



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.152 OF 2018

(An Appeal arising out of the conviction and sentence of Hon. E. Boke (SPM) delivered on 31st August 2018 in Kibera Criminal Case No.4078 of 2011)

IBRAHIM SORY DIALLO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Ibrahim Sory Diallo was charged with the offence of **trafficking in narcotic drugs** contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act**. The particulars of the offence were that on 7th October 2011 at Jomo Kenyatta International Airport in Nairobi County, the Appellant unlawfully trafficked 95 pellets of Amphetamine weighing 1528 grams by conveying it in his body (rectum) with a market value of Kshs.6,112,000/- in contravention of the provisions of the said **Act**. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty as charged. He was sentenced to serve life imprisonment. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.

During the hearing of the appeal, the Appellant abandoned his appeal against conviction. Instead, the Appellant pleaded with the court to reconsider his sentence. Ms. Mwenesi for the Appellant urged the court to reconsider the grounds of mitigation that the Appellant filed in his amended petition of appeal. She submitted that the sentence that was meted on the Appellant was harsh, excessive, and discriminative and failed to take into consideration the applicable law. In particular, the Appellant states that the trial court misapprehended the provisions of **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act** by sentencing the Appellant to serve life imprisonment instead of a less severe sentence. In that regard, the Appellant relied on several decisions of the Court of Appeal which held that the sentence of life imprisonment under the above **Act** was not mandatory but rather, was the maximum sentence that could be meted, depending on the circumstances of the case. Learned counsel therefore urged the court to reconsider the sentence meted on the Appellant. Ms. Akunja left the issue of the sentence to the discretion of the court.

The Appellant's appeal seeks to challenge the exercise of discretion by the trial court when it sentenced him. This court cannot interfere with the exercise of sentencing discretion by the trial court unless it is established that the trial court either abused its discretion or acted against the law. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No. 135 of 2016** (unreported) held at Page 25 thus:

“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:

“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, any one of the matters already stated is shown to exist.”

In the present appeal, it was clear to the court that indeed the trial court misapprehended the law when it sentenced the Appellant to serve the maximum sentence of life imprisonment. It appeared that the trial court formed the impression that **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act** mandated the trial court, upon conviction, to sentence the convict to life imprisonment. That position is no longer the law. The Court of Appeal has held in **Mohamed Famau Bakari v Republic [2016] eKLR**, **Caroline Auma Majabu v Republic [2014] eKLR** and **Kabibi Kalume Katsui v Republic [2015] eKLR** that the life imprisonment option under **Section 4(a)** of the above **Act** is a maximum sentence and not a mandatory one. The trial court has discretion to sentence the convict to any lesser sentence depending on the circumstances of each case and the mitigation of such convict. In **Caroline Auma Majabu v Republic [2014] eKLR**, the court held thus:

“14. Applying the above definition, the use of the word ‘liable’ in Section 4(a) of Narcotic Drugs and Psychotropic Substances 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 that compromise discretion, are an exception rather than the rule. Thus, where applicable the mandatory sentence must be expressed in clear and unambiguous terms.”

In **Kabibi Kalume Katsui v Republic [2015] eKLR**, the Court of Appeal held that:

*“In the premises we shall state without tiring, that under the Narcotic Drugs and Psychotropic Substances Control Act, sentence is still discretionary. We are of course in no way suggesting that under this Act, this court or the High Court has an automatic duty to interfere with the exercise of discretion by the trial court as sentencing is discretionary. That an intervention on discretion is only justified when it is wrongly exercised such as when the court takes in irrelevant facts or leaves out relevant ones and it is automatic when the wrong sentence is imposed which is legally erroneous. See **Wanjema v Republic [1971] EA 493** and **Diego v Republic [1985] KLR 621**. The trial court and High Court meted out a life imprisonment sentence inclusive of a one million fine, on the premise that such sentence was mandatory hence they misdirected themselves. That misdirection calls for our intervention. In arriving at the appropriate sentence that we should substitute we are bound to consider the quantity of the drugs, its value, the mitigation canvassed by the Appellant and her antecedents if at all relating to the same offence.”*

It is clear from the above cited decisions that the trial court misdirected itself when it sentenced the Appellant to serve the sentence of life imprisonment. It was apparent that the trial court was under an impression that the sentence provided in **Section 4(a)** of the above **Act** was mandatory. In the premises therefore, this court shall interfere with the exercise of the sentencing discretion by the trial magistrate. The sentence of life imprisonment that was imposed is hereby set aside and substituted by a sentence of this court.

This court has taken into consideration the mitigation of the Appellant. The Appellant has been in lawful custody since 7th October 2011 when he was arrested. He was not released on bail pending his trial. Under **Section 333(2)** of the **Criminal Procedure Code**, the period that the Appellant was in remand custody must be taken into account in determining the custodial sentence that should be meted on him. From the proceedings, it is clear that the Appellant has been ailing in the entire period that he has been in lawful custody. He has been medically attended to while in prison and referred to other hospitals outside prison. The Appellant did not waste his time while in prison. He has undertaken several courses that have built him both socially and spiritually. He has attached several certificates in support of his social and spiritual transformation.

This court has taken into account the quantity of the drugs that were found in his possession. It has also taken into account the recent custodial sentences that have been meted on those found with drugs in similar circumstances as that of the Appellant. This court formed the view that the appropriate sentence to be meted on the Appellant is fifteen (15) years imprisonment with effect from 7th October 2011 when the Appellant was placed in lawful custody. Where appropriate, the Appellant may be entitled to remission. After the completion of his sentence, the Appellant shall be repatriated to his country of origin. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF APRIL 2020

L. KIMARU

JUDGE