



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL CASE NO. 5 OF 2020

CHRISTINE NALIAKA.....APPELLANT

- VRS -

THE REPUBLIC.....RESPONDENT

{Being an appeal against conviction and sentence of Hon. B. M. Kimtai (Mr.) – PM Keroka delivered on 19th February, 2020 and sentencing on 26th February, 2020 in the original Keroka Principal Magistrate’s Court Criminal Case No. 659 of 2019}

JUDGMENT

The appellant was charged with the offence of trafficking narcotic drugs contrary to Section 4(9) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.

The particulars of the offence are that on 30th July, 2019 at Ichuni Sub-Location in Masaba South Sub-County within Kisii County the appellant was found trafficking narcotic drugs by storing in her house 10 ½ big rolls of cannabis weighing 1kg with a market value of Kshs. 15,000/=.

On 31st July, 2019 the accused pleaded not guilty to the charges, however, on 19th February, 2020 the appellant requested to plead afresh to the charges. She pleaded guilty and plea of guilty was entered. The trial court then convicted and sentenced the appellant to 5years imprisonment on her own plea of guilty.

Being dissatisfied the appellant has lodged this appeal citing the following grounds in her Petition of Appeal: -

“1. The trial magistrate erred in law and facts in passing out sentence in total disregard of the appellant’s mitigation factors.

2. That in the circumstances the appellant prays that the court be please to admit the appeal, call for the record and after hearing the appellant quash the conviction and set free the appellant or pass such orders as the end of justice may call for.”

The appeal proceeded by way of written submissions. The appellant submitted that she was employed by one Sophy Mwita after being chased away from her family and that because of her desperation she was given the substances to sell not knowing that she was engaging in drug trafficking. She also stated that she is a mother of three children and having been chased away by the family she was married to her children are suffering as they do not have someone to take care of them. She asks for forgiveness and pleads with this court to give her a non-custodial sentence.

Mr. Majale, Counsel for the respondent submitted that the appellant pleaded guilty to the offence and **Section 348 of the Criminal Procedure Code** provides that no appeal on plea of guilty, nor in petty cases except as to the extent or legality of the sentence. He submitted that the sentence of five years was well within the provisions of the law noting that prior to sentencing the trial court called for a probation report which indicated that the appellant is not deserving of a non-custodial sentence. He contended that the sentence was neither harsh nor excessive. Mr. Majale also submitted that the denial by the appellant of her responsibility to the offence at this stage is misplaced as she should have informed the trial court at the time of plea taking. Mr. Majale urges this court to dismiss the appeal for lack of merit and proceed to uphold the conviction and sentence of the appellant.

I have carefully considered the grounds put forth by the appellant and the rival submissions. It is evident that her contention is only against the sentence. In paragraph 2 of her written submissions which though undated and unsigned evidently came from her, she states: -

“Your Lordship I request this superior court to revisit the sentence of 5 years to which have served 9 months part of it

(sic). That the kiosk I was operating did not belong to me, I was employed by a lady by the name Sophy Mwita whom she had hosted me after I was chased away by the family where I was married.”

She continues in paragraph 3: -

“Your lordship I was given by the owner of the kiosk to sell the substances and out of desperation I never knew that I was engaged myself in drug trafficking.”

It is clear from the above submissions that the psychotropic substance was found in her possession hence the reason she pleaded guilty. Indeed, in the petition she does not challenge the conviction.

The issue for determination is **whether the sentence imposed by the lower court was illegal, harsh or oppressive to warrant this court to interfere.**

The punishment for this offence is provided in **Section 4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act** which states: -

“4. 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.....”

Before sentencing the appellant, the trial Magistrate heard her mitigation and called for a pre-sentence report and it is therefore not correct to say that the court ignored her mitigation. The pre-sentence report was not favourable as it disclosed she was a known drug peddler. Given that the law prescribes a sentence of life imprisonment, taking into account the contents of the presentence report I am not persuaded that a term of imprisonment for five years is illegal, harsh or oppressive. This appeal has no merit and it is dismissed. The sentence is affirmed.

Judgement signed, dated and delivered in Nyamira via video link (Microsoft Teams) on this 3rd day of December 2020.

E. N. MAINA

JUDGE