



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO 18 OF 2017

ALI ABDALLAH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of the Principal magistrate court Hon. Njeri Thuku (PM) in Lamu Criminal Case No. 6 of 2017 delivered on 19th June, 2019)

JUDGMENT

1. The Appellant Ali Abdalla was charged with trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.
 2. The particulars of the offence were that on 2nd January, 2017 at Langoni area in Lamu West Sub County trafficked by conveying Narcotic Drugs namely cannabis to wit 30 rolls of estimated value of Kshs. 30,000/= in contravention of the provisions of the said Act.
 3. The Appellant faced a second count of possession of Psychotropic substance contrary to section 3(1) as read with section 3(2) (b) of the Narcotic Drugs and Substance Control Act No. 4 of 1994. The particulars were that on 2nd January, 2017 at Langoni area in Lamu West Sub – county within Lamu was found in possession of a psychotropic substance namely Rohyphol Flunitrazepam to wit one tablet with estimated market value of Ksh. 100/= which was not meant for medical purpose in contravention of the said Act.
 4. The Appellant denied the charges and the matter went to full trial. On count 1, the court convicted the Appellant of the lesser charge of possession and sentenced him to 10 years imprisonment. He was also convicted on count 2 and sentenced to 1 ½ years imprisonment with both sentences running concurrently.
 5. The Appellant was aggrieved by the conviction and sentence and lodged the present appeal on eleven grounds which summarized are to the effect that the prosecution case was not proved; that the prosecution relied solely on the evidence of police officers and failed to call any civilian witnesses; that the court accepted the evidence of the officer who was not the maker of the government analyst report, and; that the court rejected the Appellant’s sworn defence.
- In addition, and strangely so, the Appellant took issue with the trial court for convicting him of the lesser offence of possession instead of the original charge of trafficking.
6. The Appellant filed written submissions on 19th February, 2019. He submitted that the prosecution case was not proved beyond reasonable doubt and that the trial magistrate erred in amending the charge. He further submitted that he was arrested on his way home from work and searched by police officers who escorted him to the police station despite not having found anything on him when they searched him. That the allegation that he was carrying a yellow paper bag tucked in his shirt was false. The Appellant further faulted the trial magistrate for not considering his defence and for believing the prosecution witnesses.
 7. The Respondent opposed the appeal in its entirety. In written submissions filed on 5th February, 2019 the Respondent submitted that the trial court rightly substituted the charge under section 179(2) of the Criminal Procedure Code and convicted the Appellant of the lesser offence of possession. Further the Respondent submitted that the prosecution had proved its case to the required standard.
 8. At the hearing of the appeal on 13th November, 2019 the Appellant abandoned all his grounds of appeal and limited his appeal to sentence only.

9. It is my duty however as a first appellate court to review the evidence and subjected the case to a fresh evaluation. See **Okeno vs R[1972] EA32; Erick Onyango V R [2014]eKLR.**

10. The evidence before the trial court which is on record was given by 5 prosecution witnesses. PW1 AP Inspector Videlis Wanyala and AP Inspector David Ndungu were on patrol in Kijitoni area Lamu on 2nd January, 2017. They encountered the Appellant at around 6.30pm. The Appellant looked suspicious and unsettled when he saw the two police officers. They apprehended and searched him where upon they found a yellow paper bag under his tucked shirt. They recovered from him 30 rolls of cannabis (Exhibit 1), yellow paper bag (Exhibit 2), green tablet (Exhibit 3), blue tablet (Exhibit 4) bars of chocolate (Exhibit 5) match box (Exhibit 8) and dry plant material inside the Matchbox (Exhibit 9). The exhibits were escorted to the Government Chemist by P.C Felix Koono for analysis according with section 74(a) of the N.P.S.A.

11. The government analyst report (Exhibit 7) was produced by PW3 Lawrence Oguda on behalf of his expert colleague George Opello. The analysis showed that the dry plant material (Exhibit 9) and the green tablet (Exhibit 3) were cannabis and flunitrazeban Rohyphol respectively. Cannabis is a prohibited drug under the N.P.S.A while Rohyphol is a prescription only drug.

12. The Appellant's defence in the lower court was that the police officers PW1 and PW2 planted the yellow paper bag on him. He denied that he was in possession of any of the exhibits.

13. My analysis of the evidence above leads me to the finding that the Appellant was indeed found with the drugs and that his defence was a mere denial. I agree with the conclusion drawn by the trial court. Contrary to the submission by the Appellant that the prosecution case was not proved, I find that the evidence was sufficient to warrant a conviction on the substituted charge of possession. I agree with the submission of the Respondent that conviction was safe.

14. With respect to sentence the Appellant has argued that the sentence was harsh. He has pleaded with the court to consider that he was a bread winner for his family.

15. I must confirm from the outset that the sentences on both counts were lawful. The sentence in count 1 was not however a mandatory minimum sentence as the term "shall be liable" provides for the maximum and not minimum sentence.

16. In **Daniel Kyalo Muema V. Republic, Criminal Appeal No. 479 of 2007** Court of Appeal sitting in Nairobi quoted with approval the decision of its predecessor (the Court of Appeal of East Africa) in **Opoya V. Uganda(1967) E.A 752** in which it observed that:

"It seems to us beyond argument the words "shall be liable" to did not in their ordinary meaning require the imposition of the stated penalty but merely expresses the stated penalty 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 the liability existed the court might not see it fit to impose it"

17. Similarly the Court of Appeal sitting in Malindi in **Caroline Auma Majabu V Republic, Criminal Appeal No. 65 of 2014** in finding that the term "shall be liable" imposes a maximum sentence rather than a mandatory sentence stated thus:-

"Applying the above definition, the use of the word "liable" in section 4(a) of Narcotic Drugs and Psychotropic Substance Control Act merely gives a likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentence with the maximum limit being indicated. It should be noted that sentencing is an exercise of judicial discretion, and therefore provisions, which provide for mandatory sentence compromise that discretion, and are the exception rather than the rule. Thus, where applicable the mandatory sentence must be expressed in clear and unambiguous terms."

18. It is trite that sentencing is at the discretion of the trial court and an appellate court can interfere with the sentence only under specific circumstances. See **Benard Kimani Gacheru vs Republic [2002] eKLR.** See also **Dalmas Omboko Ongaro v Republic Criminal Appeal No. 7 Of 2016 [2016] eKLR.**

19. In this case, the appellant was sentenced to serve 10 years imprisonment on 19th June, 2017. Prior to that he was in pre-trial custody for 3 months. He was a first offender and his mitigation that he was an orphan with two young children ought to have been considered. I consider the period served sufficient. The Appellant is set at liberty forthwith unless otherwise lawfully held.

20. Orders accordingly

Judgment dated delivered and signed at Garsen on this 17th day of February, 2020.

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R. LAGAT KORIR

JUDGE

In the presence of:

T. Maro Court Assistant

Appellant in person

Mr. Mwangi for Respondent