



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.785 OF 2018

PENINAH MWONGO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Peninah Mwongo was convicted of the charge of **being in possession of narcotic drugs** contrary to **Section 4(a) of Narcotic Drugs and Psychotropic Substances (Control) Act**. The particulars of the offence that led to her conviction were that on 18<sup>th</sup> October 2011 at Jomo Kenyatta International Airport in Nairobi County, the Applicant, together with others not before court, trafficked by conveying in her body (rectum) 1104 grams of psychotropic substances namely amphetamine with a market value of Kshs.4, 416,000/- in contravention of the provisions of the said **Act**. The Applicant was convicted after a full trial. She was sentenced to pay a fine of Kshs.13,238,000/- or in default thereof serve a term of one (1) year imprisonment. In addition, the Applicant was sentenced to serve a term of six (6) years imprisonment. The Applicant was sentenced on 16<sup>th</sup> June 2017.

She made an application before this court on 14<sup>th</sup> August 2018 seeking to have the sentence that was imposed upon her revised on several grounds. The Applicant alleges that prior to her conviction, she was in remand for a period of seven (7) years. She was of the view that this period was not taken into account when the trial court sentenced her to serve the custodial sentence. She claims that she had developed respiratory and throat ailments accompanied by abdominal pain as well as skin lesions from the time of her incarceration. She pleads with the court to exercise leniency on her noting that she had learnt her lesson and was extremely remorseful for the offence that she had committed. She urged the court to take into consideration that she was a single mother. Her family had suffered since her incarceration. Her children were not attending school and were deprived of love and affection due her absence. She pleaded with the court to exercise mercy on her on humanitarian grounds. The application was supported by Applicant's annexed affidavit. Annexed to the affidavit was a medical report giving the medical status of the Applicant. The Applicant further filed a recommendation by prison authorities indicating that she was a person of good behaviour while in prison.

During the hearing of the application, this court heard oral rival submission made by Mr. Swaka for the Applicant and by Ms. Sigei for the State. Mr. Swaka reiterated the grounds put forward by the Applicant in her application. In addition, he submitted that the Applicant had been in lawful custody for a period of nine (9) years. Being a single mother, her family had disintegrated in her absence. She was remorseful. Her character had changed. She had undertaken several courses while in prison with a view to improving her life upon being released from prison. He urged the court to look at the report prepared by prison regarding her character. He reiterated that, taken into totality, it was clear that the Applicant had reformed and should be released from prison. The Applicant had developed mental illness while in prison and had been admitted to Mathare Mental Hospital.

Ms. Sigei for the State opposed the application. She submitted that the period that the Applicant was in remand custody was considered by the trial court when it meted the sentence. The Applicant faced a serious charge which attracts serious sanctions. Such sanctions were necessary to deter those who may be tempted to commit such crime. She urged the court to take into consideration the effect that narcotic drugs have on the members of the public. She was not convinced that the Applicant was remorseful or that her character was beyond reproach taking into consideration the evidence that emerged during trial. As regard the ailments suffered by the Applicant, she submitted that the same can be handled by the prison authorities. The fact that she had even been referred to Mathare Mental Hospital for treatment showed that the prison authorities had the capacity to attend to her medical needs. She urged the court to disallow the application.

This court has carefully considered the rival submission made by counsel for the parties to this application and the proceedings and judgment of the magistrate's court. It is now settled that when a trial magistrate is sentencing a convict, such magistrate is exercising judicial discretion. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No. 135 of 2016** (unreported) held at Page 25 thus:

***“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v. Republic, Cr App No.188 of 2000 this Court stated thus:***

***“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, any one of the matters already stated is shown to exist.”***

In the present application, it was clear to this court that the sentence that was imposed by the trial court was a legal one. The maximum custodial sentence that the Applicant would have been sentenced to serve is life imprisonment. While sentencing the Applicant, the trial magistrate took into consideration the period that the Applicant was in remand custody. This was a period of six (6) years at the time the Applicant was convicted and sentenced. That being the case, the claim by the Applicant that the trial court did not take into consideration the period that she was in pre-trial custody prior to conviction is not supported by evidence.

Further, taking into consideration the serious nature of the offence that the Applicant was convicted of, this court is of the view that the trial court did not err in sentencing the Applicant to serve the said custodial period. This court agrees with the prosecution that if this court were to interfere with the custodial sentence imposed by the trial court, it would send a wrong message to those who may be minded to engage in drug trafficking. It has not been alleged by the Applicant that the trial magistrate applied the wrong principle of the law or failed to take into consideration a relevant factor when he sentenced the Applicant. That being the case, this court cannot interfere with the exercise of sentencing discretion by the trial court.

The personal circumstance of the Applicant notwithstanding, this court is of the view that the custodial sentence imposed by the trial magistrate fitted the crime. In the premises therefore, the Applicant's application lacks merit and is hereby dismissed. The sentence of the trial magistrate is confirmed. It is so ordered.

**DATED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JULY 2019.**

**L. KIMARU**

**JUDGE**