



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**CRIMINAL APPEAL NO. 23 OF 2017**

**ADU KHALIFA MOHAMED.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the conviction and sentence of the Principal Magistrate Court*

*at Lamu by Hon N. Thuku (SRM) delivered on 17<sup>th</sup> July, 2017*

*in MCSO Case No. 50 of 2017)*

**Coram: Hon. Justice R. Nyakundi**

**Mr. Mwangi for the state**

**Appellant in person**

**J U D G M E N T**

**Adu Khalifa Mohamed**, the appellant herein was tried convicted and sentenced to ten (10) years imprisonment by the Senior Resident Magistrate at Lamu (**Hon. N. Thuku**) as she then was, on a charge 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 brief particulars of the charge were that on 26.2.2017 at [particulars withheld] area, Langoni Location in Lamu – West, the appellant was found in possession of Narcotic Drugs, namely *cannabis sativa* measuring 24 cm long with an estimated market value of Kshs.750/= which was not meant for medicinal purpose in contravening the statute.

Being aggrieved with the conviction and sentence, the appellant appealed to this Court on two grounds namely:

**(a). That the Learned trial Magistrate erred in Law and facts by finding that the prosecution discharged the burden of proof of beyond reasonable doubt to secure a conviction.**

**(b). That the Learned trial Magistrate erred in Law and fact by failing to consider that the sentence was harsh and excessive.**

In support of the appeal, appellant entirely relied on his written submissions. The major complaint in those submissions revolved around the inconsistencies and contradictions of the prosecution evidence as narrated by the witnesses. The appellant in buttressing this ground cited and relied upon the principles in **David Ojeabuo v Federal Republic of Nigeria {2014} 2 PELR – 22555 (CA)** and **Joseph Mwangi v R CR Appeal No. 73 of 1993**. With regard to sentence for the offence, appellant argued and submitted that the sentence of ten (10) years imposed was punitive and excessive given the nature surrounding the facts of the case. He placed reliance on the principles in the case of **John Kamau v R CR Appeal No. 123 of 2010**.

In a rejoinder, **Mr. Mwangi** the prosecution counsel opposed the appeal on the following reasons. First, on appraisal of the evidence, there are no identifiable contradictions or inconsistencies which renders the case against the appellant fatal to secure a conviction. In the circumstances of the appeal, Learned prosecution counsel cited the guidelines outlined in the following authorities to distinguish the appellant's appeal. **Joseph Maina Mwangi v R CR Case No. 73 of 1993; David Ojeabuo (supra); Dickson Eliansamba Shapwata & Anor v R CR Appeal No. 92 of 2007; Naftali Mwenda Mutua v R {2015} eKLR; Twahangane Alfred v Uganda CR Appeal No. 139 of 2001 {2003} UG CA 6; Willis Ochieng Odero v R {2006} eKLR.**

Second, on sentence Learned prosecution counsel submitted that the appellant has failed to point out any misdirections or irrelevant factors taken into account by the Learned trial Magistrate to render the verdict irregular, excessive, punitive or illegal. Learned prosecution counsel cited the following authorities to persuade this Court not to interfere with the sentence. **Priscilla Jemutai v Kalongei v R {2005} eKLR; Bryne v Low {1972} 3 ALL ER 526; Moses Banda Daniel v R {2016} eKLR; Benard Kimani Gacheru v R {2002} eKLR.** To appreciate the rivalised submissions raised by both parties, I have carefully perused the appeal, the record and the evidence adduced by the prosecution and the defence offered by the appellant.

### **Resolution of the Appeal**

Assailing the legal sustainability of the Judgment of the Senior Resident Magistrate for purposes of this appeal, I shall be guided by the principles in **Ngugi v R {1984} KLR.** In this regard, I am absolutely conscious that I should give due regard to the advantage held by the trial Court on the demeanor and assertions of the witnesses on proof of existence or non-existence of facts in issue preceding the findings on conviction. I also agree with the submissions made by the Learned prosecution counsel that the evidence which implicated the appellant was entirely on possession. In other words, it is a total repudiation of the elements of that ingredient which would permit the acquittal of the appellant.

In the trial before the Magistrate Court, it was averred by the prosecution witnesses namely **PC Ewoi (PW1), (PW3) PC James Muroki and (PW4) PC Leonard Ochola.** That police raid was carried out on drugs within [particulars withheld] area, in Lamu West Sub-County on 26.2.2017. In that operation **(PW1), (PW3)** and **(PW4)** alluded to the facts that a trap was laid towards facilitating an arrest of drug dealers or those trafficking to promote the commission of the crime. It is in that patrol and raid, appellant in company of other people got arrested for being in possession of the prohibited drug. Just prior to the indictment, **(PW1), (PW3)** and **(PW4)** testified that the suspected drug was subjected to a chemical analyst in compliance with the Law. That on receipt of the analyst report, by one **George Ogunda (PW2),** the appellant and another was charged of being in possession of *cannabis sativa* in contravention of the Act. The analyst **(PW2)** testified on behalf of his fellow scientist, **Yahya H. Maingu** on the exhibits forwarded by **PC Collins** which was found to be *cannabis sativa*, a prohibited scheduled drug under the Act. The aforesaid analyst report was admitted as **Exhibit 3.**

In rebuttal, the appellant denied ever being in possession of the exhibited drug as alleged by the prosecution witnesses. In between the lines of his defence, appellant stated that the indictment was founded on a fabricated offence.

In that trial the investigating officer showed the plant to be *cannabis sativa* (bhang) which was a narcotic drug restricted by Law unless when used for medicinal purposes. A very complete discussion on how the appellant was arrested can be found in the comprehensive statements of witnesses identified as **(PW1), (PW3)** and **(PW4)** respectively. The factual matrix and the evidence in its entirety demonstrate that the appellant was arrested on the material day by the witnesses on operation within the locality. The subsequent events that transpired established the fact of possession. The Penal Code under Section 4 provides a much more broad definition on what constitutes possession to wit:

***“Be in possession of includes not only having in one’s own personal possession, but includes knowingly having anything in the actual possession or custody of any other person, or having anything in any place whether belonging to or occupied by oneself or not, for the use of benefit of oneself or of any other person.”***

In order to find the appellant guilty, it is incumbent upon the state to prove that he secured the *cannabis sativa* with intent to use the same unlawfully. The trial Court heard the chronological state of events as reiterated by **(PW1), (PW3)** and **(PW4)** to illustrate the elements of possession. The appellant presented a defence which failed to dislodge the prima facie case on possession of the narcotic drug. In this appeal, he contends that the evidence by the prosecution witnesses was inconsistent and contradictory to a level which rendered the conviction fatal. He cited authorities as a basis of the errors and inconsistencies that he claims should be applied to grant the relief of an acquittal.

On analysis of the appeal and the state of the record before me, the position taken by the appellant fails to conclusively persuade this Court that the charge and elements of it were based on contradictory testimonies of the witnesses.

To these submissions of the appellant there are certain exceptions that mere discrepancies on material facts which do not go to the root of the charge are inconsequential to render the conviction fatal. See the principles in **David Ojeabuo (supra); Dickson Eliansamba Shapwata (supra); Naftali Mwenda Mutua (supra).** I must conclude that the issue of knowledge that the plant recovered by **(PW1), (PW3)** and **(PW4)** from the appellant was *cannabis sativa* came out clearly from their respective testimonies. It can be said that this evidence tended to establish that the appellant at the time had committed the offence of having *cannabis sativa* in his possession. His defence failed to impeach the veracity and credibility of the prosecution witnesses to such a greater extent for the trial Court to give advantage to that hypothesis. The defence theory of a fabricated charge failed to withstand the consistency, credibility and cogency of the evidence adduced by the prosecution witnesses. I find nothing prejudicial to the case, to persuade this Court to set aside the conviction.

My examination of the record and impugned Judgment satisfies the criteria that the trial Court must have properly evaluated the evidence and the nature of the defence bearing in mind the standard of proof vested in the state of beyond reasonable doubt. The appellant evidential burden to prove what he alleges against the prosecution was never discharged to entitle him a benefit of reasonable doubt required to result in an acquittal.

Consequently, regardless of what he feels about the Judgment that alone cannot mandate this first appeals Court to set aside the findings of the trial Court. Based on careful consideration of the evidence and other documentary material, like the analyst report, the trial Magistrate set out her findings at length which are factually identical with the prosecution case in support of the charge. At the same time she found the defence by the appellant untenable and unworthy of belief. In the result, the appellant was properly convicted of possession of *cannabis sativa*.

On the issue of sentence, I have reviewed and scrutinized the parameters applied by the Learned trial Magistrate to impose a custodial

sentence of ten (10) years imprisonment. I sense the following concerns to the sentence as passed against the appellant. Firstly, the principles of fundamental justice are violated by criminalizing any activity that is no more than an exercise of personal autonomy in the privacy of the home unless, the state can show that the criminalized activity causes substantial harm to society.

Secondly, while the statute on Narcotics provides a broader framework of prohibition, I hold, the view that while a reasonable apprehension of a not significant or not trivial harm may suffice to justify a regulatory prohibition on the personal and private consumption of a substance, it is not constitutionally adequate to justify the use of incarceration and the imposition of long custodial sentences. It is sometimes counterproductive without any rehabilitation measures to deter consumption, by mere fact of continuation of incarceration.

Thirdly, I recognize the circumstances of the offence as reflective from the prosecution case, the appellant was arrested with small quantities of the dangerous substance with a market value of Kshs.750. It meant that the substance may not have been for promotion of commercial trade in drugs within our borders. These small quantities invariably are for personal use by addicted offenders/users. That therefore required the Learned trial Magistrate to apply the guidelines on sentencing as expounded by the Supreme Court in **Francis K. Muruatetu v R {2017} eKLR**.

In today's metric system of sentencing important factors, like the gravity of the offence, the personal profile of the convict, i.e. age, whether first offender, the possibility of rehabilitation and reform within the community based set up, the intended use of the recovered drug from the convict, the aggravating and mitigatory factors leverage in exercising judicial discretion in arriving at an appropriate sentence, there is no evidence that the Learned trial Magistrate considered some of these critical factors in arriving at a custodial sentence of ten (10) years imposed against the appellant. There was room for tempering justice with mercy to emphasize more on transformation of the convict. There was even a further opportunity in this case for the appellant to benefit by imposition of a fine accompanied with a pursuit of rehabilitation to give him a chance to take remedial measures not to re-offend. Treatment and care for petty offenders with drug use disorders, who have been identified by the criminal justice system is critical and effective as an alternative to conviction. The trial Courts should take judicial notice that drug use is a complex, multifunctional, a psycho-social deficiency which influence cognitive behaviors of individuals. Imprisonment of such individuals comes at high cost to the tax-payers and creates a significant burden on the national budget. Sometimes, its disproportionate to the gains to be achieved by both the convicted offender and the public interest strategic objectives. Lacking the Kenyan legal system provides other options to custodial sentences as a framework for Courts to exercise a certain flexibility in the choice of criminal sanctions. With that policy background out Constitution in Article 50 (2) (P) provides interalia that:

***“An accused has a right to the benefit of the least severe sentence of the prescribed punishment for an offence....”***

As mentioned in the sentencing policy guideline of the Judiciary 2016 and the principles in **Muruatetu case (supra)**, assessment of established criteria concerning the offence, the offender and any victims impact statement would be crucial in selection of the appropriate and proportionate punishment for the offence. The general rule in all cases of conviction and imposition of sanctions, the main endeavor would be to apply the broad parameters of the proportionality principle. The term **‘proportionality’** carries with it the notion that the severity of the punishment is to be in proportion to the seriousness of the offence. The Court observes that each case ought to be treated differently. Every case must be judged in relation to its attendant circumstances in line with the Constitutional and statutory guidelines on sentencing. For my part, a central problem of sentencing decisions emanating from the trial Courts tend to lay emphasis on deterrence of the offenders without the desire of rehabilitation of the offender. It is important for session Magistrates to pay attention to each goal and objectives in sentencing to fashion it in making the decision in which consistency and proportionate sentencing can co-exist to determine the Magnitude of the sentence.

It is my view that in this appeal, the sentencing process failed to address the above issues. The Learned trial Magistrate failure was to conceptualize, the characteristics of the appellant and the gravity of the crime to translate that blend to arrive at a fair and just sanction. To model that decision of ten (10) years imprisonment, the Learned trial Magistrate failed to temper with the discretion to choose from a broad spectrum of sentencing options, which could range from a fine or other noncustodial sentences to a term of incarceration not capped at severity of ten (10) year period to be served in a correctional facility.

As noted, the choice of a starting point for the Learned trial Magistrate was the comparative jurisprudence put in context with the appellant set of facts. In that final choice, the Learned trial Magistrate initiated a process in reference to the seriousness of the offence and that it serves to be punished appropriately. Factors such as information that will fit a lesser term of incarceration or alternative sentence like age of the appellant, prior record, possibility of homecare treatment and rehabilitation, causal processes of the crime/social context of the crime, local environment were widely disregarded as legally relevant factors. The fundamental problem with the decision is how the Learned Magistrate identified the variable of ten (10) years to provide a meaningful guidance to the choice of a multiplier which would not be substituted with a less period of custody or other variety of alternative sanctions.

When I carefully evaluate the order on the sanction imposed by the Learned trial Magistrate and scrutinize her findings, in the background of facts and circumstances of this case, it becomes obvious that the approach adopted in deciding the issue is far from satisfactory. In answer to this ground, the primary implication is to vary the sentence of ten (10) years imprisonment by substituting it with the period already served by the appellant. In doing so, the conviction of the appellant is affirmed in line with the findings reached by the trial Court. Combing these basic approaches taken by this Court simultaneously, grants the appellant an early release from prison custody forthwith unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 15<sup>TH</sup> DAY OF SEPTEMBER 2021**

.....  
**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Mr. Mwangi for the State
2. The appellant