



REPUBLIC OF KENYA



KENYA LAW
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**Masaku v Republic (Criminal Appeal E139 of 2022)
[2025] KEHC 9393 (KLR) (4 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 9393 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E139 OF 2022**

TM MATHEKA, J

APRIL 4, 2025

BETWEEN

JOSEPH MUTINDA MASAKU APPELLANT

AND

THE REPUBLIC RESPONDENT

JUDGMENT

1. The appellant Joseph Mutinda Masaku was charged with the offence of Trafficking in Narcotic Drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars of the offence were that on the 24th day of November 2022 at Nziu Location in Makueni Sub-County within Makueni County, the Appellant was found storing bhang to wit 800g of street value of Kshs 16,000 which was not medically prepared.
2. In Count II, the Appellant was charged together with Alfred Makau Kiamba with the offence of Being in possession of Narcotic Drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars of the offence were that on the 28th day of November 2022 at Nziu Shopping Centre, Nziu Location, Makueni Sub-County within Makueni County, they were found in possession of 30 rolls of bhang with a street value of Kshs 1,500/= which was not medicinally prepared.
3. The appellant and his co accused pleaded guilty to both counts and were convicted on their own plea of guilt. He was sentenced to 6 years' imprisonment on Count I and on Count II, each was fined Kshs 20,000/= in default to serve one year in prison.
4. In addition, to these sentences each Appellant and his co accused were ordered to be placed on probation supervision for two years.



The Appeal

5. Aggrieved by that decision, the Appellant filed this appeal on the following grounds;
 - a) That he pleaded guilty to the charges.
 - b) That the prosecution case is replete with monumental inconsistencies and contradictions which would have attracted acquittal verdict.
 - c) That the trial court erred in both law and fact by failing to conduct holistic scrutiny of the whole evidence on record to base its conviction and sentence.
 - d) That he ca't recall all that transpired during the trial hence his plea to this court to furnish him with lower court proceedings and judgment transcripts.

Facts read to the Trial Court

6. On 24/11/2020, police officers from Nziu received a tip off that there was a rental house which was being used as storage for narcotic drugs. Members of the public went to the house and the land lady identified the tenant as Joseph Mutinda, the appellant herein. When they opened the house, they found 800gm of cannabis sativa as P. Ex 1 packed on bags inside a basin. Maroon basin as P. Ex 2. Packing papers as P. Ex 3. On 28/11/2022, police received another tip off that there was another house occupied by the appellant which was a rental. Upon raiding the house, the appellant was found in the house together his co accused. 30 rolls of bhang discovered produced as P. Ex 4.
7. They each pleaded guilty to the facts.
8. The appeal was canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions.

The Appellant's Submissions

9. The appellant urged this court to allow him to mitigate as far as the sentence is concerned. He asked the court to consider him for leniency and reduce 7years imprisonment to a short term as the decision was harsh and excessive. That his health has deteriorated due to acute stomach ulcers and he should be given a non- custodial sentence so as to access proper medication. That he is the sole bread winner of the family as his parents are old. That he has undergone rehabilitation and is ready to abide by the rules of the society. That he comes from a very humble background and was young at the time of the incidence, that he is a first offender, that he was unarmed and did not commit the offence, that he is remorseful and is ready for re-integration with the society.
10. He called upon this court to consider the guidelines set out in the Supreme Court decision of Francis Karioko Muruatetu -vs- R as well as other persuasive decisions from other jurisdictions.
11. He submitted that the main purpose of punishment is retribution, deterrence, prevention and rehabilitation and must be accorded due weight in any sentence. He submitted that sentencing is about achieving the right balance or proportionality and the elements at play are the crime, the offender and the interests of the society.
12. He submitted that in light of the fact that the presiding officer is endowed with a wide discretion in the imposition of the sentence, appropriateness tends to be subjective judgment according to the view of the sentencing officer.



Submissions by the Respondent

13. The State, through Prosecution Counsel Lucas Tanui contended that the sentence is not harsh or excessive but left the matter to the court to consider appropriate sentence while exercising its powers on appeal. He submitted that in doing so, the court may call for a social inquiry report.

Duty of Court

14. It is now settled that the duty of a first appellate Court is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses. Evidently in this case there were no witnesses as the appellant pleaded guilty to the charges.
15. Having looked at the grounds of appeal, the rival submissions and the entire record, it is important to note that the grounds were set out as though the matter had gone on appeal. It is clearly evident that this appellant may have just picked another appellant's grounds and filed them. This is not good as it could jeopardize an appellant's appeal.
16. In his submissions the appellant now addressed the issue of sentence calling it "Appeal of Mitigation" seeking what is ultimately a review of his sentence on the consideration that he is a first offender and has indeed reformed.

The only issue for determination is whether the sentence was harsh and excessive.

17. Having pleaded guilty to the offences, section 348 of the CPC prevents the Appellant from appealing against the conviction but he is allowed to challenge the sentence. The section provides that;

"348. No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."

18. In Count I, the particulars are that the Appellant was found storing 800g of bhang with a street value of Kshs 16,000/=.
19. Trafficking is defined at S. 2 of the Act to mean the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance or making of any offer in respect thereof, but does not include—...

On sentence the relevant penal section is S. 4 of the Narcotic Drugs and Psychotropic Substances (Control) Act which provides Penalty for trafficking in narcotic drugs, etc.

Any person who trafficks in, or has in his or her possession any narcotic drug or psychotropic substance or any substance represented or held out by him or her to be a narcotic drug or psychotropic substance, shall be guilty of an offence and liable—(a) in respect of any narcotic drug or psychotropic substance—
(i) where the person is in possession of between 1—100 grams, to a fine of not less than thirty million shillings or to imprisonment for a term of thirty years, or to both such fine and imprisonment;

(ii) where the person is in possession of more than 100 grams, to a fine of not less than fifty million shilling or three times the market value of the narcotic psychotropic substance, whichever is greater, or to imprisonment for a term of fifty years, or to both such fine and imprisonment;



20. In Count II, the particulars are that the Appellant was found in possession of 30 rolls of bhang with a street value of Kshs 1,500/= which was not medicinally prepared. The relevant penal section is 3 of the Act which provides Penalty for possession of narcotic drugs, etc.
- (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).....
21. Looking at the sentence-imposed vis-a vis the sentence in the statute, it is clear that the trial court took into consideration the circumstances of the offence, the principles of sentencing in as far as the appellant was a first offender. The court also had the benefit of the pre sentence report.
22. In Count II for instance, the maximum term of five years is for accused persons who satisfy the court that the cannabis is solely for own consumption. In this case, this requirement was not fulfilled as the matter did not go to trial but the Appellant was sentenced to a fine of Ksh 20,000/= or one-year imprisonment in default.
23. It is trite that an appellate court should not interfere with a sentence unless the trial court has acted upon wrong principles or overlooked some material factors. In *Bernard Kimani Gacheru -vs- R* [2002] eKLR the Court of Appeal restated that:
- “It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”
24. While imposing the sentence, the trial court stated that; “I have considered the sentence by law imposed for the offences, the mitigation and each probation report.”
25. As for the additional sentence of probation supervision upon completion of the sentence, with respect to Count 11, the court is permitted to do so by section 3 (2) (c) of the Act which provides that;
- (2) A person guilty of an offence under subsection (1) shall be liable—
- (c) 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.”
26. This is intended to ensure that the appellant and his co accused are weaned off their drug habit and are reintegrated to become responsible members of the society.
27. Before I pen off I must lay emphasis on the need for the prosecution to always ensure that these charges come with a government analyst report as to what the substance presented to the court is.



28. Other than that I am of the view that the sentence as meted was lawful and appropriate in the circumstances of the case.

29. The appeal is therefor without merit and is dismissed. Dated, signed and delivered in open court this 4th April 2025 Mumbua T Matheka Judge

Appellant present

Kazungu for state

Chrispol CA

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

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