REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL 50 OF 2016

(From original conviction and sentence in criminal case No. 1682'A' of 2015 of the Principal Magistrate's Court at Baricho)

CEASER MURIUKI MWANGI...........1ST APPELLANT

MOSES MUTHIE GICANGI................2ND APPELLANT

V E R S U S

REPUBLIC.. RESPONDENT

JUDGMENT

1. The appellants were charged the offence of breaking into a building and committing a felony contrary to **Section 306(a) of the Penal Code** and were each committed to serve 4 years jail term. The 1st appellant was also charged with the offence of being in possession of Cannabis contrary to **Section 3(1) as read with Section 3(2) of the Narcotics Drugs and Psychotic Substance Control Act No. 4 of 1994**. They were sentenced to serve 4 years imprisonment for each limb in Count 1 and the 1st appellant to serve 4 years imprisonment for Count II and the sentence to run concurrently. On 23/01/2019, they withdrew their appeal on conviction and proceeded with appeal on sentence.

2. For to the prosecution, the appellants will have served 3 years by October and stated that the court can exercise discretion since they have served more than half of the sentence imposed. I have considered the application.

3. The State has not opposed the appeal on the sentence. The appellants were charged under the following sections:-

Section 306(a) of the Penal Code provides:

> *Any person who—breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or is guilty of a felony and is liable to imprisonment for seven years.*

4. The penalty for breaking into a building and committing a felony under **Section 306(a)** above is 7 years imprisonment therefore the sentence imposed upon the appellants of 4 years was lawful.

Section 3 of the Narcotics Drugs and Psychotic Substance Control Act No. 4 of 1994 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) 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.*

5. In **Bernard Kimani Gacheru V Republic [2002] eKLR**

The court in holding that sentence given was well deserved and found absolutely no reason to interfere with it stated;

> **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.**

6. In **George Karanja Njoroge V Republic [2008] Eklr**

The court in affirm the sentence imposed by the Court below stated;

> **The last-listed case, an appellate Court decision, sets out the pertinent principles which must guide this Court in disposing of the instant matter. The Court in that case stated (p. 270):**
>
> > ***"The principles upon which an Appellant Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v. R (1950) 18 EACA 147,*** *'it is evident that the Judge has acted upon some wrong principle or overlooked some material factor.'* ***To this we would add athird criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case......"***

Section 306(a) of the Penal Code provides:

> *Any person who—breaks and enters a school, house, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or is guilty of a felony and is liable to imprisonment for seven years.*

7. The penalty for stealing motor vehicle under **Section 306(a)** above is 7 years imprisonment therefore the sentence imposed upon the appellants of 4 years was lawful.

Section 3 of the Narcotics Drugs and Psychotic Substance Control Act No. 4 of 1994 provides:

> *3) Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.*
>
> *4) A person guilty of an offence under subsection (1) shall be liable—*
>
> *c) 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*
>
> ***d)*** *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.*

8. The penalty for being in possession of Cannabis under **Section 3** above is 10 years imprisonment therefore the sentence imposed upon the 1st appellant of 4 years was lawful.

9. The trial court did not act on some wrong principle or overlooked some material factor therefore there is no reason whatsoever for this court to interfere with the sentence meted out to the appellants by the trial court as the same was neither harsh nor overly excessive.

10. The sentence imposed was therefore lawful. The appellants have appealed against the sentence stating that they have learnt a lesson and have now reformed. Sentencing is the discretion of the trial court. In **James –v- R(1950) E. A. CA 147**, It was stated, ***"that the court will not ordinarily interfere with the discretion exercised by the trial Judge unless it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this we would add a 3rd criterion that the sentence was manifestly excessive in view of the circumstances of the case----" .***

11. The appellants are saying that the sentence was harsh and excessive. The appellants were charged with breaking into a building and committing a felony namely stealing. This charge was defective for not having disclosed what was stolen. Where a person is alleged to have committed a felony of stealing, the charge must state what was stolen for the accused to be able to understand the nature of the charge.

12. On the 2nd count Ceaser Muriuki Mwangi was charged with being in possession of ten rolls of cannabis sativa with a street value of Kshs 200/-. Considering the drug, a sentence of four years was manifestly excessive. The sentence imposed states that 1st & 2nd accused were sentenced to 4 years imprisonment on each limb in count 1 & 2. Yet the applicants were convicted on the 1st count which does not contain

two limbs. The sentence on the 1st count was clearly wrong and occasioned a miscarriage of justice. The sentence on the 2nd count was manifestly excessive. I find that these reason enough to interfere with the sentence of the trial Magistrate.

13. I find that the State did not oppose the application.

14. In the circumstances the appeal on the sentence succeeds.

15. I order that the sentence on the first count should have been four years imprisonment. Section 354(3)(b) of the Criminal Procedure Code gives High Court power on appeal to alter the finding, mainly against the sentence to increase or reduce the sentence or alter the nature of the sentence.

16. In the circumstances and for the reasons I have stated, I order that the sentence against the appellants be reduced to the sentence already served. The appellants will be set at liberty unless otherwise lawfully held.

Dated at Kerugoya this 12th day of March 2019.

L. W. GITARI

JUDGE