



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. 28 OF 2018**

**ELVIS MATIVO CHELEKO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[An appeal from the judgement delivered on 21.5.2015 by Hon. Y. A. Shikanda, SRM in Malindi CM Criminal Case No. 739 of 2014, Republic v Elvis Mativo Cheleko]**

**JUDGEMENT**

1. The Appellant, Elvis Mativo Cheleko, through amended grounds of appeal filed together with his submissions on 10<sup>th</sup> October, 2018 reduced his appeal to one ground namely the severity of the sentence.
2. After a full trial, the Appellant who had been charged with trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994 was found guilty and sentenced to serve ten years imprisonment and in addition to pay a fine of Kshs.1,000,000.
3. The Appellant's case is that the sentence was harsh in the circumstances and that he has since reformed. He urges this court to have mercy on him. He relied on the decision of Chitembwe, J in **Said Athman Hamisi & 2 others v Republic, Criminal Appeal No. 61 of 2012**.
4. The Respondent's submissions was in respect to the earlier grounds of appeal. No comment was therefore made on the issue of the severity of the sentence imposed on the Appellant.
5. In **Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR**, the Court of Appeal restated that sentencing falls within the discretion of the trial court and the discretion can only be interfered with where it is demonstrated that the trial court acted on wrong principles or ignored material factors or took into account irrelevant considerations or on the whole the sentence is manifestly excessive.
6. A perusal of the record shows that the sentence imposed by the trial court is the one provided by the law. It cannot therefore be said that the sentence is illegal.
7. The Appellant was accused of trafficking in 17 big rolls of cannabis weighing 700 grams with a street value of Kshs. 4,250 and 26 tablets of Rohypnol with a street value of Kshs. 2,600.
8. It is also correct that the Appellant had admitted to a previous conviction for possession of narcotic drugs. However, ten years in prison is not a walk in the park. The Appellant was convicted for trafficking in narcotic drugs with a street value of Kshs. 6,850. The quantity of the drugs and their street value was not enormous.
9. The Appellant was in custody for seven months during his trial. He has already served close to four years of his sentence.
10. Looking at the facts of this case I find that the sentence was excessive. I also note that the trial magistrate did not provide an alternative custodial sentence for the additional fine imposed. What would happen once he concludes his prison sentence without raising the Kshs.1,000,000 fine? The fine is an additional sentence. It was therefore necessary to provide a custodial period the Appellant was expected to serve if he failed to pay the fine which was an additional punishment to the ten years imprisonment.
11. In the circumstances of this case I find that the seven months the Appellant was in custody prior to conviction, which period has to be taken into account by virtue of Section 333(2) of the Criminal Procedure Code, Cap. 75, would be adequate as a default sentence for the fine of Kshs.1,000,000. I also find that the period already served from the time of sentencing is sufficient punishment when one considers the

street value of the narcotics the Appellant was found trafficking in. The sentence is thus reduced to the period already served.

12. Having found that the period of close to 4 years already spent in prison by the Appellant is sufficient punishment and considering that the period of seven months spent in remand has been found adequate as a default sentence for the additional fine, I allow the appeal on sentence so that the sentences are reduced to the period already served. Consequently, the Appellant is set free forthwith unless otherwise lawfully held.

**Dated and Signed at Nairobi this 9<sup>th</sup> day of May, 2019**

**W. Korir,**

**Judge of the High Court**

**Dated, Countersigned and Delivered at Malindi this 13<sup>th</sup> day of June 2019**

**R. Nyakundi,**

**Judge of the High Court**