Lokwang v Republic (Criminal Appeal E012 of 2023)
[2024] KEHC 3454 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3454 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL E012 OF 2023

RB NGETICH, J

APRIL 11, 2024

BETWEEN

MOSES LOKWANG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal arising from the judgment and sentence in Kabarnet Chief Magistrate's Court Criminal Case No. E124 of 2022 delivered by Hon C.R.T Ateya (Senior Resident Magistrate) on the 9th February, 2023)

JUDGMENT

1. The appellant Moses Lokwangwas charged with the offence of being in possession of Narcotic drugs contrary to section 3(1) as read with section 3(2) of the Narcotic drugs and psychotropic substances Control Act No.4 of 1994. The particulars of the offence are that on the 1st day of July,2022 at around 1445 Hours at Marigat Township Marigat Location in Baringo South Sub- County within Baringo county, the appellants was found in possession of cannabis sativa(bhang) to wit ninety-six (96) rolls and 1200gms of bhang with a street value of Kshs. 9,000/= in contravention of the said Act.

2. When the charge was read to the appellant on 4th July,2022, he pleaded not guilty to the charge which culminated in the matter being set down for trial. The prosecution availed 3 witnesses in support of the charge against the accused. Upon the closure of the prosecution's case, the court rendered a ruling on the 9th December,2022 finding that prosecution had established a prima facie case to warrant accused placed on his defence. The accused gave a sworn statement in his defence on 20th December, 2022. He did not call any witness.

3. After trial, the court delivered judgement on the 24th January, 2023 finding that prosecution had proved its case beyond reasonable doubt. The appellant was found guilty and convicted under section 215 of

the Criminal Procedure Code. After mitigation, the appellant was sentenced to 20 years imprisonment on the 13th February,2023.

4. Dissatisfied and aggrieved with the decision of the court, the Appellant filed this appeal citing the following grounds: -

   i. That I am a first offender thus beg for leniency.

   ii. That I am remorseful, repentant and reformed as I have learnt to take responsibility of my own actions.

   iii. That I am praying for reduction of sentence by the time spent in remand custody pursuant to section 333(2) and Section 362, 364(1) b and 365 of the Criminal Procedure Code among other enabling laws.

   iv. That may this Honourable court be pleased to consider the sentencing policy guidelines of 2016 published by the Kenya Judiciary and consider the mitigating circumstances that would lessen the custodial sentence.

   v. That more grounds to be adduced at the hearing hereof and determination of this appeal.

5. The Appellant filed a letter on the 22nd November,2023 seeking to amend his grounds of appeal and filed the following grounds of appeal: -

   i. That the trial magistrate did not give much consideration to the Appellant's claim that his money had been taken away from him which resulted to him being framed for making a formal complaint and that it is very strange that the money was never listed as exhibit in this case.

   ii. That the trial magistrate failed to note the variance on the particulars of the charge and the evidence adduced in breach of section 214(1) of the Criminal Procedure Code.

   iii. That the trial magistrate's finding on possession did not meet the required standards while it was factual the Government analyst did not testify but his report was presented by the investigating officer who was not competent to present the report to the court.

   iv. That the trial magistrate arrived on a conviction on mere suspicion that the appellant was selling bhang to students while there was no school nearby. On the contrary no evidence was presented to substantiate the allegations that was presented.

   v. That the trial magistrate failed to note the unusual uniformity where only policemen were the prosecution witnesses in the case signaling a fabrication and coaching of witnesses who doubled up as investigating officer, arresting officer.

   vi. That the trial magistrate did not consider all the relevant factors including the quantity and value of the drugs, specifically no valuation certificate was availed to ascertain the market value. The indicated value of Kshs.9,000/= was speculative and an exaggeration contrary to section 86 of the Narcotic Drugs Act.

   vii. That the trial magistrate conducted an irregular proceeding which raises a lot questions whereby the court failed to impose a fine contrary to Section 86 of the Narcotic drugs Act.

   viii. That the trial magistrate failed to utilize the principle contained in Section 26 of the Penal Code which authorizes the court to sentence offenders to a shorter term than the maximum provided in the written law.

ix. That the trial magistrate failed to take into account mitigation advanced by the Appellant particularly that he was a first offender and his other personal circumstances, but went ahead to sentence the Appellant to a maximum sentence of 20 years which was harsh and excessive in the circumstances.

x. That the trial magistrate when sentencing the Appellant did not take into account the period of 7 months spent in pre-trial custody from his 20 year sentence contrary to section 333(2).

6. The appellant prays for the appeal to be allowed, the sentence be set aside and reviewed to a lesser term of sentence and/or set such other orders that the court may deem fit.

7. The Appeal was canvassed by way of both written and oral submissions.

Appellant's Submissions

8. The Appellant restated grounds of appeal and submitted that the court imposed maximum penalty of 20 years without option of fine against the appellant and further urged the court to take into account the period of 7 months spent in pre-trial custody in computation of sentence in compliance with section 333(2) of the C.P.C.

Respondent's Submissions

9. Ms. Ratemo for the state submitted orally. She stated that the Appellant was charged with the offence of being in possession of cannabis Sativa 96 Rolls with a street value of Kshs.9000. That the prosecution called 3 witnesses and the prosecution was required to establish that the rolls found with the Appellant were rolls of bhang and whether he was found in possession of Cannabis Sativa.

10. She submitted that the prosecution produced a report from the Government analyst which confirmed that the substance was cannabis and also produced an inventory signed by the Appellant in the presence of 3 officers who signed as witnesses and among the items found with the Appellant were: -

a. Mobile make Techno Phone.

b. 6 packets of rolling papers.

c. 2 nylon bags with bhang.

d. 96 Rolls of Bhang.

11. Further that during the defence, the Appellant said he did not know where the rolls of bhang came from and also denied the mobile phone but he admitted that the identity card number in the inventory was correct; that he did not dispute the signature in the inventory and he was therefore found with 96 rolls of bhang; and the sentence imposed was within the parameters of the law but are not opposed to time spent in custody being considered in sentence as it was not considered by the trial court.

12. In response to the Respondent's submissions, the appellant submitted that the prosecution has not mentioned kshs 50,000 taken from him which led to him being framed up. Further, the charge sheet show that he was arrested on 1st July, 2022; that he was in custody for 4 days which was not a holiday or weekend and no explanation was given by prosecution for being detained for 4 days before arraignment; and there is no confirmation on the quantity in grams and value of the bhang and the person who measured and estimated street value should have testified. He stated that he did not agree with the inventory done. He submitted that he was forced to sign the inventory at the police station. Further that only the police testified yet he was arrested in a hotel and further stated that he disputes Government analyst report as it does not have stamp.

Analysis And Determination

13. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of Okeno v 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.)"

14. Further in the case of Mark Oiruri Mose –Vs- Republic [2013] e KLR Criminal Appeal No.295 of 2012 the Court of Appeal stated as follows:-

> " It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that."

15. In view of the above, I have considered the record of appeal and the rival submissions by the parties and consider the following as the issues for determination: -

    i. Whether the charge against the accused were proved beyond reasonable doubt.

    ii. Whether the sentence imposed by the trial court was harsh and excessive.

(i)Whether the charge was proved beyond reasonable doubt

16. Record show that on the 1st July,2022 upon Pw1 together with his colleagues PC Kemboi upon receiving information from PC Mutembei went to Kamco Hotel in Marigat where the appellant herein was alleged to be selling cannabis to students. At the hotel they approached the appellant, interrogated, searched him and found 96 Rolls of bhang in his black leather jacket. They booked him in after informing the OCS.

17. PW 3 one No.118818 PC Andrew Mutembei testified that on the 1st July, 2022 at around 2: 00P.M, he was at Marigat police station when he received a call that there was someone selling bhang to students outside Kamco Hotel. He said that he informed the OCS who advised him to take 2 officers for investigations. Pw2 and Pw3 both police officers confirmed that they accompanied Pw3 to Kamco Hotel in Marigat where they found the appellant. They interrogated and searched him and recovered 96 Rolls, 6 rolling papers and bhang in 2 sachets in a black jacket with torn pockets where he was storing the drugs. He produced the 96 Rolls of bhang as P. exhibit 1, 6 Rolling papers as P. Exhibit 2, 2 Sachets of bhang as Exhibit 3 and the Government chemist Report dated 28th July,2022 as Exhibit 4, exhibit memo form. He produced the inventory which was signed by the accused on every form as exhibit 5 and said it is the appellant who indicated his identity card number.

18. The 3 prosecution witness were all present at the time they arrested and interrogated the appellant. They all adduced consistent evident in respect to place of arrest, search and recovery of the bhang from the black jacket that the appellant was wearing. The Black`s Law Dictionary 10th Edition defines the term possession to mean –the fact of having or holding property in one's power. From the evidence adduced, there is therefore no doubt that the appellant was found in possession of the bhang. He acknowledged the same by signing inventory and writing his Identification number on it.

19. On whether the substance recovered was cannabis, Government analyst report was produced by the investigations officer which confirmed that what was recovered from the appellant was bhang. Record show that he did not object to production of the report by the investigations officer. Raising objection at appeal stage in my view is an afterthought and cannot stand.

20. On whether charges were framed up, in my view if indeed the appellant was framed for any reason, it would have come out clearly in evidence adduced. On the contrary, there was consistency on evidence adduced leaving no room for doubt.

21. On argument that the prosecution availed only police officers to testify, record show that at the time of arrest there were no students and the officers were all together at the time of arrest and they all witnessed the search of appellant and counting of cannabis. In my view, their evidence was sufficient to prove the charge against the appellant. What the prosecution were required to prove was possession and that was done by the people witnessed the search being the 3 police officers. From the foregoing, I find that the charge against accused was proved beyond reasonable doubt.

(ii) Whether the sentence imposed was harsh and excessive

22. The appellant submitted that the sentence of twenty years imprisonment imposed is excessive and that this court should revise it. The Court of Appeal while dealing with the issue of sentence in the case of Bernard Kimani Gacheru vs. Republic [2002] eKLR restated as hereunder: -

> " 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 states is shown to exist."

23. Further in the case of Charo Ngumbao Gugudu V Republic (2011) eKLR, the court held that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged.

24. The Appellant argues that the value of the alleged drugs was not ascertained. Section 86 of the Narcotic Drugs & Psychotropic Substances (Control) Act provides as follows:

> (1) Where in any prosecution under this Act any fine is to be determined by the market value of any narcotic drug, psychotropic substance or prohibited plant, a certificate under the hand of the proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by the court as prima facie evidence of the value thereof.

(2) In this section "proper officer" means the officer authorized by the Minister by notification in the Gazette for the purposes of this section.

25. The question then is what happens where there is no certificate produced to prove the market value of the narcotic drug. The Court of Appeal has had occasion to deal with the provisions of that section in the case of Kibibi Kalume Katsui v Republic [2015] eKLR where it expressed itself as follows:-

> " The valuation certificate whose importance cannot be gainsaid as it conquers the awkward position the court is put in to second guessing the value, was not produced. However, all is not lost, we take note that Pw4 and Pw2 were part of the Anti-narcotic Police Unit that recovered the drugs. It can be safely presumed that as they frequently interacted with drug-users or even dealers they brushed on the minute idea of the retail value of the drugs as at that time. We shall take the value to be as stated but with caution, we are not giving the police a free-hand by doing this, no! They must pull-up their socks."

26. The same court also in the case of Priscilla Jemutai Kolongei v Republic [2005] eKLR held that the provisions of the said section are not mandatory. The court stated that:-

> " Parliament has the powers to prescribe a fixed punishment or range of punishments applicable to all offenders found guilty of a specified offence. It has done so in Section 4(a) of the Act by giving to the Court several options in sentencing for trafficking narcotic drugs. Section 86 is not a mandatory provision on sentencing but evidential aid, again for the benefit of the Court, in the valuation of goods for penalty."

27. In this case the appellant was found with 96 Rolls of bhang. The market value given was Ksh.9,000/-. That would mean that the value of each stone was Ksh.93.75/=. The bhang weighed 1200 grams. The Investigating officer who charged the appellant with the offence PW3 did not explain how he arrived at the stated market value. There was no evidence that he had experience in investigating drug cases nor that he was aware of the market value.

28. However, in my view, the fact that no certificate has been produced to prove the market value of the drug that an accused person has been convicted of cannot vitiate the conviction. My interpretation of section 4(a) is that where the court is unable to determine the market value of the drug, the court has the discretion to impose a fine of up to a maximum of Ksh1,000,000/- and in that case disregard the limb on the market value of the drug.

29. The upshot is that the conviction is upheld. I however find that the sentence of 20 years imprisonment to be excessive when there was no evidence on the market value of the cannabis. I am therefore inclined to revise the sentence of 20 years imprisonment downwards and give an option of a fine. I impose a fine of Kshs. 500,000/= in default 10 years imprisonment.

30. Final Orders:

1. Appeal on conviction is hereby dismissed.
2. Sentence of 20 years imprisonment is set aside.
3. Appellant is hereby fined Kshs 500,000 in default 10 years imprisonment.
4. Period served in remand to be considered in the sentence.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET

THIS 11TH DAY OF APRIL 2024.

.....

RACHEL NGETICH

JUDGE

In the presence of:

CA Sitienei/Momanyi.

Ms. Ratemo for state.

Appellant present.