



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO. 11 OF 2018

(From original conviction and sentence in Criminal Case No. 114 of 2017

of the Resident Magistrate's Court at Wangu'ru).

SIMON WACHIRA CHOMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was charged with trafficking in Narcotic Drugs Contrary to Section 4(a) of the Narcotic Drugs Psychotropic Substances Control Act. It was alleged that on 3/3/2017 at Kutus Mjini Kutus Location within the County of Kirinyaga was found trafficking 195 rolls of Cannabis by way of selling with a street value of Kshs 3,900/-.
2. After a full trial the appellant was convicted and sentenced to imprisonment for ten years.
3. He filed this appeal which raised five grounds. However, when the appeal came up for hearing the appellant applied to withdraw the appeal and opted to proceed with the appeal on the sentence. The application was allowed on 21/1/19 and the appeal was marked as withdrawn.
4. The appellant contends that sentence of ten years was harsh and pleads with the court to reduce the sentence.
5. I have considered the appeal on the sentence. **Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act** provides:-

“Any person who traffics in any Narcotic Drug or Psychotropic Substance or any substance represented or held out by him to be a Narcotic Drug or Psychotropic Substance and shall be guilty of an offence and liable –

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 greater and in addition to imprisonment for life”.

6. Under the Section which the appellant was charged the sentence prescribed is a fine of One Million or three times the market value of the Narcotic Drug or psychotropic substance and in addition, to imprisonment for life. The appellant was sentenced to serve Ten years. Though the prosecution had filed notice of enhancement, it was not pursued. The issue for determination is reducing of the sentence of the trial court.
7. It is trite that an appellate court will not interfere with the sentence as sentencing is the discretion of the trial court. The principles which will guide the appellate court when dealing with issues of sentence are whether the sentence is manifestly excessive in the circumstances of the case, whether the court overlooked some material factor or took into account something material or acted on a wrong principle.
8. In this case the Section under which the appellant was charged provides for an option of a fine before in addition to a sentence of imprisonment for life. The section provides for a sentence of a fine which has two limbs, i.e a fine of One Million or three times the market value of the drug. In determining the fine, the court is called upon to consider which would be the greater sentence. So if three times the market value is greater than One Million, it would be appropriate to pass that as sentence and where it is less, the court would consider the fine of One Million. It would be appropriate when passing the sentence of fine for the court to put a default clause based on **Section 28 (2) of the Penal Code** which specifies the term of imprisonment in default of payment of the fine and the scale.

9. The 2nd limb of the sentence is the sentence of imprisonment. This means that a person convicted for the offence of trafficking in Narcotic Drugs is supposed to be sentenced to a fine and imprisonment. The sentence is however not mandatory and leaves room for the exercise of discretion.

10. The Court of Appeal has dealt with the sentence under **Section 4(a) of the Narcotic Drugs and Psychotropic Substance Control Act.**

In **Daniel Kyalo Muema v Republic [2009] eKLR**

The Court of Appeal advanced the view that the Act does not provide for mandatory sentences and stated;

Thirdly, the preamble to the Act does not show that one of the purposes of the Act is to provide for mandatory sentences. Indeed, for the more serious offence of trafficking in narcotic or psychotropic substances in Section 4, for example, the Parliament uses the phrase – “shall be guilty of an offence and liable” – which phrase does not import a mandatory sentence. That is why in Kolongi vs. Republic [2005] 1 KLR 7, the appellant who was convicted of trafficking in 27.8 Kgs. of heroin was sentenced to 18 years imprisonment plus a fine and not to the prescribed life imprisonment plus a fine (see also Gathara vs. Republic [2005] 2 KLR 58 where the appellant was sentenced to 10 years imprisonment plus a fine for trafficking in eleven (11) bags of cannabis sativa.’

In **Caroline Auma Majabu v Republic [2014] eKLR**

The Court of Appeal reasoned as follows:

On her part, the learned Judge of the High Court followed Kingsley Chukwu v R Criminal Appeal No. 69 of 2010 (actually Criminal Appeal No. 257 of 2007 cited as Kingsley Chukwu v R2010 eKLR), where the Court differently constituted held that a person convicted for an offence under Section 4(a) of the Act shall be fined Kshs.1000,000/- or three times the value of the drug whichever is greater and in addition to imprisonment for life. With respect, that is not the purport of section 4(a). We find it appropriate to revisit the question whether section 4(a) of the Narcotic Drugs and Psychotropic Substance Control Act states provides for a mandatory sentence.

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In our view, the word “shall” is used in relation to the guilt of the offender and the word used in relation to the sentence is “liable”. The Concise Oxford English Dictionary 12th Edition defines the word “liable” as

“(i) Responsible by law, legally answerable, (liable to) subject by law to;

(ii) (Liable to do something) likely to do something;

(iii) (Liable to) likely to experience (something undesirable).

Black’s Law Dictionary defines “liable” as

(i) Responsible or answerable in law; legally obligated,

(ii) Subject to or likely to incur (a fine, penalty etc.)

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.’

11. The appellant has appealed against the sentence. **Section 354(3)ii of the Criminal Procedure Code** gives this court powers to alter the finding of the trial court on the sentence. It provides:-

“At the hearing of the appeal the appellant or his Advocate may address the court in support of the particulars set out in the petition of appeal and the respondent or his advocate may then address the court.

The court may then if it considers that there is no sufficient ground for interfering dismiss the appeal or may –

Alter the finding maintaining the sentence acquit or with or without altering the finding reduce or increase the sentence.”

12. It is therefore within the power of this court to allow the prayer by the appellant to reduce the sentence.

13. It is a principle of sentencing that the sentence must be proportionate to the offence charged. The appellant was convicted for being in possession of 195 rolls of cannabis by way of selling. The value of the cannabis was stated to be KShs 3,900/-. The sentence imposed was

not proportionate to the offence which he was convicted. There were mitigating factors as the appellant was a first offender. Considering the amount of drugs, that appellant was a 1st offender and the mitigation which requested court for leniency, the sentence passed was not proportionate and was harsh in the circumstance. I will therefore exercise powers conferred under **Section 354 of the Criminal Procedure Code** and allow the appeal on the sentence. I order that the sentence of Ten years is set aside. The appellant is sentenced to pay a fine of Kshs 50,000/- or in default serve six months imprisonment. He will also serve Four years' imprisonment from the date he was sentenced.

Dated at Kerugoya this 16th Day of May 2019.

L. W. GITARI

JUDGE