comes to the firm conclusion that a sentence of 4 years was improper as a noncustodial sentence would have been suitable. To maintain such a harsh sentence, will discourage plea bargain.

16. The Appellant has been in custody from 16.12.2023. Even if the court was to sentence him to half of the period he was to serve, he will have still concluded the sentence. I find that the court ignored the fact that the Appellant was a first offender. Secondly, the court disregarded the fact that this was a plea bargain, where, the Appellant agreed not to appeal on conviction. The Appellant considerably showed remorse. The court indicated that she had considered the mitigation of the offender. I cannot see the consideration of the mitigation. The appellant had stated that he had a family whose welfare he was not aware of. He promised to be good in the community. He also requested that the period in custody be considered. The latter was considered in sentencing but not as a means of reducing sentence but in terms of Section 333(2) of the *Criminal Procedure Code*.

17. A tragedy that can be seen from the file, is that the appellant requested for non-custodial sentence, the court did not find it wise to consider the request even if it was not minded to award. There was no pre-sentence report to guide the court. In that respect absence of the report makes denial of non-custodial sentence perfunctory. Non-custodial sentence cannot be ruled out in offences of this nature without considering a report from PACS.

18. Considering the period the Appellant has been in custody since his arrest on 16.12.2023, I set aside the sentence of 4 years entirely. In lieu thereof I direct that the period the Appellant has been in custody is sufficient since he was a remorseful first offender. Therefore, the Appellant is at liberty unless otherwise lawfully held.

Determination

19. I therefore make the following orders: -

    a. Considering the period the Appellant has been in custody since his arrest on 16.12.2023, I set aside the sentence of 4 years entirely. In lieu thereof I direct that the period the Appellant has been in custody is sufficient since he was a remorseful first offender.

    b. Consequently, the Appellant is at liberty unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 7TH DAY OF APRIL, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Kimani for the State

Appellant present

PC. Boniface Rotich

Court Assistant – Michael