REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 12 OF 2020

MOHAMED KAME.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the

Principal Magistrate Court at Lamu Criminal Case No. 208 of 2016

by Hon. Njeri Thuku (PM) dated 22nd August 2017)

Coram: Hon. Justice R. Nyakundi

Appellant in person

Mr. Mwangi for the state

JUDGEMENT

The appellant was charged with being in possession of narcotic drugs contrary to section 3(1) as read with section 3(2) of the Narcotic and Psychotropic Substance Control Act (NDPSCA). The particulars of the offence was that on.

At the end of the trial, the appellant was convicted and sentenced to 5 years imprisonment. Aggrieved by the sentence and the conviction of the trial court, the appellant lodged an appeal on the following amended grounds:

1) That the ten years is harsh and excessive.

2) That the appellant had no prior criminal records – first offender and hence prays may this court be lenient thus forgive him.

3) That the Appellant s remorseful and promises not to repeat the offence.

4) That the Appellant is of good character and high level discipline and conduct with the prison authority and fellow inmates as well.

5) That the Appellant is a reformed prisoner and well rehabilitated through the rehabilitation program.

Submissions

Appellant's written submissions

The appellant relied on his written filed on the 23th March 2021. He submitted that the sentence was harsh and excessive considering that he was found in possession was only 4 sachets of heroin which he argues was a small quantity.

It was the appellant's submission that he was a first offender as stated by the prosecution during mitigation and was therefore entitled to serve a less severe punishment as provided for in Article 50(2) of the Constitution. He further submitted that he was remorseful and promised that he would be a law-abiding citizen.

The appellant contended that he has maintained a high level of discipline and conduct with other inmates from the date he was arrested on 39th November 2016. He submitted that he had learnt his lesson in the three years he had spent and that he would not repeat the offence. He prayed that the court reduced his sentence from 10 years to the time already served.

Respondent's submissions

Mr. Okaka for the respondent relied in his written submissions dated and filed on 12th March 2021. He submitted that whether discrepancies were believable or not depended on the circumstance of each case and the nature and extent of the discrepancies as stated in **Joseph Maina Mwangi v R Criminal Case No. 73 of 1993.** He contended that if there were any discrepancies in the trial court the same were minor that would not affect the substance of the prosecution case. He relied on the case of **Jacksom Mwanzia Musembi v R** where the Court of Appeal cited with approval the case of **Twahangane Alfred v Uganda (2003) UG CA. 6** where it was held that the court would ignore minor contradictions unless the court thinks it points to deliberate untruthfulness. Or if affects the main substance of the case.

Counsel submitted that no number of witnesses were required to prove a fact as provided for under section 143 of the Evidence Act. He contended that it was the prerogative of the Director of Public Prosecution to decide which witness they wished to call in support of their case. He placed reliance on **Criminal Appeal No. 11 of 2015 Uche v R** where the court stated that calling a witness was in the discretion of the prosecutor and that a court would not interfere unless motivated by some oblique motive. Counsel contended that the witnesses who testified on behalf of the prosecution were sufficient to prove and that the other witnesses were the appellant's family members who would have leaned towards the appellant.

On whether the appellant was found in possession of heroin, it was submitted that the prosecution proved its case and that the appellant's defence was an afterthought and it did not cast a shadow of doubt on the prosecution's case. On the issue of the prosecution's failure to issue a valuation certificate, **Mr. Okaka** submitted that the appellant was found with only 4 grams which was not a large haul. He contended that the holding of the court **Moses Banda Daniel v R (2016) eKLR** where the Court stated that section 74A of the NDPSA would be more relevant where a large haul of the drugs is concerned due to the value was applicable in this situation.

Lastly, on sentence counsel submitted that the court in **Benard Kimani Gacheru v R (2002) eKLR** laid down the principles upon which an appellant court could interfere with sentence of a trial court. He contended that in the instant appeal, the trial Magistrate considered the appellant's mitigation and gave rationale for the sentence of 5 years imprisonment. He cited the case of **The People (DPP) v David Flynn (2015) IECA 290** where the court emphasised the need to support a sentence with reasons. It was his further submission that the prosecution had proved the charge against the Appellant beyond reasonable doubt as stated in **Stephen Nguli Mulili v R (2014) eKLR.** He urged the court to dismiss the appeal as it was devoid of merit. was a habitual offender with three past convictions therefore the custodial sentence was just and sound and the trial court could not be faulted.

Mr. Okaka further submitted that the court took into consideration the fact that the Appellant was asthmatic and urged that the correctional facilities were equipped with competent personnel to handle the Appellant's health status.

Analysis and determination

I have considered the submissions by both parties. It is clear that the appeal is against the sentence only.

It is well established that sentencing is at the discretion of the trial court and an appellate court can only interfere with the sentence under very specific circumstances as was emphasized by the Court of Appeal in **Ahamad Abolfathi Mohammed & another v R [2018] eKLR** where it stated:-

> ***"As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v. Republic, Cr App No. 188 of 2000 this Court stated thus:***
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> ***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 stated is shown to exist.* (See also Wanjema v. R [1971] E.A 493)."**

In the case of **Ogolla s/o Owuor v R {1954} EACA 270** where the Court stated inter alia that:

> ***"The Court does not alter sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."***

The appellant was convicted on being in possession of a narcotic drug contrary to section 3(1) as read with section (3)(2)(b) of the NDPSCA which provides:

(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) ...

(b) in respect of a narcotic drug or psychotropic substance, other than cannabis, where the person satisfies the court that the narcotic drug or psychotropic substance was intended solely for his own consumption, to imprisonment for twenty years and in every other case to a fine of not less than one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, or to imprisonment for life or to both such fine and imprisonment.

It is trite that the court in sentencing should taking into consideration the mitigating factors as well as aggravating factors. The Supreme Court in **Francis Karioko Muruatetu & another v R [2017] eKLR** pronounced itself thus:-

To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

The Judiciary's Sentencing Policy Guidelines 2016 sets out a list of aggravating and mitigating factors in paragraphs 23.7 and 23.8 respectively while paragraph 23.9.4 of the guidelines directs the court to weigh the mitigating and aggravating circumstances while passing sentence.

In the instant case the appellant was a first offender, the trial Magistrate considered the appellant's mitigation and exercised her discretion and sentenced the appellant to 5 years imprisonment which is a quarter of the prescribed maximum sentence. The sentence of 5 years meted out on the appellant was therefore lawful.

I have considered that the appellant has already served 4 years out of the 5 years in his sentence. Further, he was in custody from 30th November 2016 a period of almost 9 months. Taking into account the provision of section 333(2) of the CPC, I find that the time served is sufficient and the appellant shall therefore set free forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF SEPTEMBER 2021

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for DPP