Moche v Republic (Criminal Appeal E015 of 2021)
[2023] KEHC 20673 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20673 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E015 OF 2021

LM NJUGUNA, J

JULY 21, 2023

BETWEEN

MUTHUKIA MOCHE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence by Hon Angima E.N. in Criminal Case No. 81 of 2020 in the PM's Court at Mukurwe-ini and delivered on 24.02.2021)

JUDGMENT

1. The appellant herein was charged with the offence of being in possession of cannabis contrary to section 3(1) as read with section 3(2) (a) of the *Narcotic and Psychotropic Substances Control Act* No 4 of 1994. Particulars of the offence being that on February 14, 2020 at around 1315 hours at Kiboya village of Mukurwe-ini sub county within Nyeri county was found in possession of cannabis to wit four stones valued at Kes.3,200/= which is not in its medicinal preparation form.

2. He was subsequently tried and convicted of the said charge and sentenced to serve seven (7) years imprisonment with no option of fine.

3. Being dissatisfied with the said judgment, the appellant lodged the appeal herein. His petition of appeal is dated June 18, 2021 wherein he relied on five grounds of appeal challenging his conviction and sentence.

4. The court gave directions that the appeal be disposed off by way of written submissions and both parties complied with the directions.

5. The appellant argued grounds one to five of his petition of appeal together and wherein it was submitted that the case herein was not proved beyond any reasonable doubt. That the prosecution availed only two witnesses without calling the investigating officer and the chief who allegedly arrested

the appellant herein; further that, the government analyst did not testify as the maker of the document which confirmed that the substance found on the appellant was indeed cannabis. It was argued that it remained unproven whether the appellant was in possession of the alleged bhang or the same was simply planted on him to frame him due to an ongoing grudge between him and the chief. That the appellant having stated that there was an ongoing land case where the chief was involved in the alleged piece of land, it was incumbent upon the investigating officer to carry out investigations to verify the veracity of such an allegation. Reliance was placed on the cases of *SC v Republic* Criminal Appeal No 22 of 2017 and *Juma Godia v Republic* (1982 -88) (KAR 454).

6. In the same breadth, it was submitted that the age of the appellant ought to have been an issue for consideration for the reason that the court meted out a harsh and excessive sentence without considering the fact that the appellant suffers from age related sicknesses such as high blood pressure. Reliance to support the proposition was placed on the case of *John Muchiri v Republic* Criminal Appeal No 31 of 2019 at Nyahururu. In the end, this court was urged to allow the appeal, quash the conviction and thereafter set aside the sentence and in default of an acquittal, consider the remaining term of two years to be a non-custodial (probation) sentence.

7. The respondent on the other hand submitted that the trial court upon evaluating the evidence before it found that the prosecution proved its case beyond any reasonable doubt. That the appellant's defence was extensively considered by the trial magistrate and the allegations by the respondent that the cannabis was planted on him were not substantiated; further, it was the prosecution's case that the cannabis found on the appellant was not for medical prescription and as such, it proved its case beyond any reasonable doubt. In regards to the sentence, it was the respondent's case that the appellant was a repeat offender as he had been previously convicted and thereafter sentenced to 5 years imprisonment both in CR No 727/2005 and CR No 520/2012. That the trial court having noted that the appellant herein was a repeat offender, rightly sentenced the appellant to seven years imprisonment without an option of fine.

8. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. [See *Okeno v Republic*].

9. Of importance to note, is the fact that the appellant in his submissions merged all his grounds of appeal and the court will adopt the same design in disposing the appeal herein. The appellant submitted that the respondent did not prove the case herein to the required standards as only two witnesses were called in support of the prosecution's case; further, the investigating officer and the chief who allegedly arrested the appellant herein were not called to testify. It was further submitted that the government analyst who was the maker of the document which established that the substance recovered from the appellant was cannabis sativa was not called as a witness. Further, it was argued that it remained unproven whether the appellant was in possession of the alleged cannabis or the same was planted on him to frame him due to an existing grudge between him and the chief.

10. Having perused the trial court's record, the allegation by the appellant that the assistant chief who arrested him at the first instance did not testify in court is unfounded; I say so for the reason that indeed the said chief testified as PW1 and the appellant herein ably cross examined him.

11. Of importance to note is the fact that the allegations raised by the appellant that there existed a grudge between him and the assistance chief is without basis as the same is simply an afterthought. I say so for the reason that when the appellant was offered an opportunity to cross examine PW1, he did not mention anything to the borderlines of what he is currently alleging. On whether the investigating officer was present as a witness in the case herein, it is trite that an exhibit memo Form prepared dated

February 21, 2020 which was produced as Pexh 2 showed that indeed the same were four stones of cannabis sativa while Pexh 3 was a report confirming that the said substances were indeed cannabis sativa.

12. Further, on the contention that the government analyst was not called as a witness, the same in my considered view should not defeat the call for justice as it is trite that the principles to consider in determining the issue of crucial witnesses was dealt with in the leading case of *Bukenya and Others v Uganda* 1972 EA 549LUTTA Ag. Vice President held:

> 'The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution...
>
> The prosecution's burden in regard to witnesses is to call witnesses who are sufficient to establish a fact.....The issue is whether those called are sufficient to aid the court establish the truth....."

13. Having considered the evidence afresh, it is my humble view that the prosecution in deed proved its case beyond any reasonable doubt and as such, I find no reason to interfere with the finding of the trial magistrate on conviction.

14. On sentencing, the principles guiding interference with sentencing by the appellate Court were properly set out in *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held:

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

15. Similarly, in *Mokela v The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held:

> " It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

16. In the instant case, the appellant was sentenced to serve seven years imprisonment with no option of fine. On the other hand, the appellant herein urged this court to allow the appeal, quash the conviction and thereafter set aside the sentence and in default of an acquittal, consider the remaining term of two years to be a non-custodial (probation) sentence. Further, the appellant submitted that the court meted out a harsh and excessive sentence without considering the fact that the appellant suffers from age related sicknesses such as high blood pressure.

17. The appellant was charged with being in possession of cannabis sativa (Bhang) contrary to Section 3 (1) as read with Section 3 (2) of the *Narcotic Drugs and Psychotropic Substances Control Act* No 3 of 1994. Section 3 of the said Act provides as follows:

> 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 for ten years and in every other case to imprisonment for twenty years; and.....

18. Under the sentencing guidelines on elderly and sick offenders, it is provided under paragraphs 20:25 and 20:26 as follows:

> 20.
>
> 25 There is no special consideration for terminally ill and elderly offenders. However, as with the case of offenders with disability, the consideration is whether in view of the illness or age, the sentence is rendered excessive. There are two dimensions worth considering. First whether the illness or old age would cause the offender to experience undue and unjustifiable hardship in custody. Further, whether the conditions in custody would be termed inhuman bearing in mind the offenders' state. Second, whether the offender's condition is one that would cause undue burden on other offender 'sand/or prison officers taking care of him/her. (emphasis added).
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> 26 Article 57 of *the Constitution* affirms the right of older members of society to live in dignity. The sentence imposed on them must therefore not undermine this right.

19. Considering the facts of the case herein, the cannabis recovered from the appellant was valued at Kes. 3,200 and in the same breadth it is not contested that the appellant is an aged person; and further that he has been in prison from March 1, 2021. [See *Republic v Kosicha Kanchora Gura* [2020] eKLR].

20. The appellant has urged this court to consider his age and in default of an acquittal, consider the remaining term of two years to be a non-custodial (probation) sentence.

21. In the case herein, the accused is currently aged seventy three years and has been in prison from March 1, 2021 when he was imprisoned. Considering the fact that the appellant is a repeat offender, it is not lost to the court that the cannabis recovered from the appellant was valued at Kes. 3,200.00. The above notwithstanding, it is my humble view that this is a case which requires court's intervention.

22. In consideration of the above therefore, I exercise my discretion to release the appellant herein on Probation for the remaining period of time with a rider that should he commit any offence within the said time, he shall be arrested to serve the remaining period of his sentence in prison.

23. It is so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 21ST DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the State