



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kimani v Republic (Criminal Appeal E028 of 2022)
[2024] KEHC 3079 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3079 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E028 OF 2022
CW GITHUA, J
MARCH 13, 2024**

BETWEEN

SILVESTER KIRIME KIMANI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant, Sylvester Karimi Kimani was convicted on his own plea of guilty with the offence of being in possession of bhang contrary to Section 3 (1) as read with Section 3 (2)(a) of the *[Narcotic drugs and Psychotropic Substance \(Control\) \(Amendment\) Act of 2022](#)*.
2. The particulars supporting the charge alleged that on 24th June 2022 at Muriranjas village in Kahuro Sub-County within Murang'a County, the appellant was found in possession of about 50 grammes and one broom of a substance believed to be cannabis sativa with a street value of Kshs. 5,000 which was not in medical preparation form.
3. Upon conviction, the appellant was sentenced to serve ten (10) years imprisonment. He was satisfied with his conviction but was aggrieved by his sentence. In his petition of appeal filed on 19th July 2022, the appellant complained that the learned trial Magistrate erred in law and fact by imposing a harsh sentence without considering that the bhang recovered from him was for his consumption only and for basing the sentence on the record of his previous conviction which related to an offence he had already been punished for.
4. In addition, the appellant faulted the learned trial magistrate for sentencing him without considering that he had pleaded guilty to the charge thereby saving the court's time and for ignoring his mitigation. He further claimed that the trial court violated the provisions of the *[Narcotic Drugs and Psychotropic Substances \(Control\) \(Amended\) Act](#)*.



5. At the hearing, the appellant who appeared in person chose to prosecute his appeal by way of oral submissions. He submitted that the sentence meted out against him was not only harsh but was also excessive considering the quantity of bhang found in his possession which was only for his consumption. He urged me to reduce the sentence noting that he was a young man aged 30 years and his continued stay in prison would only waste away his life.
6. The appeal is contested by the state. Learned prosecution counsel Ms. Muriu supported the sentence imposed by the trial court contending that it was lawful and proper considering that in exercising its discretion, the trial court considered that the appellant was not a first offender as he had previously been convicted of a similar offence. She further submitted that if the court was inclined to revise the sentence, it should impose a deterrent sentence to deter the appellant and other would be offenders from committing such crimes in future.
8. In response to the respondent's submissions, the appellant while admitting that he was not a first offender clarified that he was now reformed and was ready to be a good citizen; that when he was initially convicted of a similar offence, he was too young to understand the nature of the offence he had committed and why he should not repeat it but now that he was older, he had learnt the consequences of such conduct and will not repeat it.
9. Given that this appeal is against sentence only, it is important to consider the principles that guides an appellate court in deciding whether or not to interfere with a sentence imposed by the trial court. To start with, it is trite that sentencing is at the discretion of the trial court and for this reason, an appellate court should not disturb a sentence passed by the trial court unless sufficient basis is laid to justify its intervention.
10. It is now settled law that for an appellate court to interfere with the trial court's discretion in sentencing, it must be satisfied that the impugned sentence was illegal or that when sentencing the appellant, the trial court acted upon some wrong legal principles or overlooked some material factor or considered extraneous matters. An appellate court can also disturb the sentence if it was convinced that it was harsh and manifestly excessive in the circumstances of the case:
See: Bernard Kimani Gacheru V Republic [2000] eKLR;
Sayeko Vs Republic [1989] KLR 306.
10. In this case, the appellant was convicted of the offence of being in possession of bhang whose penalty is stipulated in Section 2(A) of the *Narcotic Drugs and Psychotropic substances (Control) (Amendment) Act* of 2022. The provision provides for a maximum penalty of five years imprisonment or a fine of not more than one hundred thousand shillings.
11. The trial court's record shows that when sentencing the appellant, the learned trial magistrate though correctly noting that the appellant was not a first offender appears to have been influenced by a perception that the appellant was a habitual offender which was not based on the evidence on record. The record as well as the pre-sentence report which was availed to the court clearly indicated that the appellant had only one as opposed to multiple previous convictions.
12. Secondly, whereas it is indeed true that the appellant was a repeat offender as this was admitted, he still retained his constitutional right to be punished only in the manner prescribed by the law- See Article 50 (p) of *the Constitution*. In this case, the learned trial magistrate fell into error when he imposed a sentence which exceeded the penalty provided for by the law. He sentenced the appellant to ten years imprisonment while the law prescribed a maximum sentence of five years imprisonment. The sentence was therefore patently illegal and cannot be sustained.



13. For all the foregoing reasons, the sentence imposed by the trial court is hereby set aside. Considering the quantity of cannabis found in the appellant's possession, I find that a sentence of two (2) years imprisonment is reasonable and appropriate in the circumstances of this case. The trial court's sentence is accordingly substituted with a sentence of two years imprisonment which shall take effect from the date of sentence by the trial court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 13TH OF MARCH, 2024.

HON. CECILIA GITHUA

JUDGE

In the presence of :

The appellant

Ms. Muriu for the respondent

Ms. Susan Waiganjo Court Assistant

