Karanja v Republic (Criminal Appeal 22 of 2018) [2023] KEHC 3805 (KLR) (18 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3805 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL 22 OF 2018

SC CHIRCHIR, J

APRIL 18, 2023

BETWEEN

FRANCES NJUGUNA KARANJA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal from the Judgment of Hon. M. Kinyanjui (SRM) delivered on 8th February, 2017 at the chief Magistrate's Court at Kandarain Criminal Case NO. 116 OF 2017)

JUDGMENT

1. On February 8, 2017, the Appellant was charged with being in possession of Cannabis Sativa (Bhang) contrary to section 3(1) as read with sub-section 2 of *Narcotic Drugs and Psychotropic Substance Control Act*. (The Act)

   It is alleged that on the 6th day of April 2017 at around 22:30 hours at Gichichi village in Kandara sub-county within Murang'a county the accused was found in possession of 500 grams of bhang with a street value of Ksh. 1000 which was not medically prepared in contravention of the said *Act*.

2. The Appellant was convicted on his own plea of guilty and sentenced to 10 years in prison. He has appealed against the sentence.

Grounds of Appeal

3. From what I can decipher from the submissions the following are the grounds of appeal:

   1. That the sentence imposed was manifestly harsh and excessive and went against the principles of sentencing.

   2. That some essentials provided under the sentencing policy guidelines were not followed.

3. That his mitigation was not considered.

Appellant's Submissions

4. It is the Appellant's submission that the sentence imposed was harsh and urges the court to consider a lesser sentence. He further submits that he has no previous criminal record; that his extended incarceration will adversely affect his children. He further submits that the trial court based his sentence on peddling while the charge he faced was one of possession of drugs resulting in a harsher sentence. It is the Appellant's further submission that the trial court took into consideration extraneous factors when imposing the sentence. Finally, the appellants submits that he has since reformed.

Respondent's Submissions

5. It is the respondent's submission that the penalty imposed was one prescribed by section 3(3) of the *Narcotic Drugs and Psychotropic Substance Control Act* and hence was lawful; that the trial Court took into account both the mitigating and aggravating factors before handing down the sentence of 10 years.

Determination

6. I have perused the record of the trial court and considered the grounds for appeal and the respective submissions.

7. This being the first appeal, the role of this court is to look at the evidence afresh, re-evaluate it and come up with its own findings (see *Okeno v Republic* (1972) EA 132

8. The Appellant pleaded guilty to the offence and hence this Appeal is against the sentence only.

The penalty for possession of narcotic drugs is provided for under section 3 of the Act.

The section provides as follows:

> " Penalty for possession of narcotic drugs, etc.
>
> 1. Subject to subsection (3) any person who herein is in possession of any narcotic drug or psychotropic substance shall be guilty of an offence.
> 2. A person guilty of an offence under sub-section (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 for ten(10) years and in every other case to imprisonment for 20 years."

9. The first thing I find it necessary to address is whether the sentence of 10 years provided in the Act is a mandatory minimum sentence? The operating phrase in the Act is, "shall be liable" and the pertinent question is whether this implies a minimum sentence. In *Opoya v Uganda* (1967) EA 752 the court held "it seems to us beyond argument that the words "shall be liable" do not in their ordinary meaning require the imposition of the stated penalty but merely expresses 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 liability existed, the court might see fit to impose it". In the case of *Daniel Kyalo Muema v Republic* (2009) eKLR the Court of Appeal was interpreting section 3(2) (a) of the aforesaid Act and held "We have no doubt that the sentence of 10 years imprisonment and 20 years imprisonment in section 3(2) (a) of the *Act* in the possession of Cannabis Sativa are maximum and that the courts can lawfully impose any shorter term of imprisonment".

10. Section 66(1) of the *Interpretation of the General Provisions Act* provides that "where in a written law a penalty is prescribed for an offence under written law, the provision shall, unless contrary intention appears, mean that the offence shall be punishable by a penalty not exceeding the penalty prescribed".

11. The *Penal Code* under section 26(2) and (3) in the same vein provides as follows:

> " (2) Save as maybe expressly provided by law under which the offence concerned is punishable, a person liable to imprisonment for life or any other shorter period may be sentenced to any shorter term."

12. It is evident that the Trial court imposed a maximum sentence. Was it warranted in the circumstances or was the trial court under the misconception that the sentence prescribed was mandatory? We will never know about the later as the record is silent on whether the trial court was conscious of the fact that it was imposing a maximum sentence.

13. Nevertheless, sentencing is an act of discretion and an Appellate court will not interfere unless the 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 some wrong principle (see *Bernard Kimani Gacheru v. Republic* [2002] eKLR)

14. According to the prosecution, the Appellant was a first offender. In the mitigation, the Appellant told the court that "I have small children and I provide for them, their mother left. I plead for leniency and for a non-custodial sentence".

    The court stated that "The accused is clearly a drug peddler to serve as a lesson to him and others. I sentence him to 10 years in jail".

15. There are a few considerations that the trial court overlooked. The Appellant pleaded guilty. According to paragraph 21.2 of the *Judiciary Sentencing Policy Guidelines*, pleas of guilty are beneficial to victims as well as to the criminal justice system (emphasis added) and according to paragraph 21.4 a plea of guilty is a mitigating factor, where the accused in addition, exhibits remorsefulness.

16. Paragraph 23.8 of the *Sentencing Guidelines* also provides that being a first offender is a mitigating factor. And in the case of *Otieno v. Republic* (1983) eKLR the court stated that "the general rule is that a maximum sentence should not be imposed on a first offender".

17. Much as the trial court stated that it had considered the Appellant's mitigation, these considerations did not seem to have had any impact on the sentence imposed as the court went ahead and imposed the maximum sentence. That imposition went contrary to the finding in Otieno case (*supra*), The fact that the Appellant pleaded guilty the first time he was arraigned in court was also not factored in.

18. In view of the above mitigating factors, I consider the sentence imposed by the trial court too excessive to warrant the intervention of this court and I hereby set it aside. The Appellant has now served six (6) years. I consider the period served to be sufficient.

    In conclusion I make the following orders:

    a). The sentence of 10 years is hereby set aside

    b).That the period served is sufficient

    c). The Appellant be set liberty at once, unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 18TH DAY OF APRIL 2023.

S. CHIRCHIR J

JUDGE

In the presence of:

Susan- Court Assistant

Appellant- present

Ms. Muriu for the Respondent.