



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HIGH COURT CRIMINAL APPEAL 156 OF 2019

NOAH KIPRUTO KIPLAGAT.....APPELLANT

DENNIS KIPRONO KIPTUM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the original Conviction and Sentence in Kapsabet Chief Magistrate's Court Criminal Case Number 3138 of 2019 by Hon. P Wasike (Senior Principal Magistrate))

J U D G M E N T

1. Noah Kipruto Kiplagat and Dennis Kiprono Kiptum were jointly charged with another with: -

COUNT 1: TRAFFICKING OF NARCOTIC DRUGS CONTRARY TO SECTION 4(a) OF THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES CONTROL ACT NO 4 OF 1994.

(1) NOAH KIPRUTO KIPLAGAT ALIAS JOSEPH (2) HENRY LUVUNGA ALUVISIA (3) DENNIS KIPRONO KIPTUM on the 3rd day of September 2019 at Surungai village in Kapsabet township location within Nandi County, jointly with another not before court, were found rolling bhang into small rolls approximately 20 rolls valued at Kshs 1000/= in a rental timber house in contravention of the said act.

COUNT II: WILFULLY OBSTRUCTING POLICE OFFICERS CONTRARY TO SECTION 103 (a) OF THE NATIONAL POLICE SERVICE ACT OF 2011.

(1) NOAH KIPRUTO KIPLAGAT ALIAS JOSEPH (2) HENRY LUVUNGA ALUVISIA (3) DENNIS KIPRONO KIPTUM on the 3rd day of September 2019 at Surungai village in Kapsabet township location within Nandi County, jointly with another not before court, wilfully obstructed number 85961 PC Mathew Nudi and number 260102 PC Paul Ongesa Police officers by fighting and struggling with them in the due execution of their duties.

COUNT III: HAVING SUSPECTED STOLEN PROPERTY CONTRARY TO SECTION 323 OF THE PENAL CODE

(1)NOAH KIPRUTO KIPLAGAT ALIAS JOSEPH (2) HENRY LUVUNGA ALUVISIA (3) DENNIS KIPRONO KIPTUM on the 3rd day of September 2019 at Surungai village in Kapsabet township location within Nandi County, having been arrested by number 85961 PC Mathew Nudi and number 260102 PC Paul Ongesa, police officers as a result of the exercise of the powers conferred by Section 26 of the Criminal Procedure Code had in your possession one woofer make Ampex AX575MS and two small speakers reasonably suspected to have been stolen or unlawfully obtained.

2. When plea was taken on 5/9/2019 each pleaded guilty to Count I and II.

The facts prosecution presented the facts as follows: -

“On 3/9/2019 at 4 p.m. police from Kapsabet got information that some people had suspected stolen property at Sirungai area. They were directed to a single room and on entering found the accused among others rolling bhang in small rolls. They had 20 rolls worth Kshs 1000/=. The accused tried to fight PC Nudi and Ongesa who tried to arrest them.

Rolls of bhang Ex 1. The bhang was taken to Kisumu for analysis Exhibit memo PEX 2. The report confirmed it was cannabis sativa. Report dated 5/9/2019 PEX 3”

3. The appellants pleaded guilty to the facts. In mitigation they each pleaded for forgiveness.
4. The trial court sought a Probation Officers Report on each for purposes of sentencing.
5. The report is indicated that Noah was 21 years old at the material time. The probation officer described him as ‘a drug addict who abuses bhang and alcohol’. The probation officer reported that Noah told him that he and his colleagues were busy smoking bhang when police raided their room. That they fought the officers because they did not know they were police officers. And that the police officers also took away their woofer and used it to charge them.

The probation officer concluded: -

“Your honour, before court is a 21-year-old man with limited formal education. He is a single man with no responsibilities. During the social enquiry, it emerged that he is a bhang addict who also doubles as an alcoholic. He lives in a high risk environment that is full of negative peer influence which has made him to be disrespectful towards police officers on duty. It is therefore unlikely that he will adhere to the terms and conditions of a non-custodial sentence in the event if granted one.

Your honour, from the above findings, I therefore find him unsuitable for placement on a non-custodial sentence and an otherwise sentence would serve him better”.

6. Dennis was found to be a 19-year-old school drop out without any previous convictions. He confirmed he and others were smoking bhang when police officer entered their room. He told the probation officer that he had no idea that the persons who entered the room were police officers.

The probation officer concluded: -

“Your Honour, before you is a 19-year-old man who is a Standard 6 drop out. He takes responsibility of his actions and pleads for mercy from court. He is a habitual bhang smoker and also takes alcohol frequently. He lives in a dangerous environment that is full of negative peer influence which has led him to be disrespectful to police officers. He therefore has low chances of compliance and completion if granted a non-custodial sentence.

Your honour, from the above findings, I find him unsuitable for placement on a non-custodial sentence and an otherwise sentence is preferred”.

7. The learned trial magistrate in meting out the sentence noted that the Probation Officers Report indicated that the appellants were habitual bhang smokers and would not benefit from a probation sentence. Consequently, he sentenced each to 10 years’ imprisonment on count 1, and 3 years’ imprisonment on Count 2. The sentences were to run concurrently.

8. The appellants filed this appeal, and although the file was in the name of the 3rd appellant, it is he who informed the court that they had filed a joint appeal.

9. Apparently, being aware of the limitations of their guilty plea the appellants did not file the usual petition of appeal but **“Mitigation grounds of appeal** listed as follows:

a. That the appellant herein is a sole bread winner and thus seek a chance of the Hon. Court a chance fend for the other siblings.

b. That having realized the importance of keeping the law I now seek a chance back to the society.

c. That the sentence imposed upon me is too harsh and deterrent in retributive nature hence fails to appreciate that I am a first offender.

d. That I am ready and willing to abide by all terms and conditions the Hon Court shall find fit and just to impose.

Reasons wherefore:

i. May this appeal be allowed, conviction quashed: -

ii. Sentence set aside and be set free at liberty

iii. Sentence be replaced by a lesser severe or non-custodial sentence”.

10. During the hearing of the appeal, Noah submitted that he had reformed and he would not sell bhang/distract police officers, he pleaded with the court to let him go having served 1 year in prison. Dennis asked the court to relook at his sentence.

11. Mr Masisa prosecuting counsel for the state submitted that the sentence of 10 years’ imprisonment was lenient considering that the offence carried a term of life imprisonment. That both were habitual bhang smokers and alcoholics. That they were living in a dangerous area where young people fall into dangerous company hence the sentence was lawful.

12. **Section 348 of the Criminal Procedure Code** estops a person who has pleaded guilty to a charge from an appeal unless the appeal is against the sentence on the ground of being unlawful. The Court of Appeal in **Wandete David Munyoki vs Republic [2015] eKLR** however states that it is not an absolute bar in the following terms.

*It has long been settled that Section 348 of the Criminal Procedure Code which provides that no appeal is allowed in a conviction arising from a plea of guilty, except to the extent and legality of the sentence, is not an absolute bar to challenging such a conviction on any other ground. Indeed, in **Ndede v R [1991] KLR 567**, this Court held that the court is not bound to accept the accused person's admission of the truth of the charge and conviction as there may be an unusual circumstance such as injury to the accused person or the accused person may be confused or there have been inordinate delay in bringing him to court from the date of arrest. The list of circumstances and examples that may lead the first appellate court to consider the appeal on merit even when the conviction was on the accused person's own plea of guilty, are not closed.*

13. It is my humble view, based on the above authority that the appellants are entitled to an examination of the record to ascertain whether, on the facts as presented by the prosecution, the conviction was safe, and whether, on those facts, the sentence was not only lawful but appropriate in the circumstances. It is my view then that s. 354 of the CPC is applicable.

14. **Section 4(a) of the Narcotic Drugs and Psychotropic Substances (control) Act no 4 of 1994** states: -

4. Penalty for trafficking in narcotic drugs, etc.

Any person who trafficks in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence and liable—

(a) in respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life; or

(b) ...

Section 103 (a) of the National Police Service Act no. 11A of 2011 states: -

Assault in execution of duty

Any person who—

(a) assaults, resists or willfully obstructs a police officer in the due execution of the police officer's duties;

(b)... ;

(c)... ; or

(d)...,

commits an offence and shall be liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years, or to both.

15. The appellants pleaded guilty to count 1 on trafficking of narcotics. Trafficking is defined at **Section 2 of the Narcotics Drugs and Psychotropic substances (control) Act** as: -

“... the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance or making of any offer in respect thereof, but does not include—

(a) the importation or exportation of any narcotic drug or psychotropic substance or the making of any offer in respect thereof by or on behalf of any person who holds a licence therefore under this Act in accordance with the licence;

(b) the manufacturing, buying, sale, giving, supplying, administering, conveying, delivery or distribution of any narcotic drug or psychotropic substance or the making of any offer in respect thereof, by or on behalf of any person who has a licence therefore under this Act in accordance with the licence; or

(c) the selling or supplying or administering for medicinal purposes, and in accordance with the provisions of this Act, of any narcotic drug or psychotropic substance or the making of any offer in respect thereof, by a medical practitioner or veterinary surgeon or dentist or by any other person qualified to do so on the instructions of the medical practitioner or veterinary surgeon or dentist; or

(d) the selling or supplying in accordance with the provisions of this Act, of any narcotic drugs or psychotropic substances by a registered pharmacist”.

16. A look at the facts of the case reveals that the police officers were acting on a tip off to arrest persons suspected to be holding stolen property. When they entered the room pointed out to them, they found them rolling 20 rolls of bhang.
17. When the charge sheet was drawn the Police indicated that the appellants had approximately 20 rolls of bhang.
18. A look at the record clearly indicates that no evidence was placed before the trial court to establish that the appellants were actually rolling bhang into smaller rolls. The bigger rolls, if any, or the other bhang, from which the smaller rolls were allegedly being rolled were not produced. The record does not show that anything else was recovered, taken to the government analyst and produced by the prosecution to establish the allegation that the appellants were actually rolling some bhang into smaller rolls. No big rolls and small rolls were produced/or any unrolled bhang and rolled bhang. On top of that the record does not say how many rolls of bhang were produced. The exhibit memo and the report from the government analyst were not in the lower court file, hence there was nothing else to look at. Clearly, there is no evidence to support the fact that the appellants were rolling bhang.
19. Neither was any fact placed before the trial court to establish that the appellants were trafficking bhang.
20. The appellants admitted to smoking the bhang. The trial court found as a fact that they were bhang smokers, not traffickers. The Probation officer who visited their home and made social enquiries found that they were young men addicted to alcohol and bhang.
21. It is my humble view that from the facts presented before the court the charge of trafficking was not established. The facts established possession under **Section 3(1) as read with 3(2) (a) of the Act. (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**
- (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.**
21. One can see from the sentence that the trial magistrate having formed the view that these were smokers and not traffickers sentenced them to the 'minimum' 10 years' imprisonment.
22. However, it is my view that the charge was unfair right from the beginning as the prosecution did not have sufficient facts to establish the charge of trafficking. The facts as presented fall squarely within the provisions of **Section 3(1) as read with 3(2) (a) of the Act**.
23. Regarding the sentence: First, the mandatory nature of any sentence is now unconstitutional as per the **Muruatetu case**. If the learned trial magistrate felt bound to impose the said sentence as a mandatory sentence, then, it is up for review, and on the other hand if the court was of the view that that was appropriate, then it is still up for review.
24. We have now the Sentencing Policy Guidelines. At page 12 they speak of ;
- Proportionality: The sentence meted out must be proportionate to the offending behaviour. The punishment must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence to the offending behaviour is weighted in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender.***
- Further at paragraph 23.9 the guidelines provide a guide on how to arrive at a custodial sentence.**
- In view of aggravating and mitigating circumstances, the determination of the term of the custodial sentence shall be as follows:***
- 1. Starting point in determining the term of the custodial sentence:**
- The first step is for the court to establish the custodial sentence set out in the statute for that particular offence. To enable the court to factor in mitigating and aggravating circumstances/factors, the starting point shall be fifty percent of the maximum custodial sentence provided by statute for that particular offence. Having a standard starting point is geared towards actualising the uniformity/impartiality/consistency and accountability/transparency principles set out in paragraphs***
- 3.2 and 3.3 of these guidelines. A starting point of fifty percent provides a scale for the determination of a higher or lower sentence in light of mitigating or aggravating circumstances.***
25. The appellants pleaded guilty. They were first offenders, remorseful for what they had done. They gave a viable explanation as to why they attacked the persons who went to arrest them. If the officers were not in uniform, in a neighborhood riddled with crime, why would that come as a surprise? This is especially so when the facts of the case did not demonstrate that the officers were in uniform or that they identified themselves in any manner whatsoever.
26. In addition, as per the probation officer's reports, these were, school dropout young men barely out of their teens, living in a poor neighbourhood. For Noah, he dropped out at class 5 after the death of his mother. The mother to Dennis abandoned him when he was a baby. He had never known her and was raised by his grandmother. He dropped out of class 6 due to lack of school provisions. Each began fending

for himself at an early age.

27. The probation officer concluded that the appellants were better off in prison because they lived in 'dangerous high risk environment' full of negative peer influence. He also concluded that, from their resisting arrest, the two could not benefit from a non-custodial supervision because they had developed a negative attitude towards law enforcement. The court equally agreed with him and gave them long prison terms.

28. **Section 4 of the Probation of Offenders Act Cap 64 Laws of Kenya** states:

(1) Where a person is charged with an offence which is triable by a subordinate court and the court thinks that the charge is proved but is of the opinion that, having regard to youth, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may—

(a) convict the offender and make a probation order; or

(b) without proceeding to conviction, make a probation order, and in either case may require the offender to enter into a recognisance, with or without sureties, in such sum as the court may deem fit.

29. The underlined factors above are the same ones the court would ordinarily take into consideration in a pre-sentence report before meting out the appropriate sentence.

30. The appellants are in the category of offenders who need Probation Supervision. The factors to be considered appear to favour the appellants: 1st offenders, youthful, living in a '*dangerous high risk environment full of negative peer influence*', alleged addicts abusing both bhang hence having requiring medical and psycho social support and the extenuating circumstances of their poor back ground. Drug addiction and alcoholism though related to crime ought to be approached with a treatment and not a punishment mode.

31. First, a reading of the Probation Officers Report does not lay a factual basis for the conclusion that the appellants were beyond supervision. One offence of resisting arrest in the circumstances described in the report cannot be sufficient evidence that a person has no respect for law enforcement. Those conclusions were harsh taking into consideration the appellant's backgrounds. They appear to suggest that the criminal justice will judge you harshly because of where you come from. That would definitely be unfair, and work injustice against the large population underprivileged youth who find themselves in such situations. The criminal justice system should not condemn them to such lives forever but attempt to give them hope and a chance to change, to be better citizens. I believe that is one of the reasons for the existence of the Probation and After Care Services. To among others, provide interventions in appropriate cases, for youthful offenders and divert them from the path to becoming hardened criminals, an alternative to a life of crime.

32. We, in the criminal justice system must stem the tide that leads to our prisons filling up with young men like Noah and Dennis, and by not exposing them to contamination before dealing with the underlying issues. That is what most societies do with their young people; the Akamba people say **that** you can bend a sapling into the shape you want but you cannot do the same with a full grown tree.

33. Hence it is my view that the appellants needed psychosocial support that Probation and After Care Department offers.

34. In sentencing, the accused persons must be seen and treated as individuals. That is what the *Muruatetu case* tells us, every accused person is an individual. The circumstances of his offence must be considered, before sentence is meted out.

35. In the circumstances of this case, the sentence was harsh and the appellants deserved a non-custodial sentence.

36. There is a Probation Officer's Report on each of them on the record. It identifies their needs and risks. It is up to the probation officer, in light of this judgment, to come up with a treatment plan for each of them.

37. The sentence of 10 years' imprisonment on count 1 and that of 3 years' on count two is set aside and substituted with a three-year Probation Order.

Delivered, Dated and Signed virtually this 9th day of November 2020.

Mumbua T. Matheka

Judge

In the presence of:

CA Koech

Appellants at GK Prison Eldoret

N/A for Prosecuting Counsel though notified.