REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 44 OF 2018

DOUGLAS MUSYOKA MUTUA…..……....……APPLICANT

VERSUS

REPUBLIC……..…….……RESPONDENT

JUDGEMENT

1. The Appellant herein, **Douglas Musyoka Mutua,** was charged with the offence of Being in Possession of Cannabis Sativa (Bhang) Contrary to Section 3(1) as read with Section 3(2)(a) of the ***Narcotics Drugs and Psychotropic Substances Control Act***, No. 4 of 1994. The facts were that on 10th day of March, 2018 at Kibauni Location Itumbile Sublocation, Itumbile Village in Mwala sub-county within Machakos County was found in possession of Cannabis Sativa (Bhang) to wit 20kg which was not in its medicinal preparation and has a street value of Kshs 20,000.00.

2. When the charge was read to the appellant, he pleaded guilty and was convicted on his own plea of guilty and sentenced to 4 years imprisonment.

3. In this appeal the appellant seeks that the court substitutes his custodial sentence with a non-custodial one and that the period spent in custody be considered as sufficient punishment so that his sentence be reduced to the time served; and that the court considers his mitigating factors.

4. I have considered the submissions made by the appellant as well as the Respondent.

5. This appeal is only against the sentence. The appellant in his submissions has repeated the mitigating factors and seeks that the court considers the same and allows his appeal. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in **S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12** where it was held that:

> **"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court…However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate".'**

6. Similarly, in **Mokela vs. The State (135/11) [2011] ZASCA 166**, the Supreme Court of South Africa held that:

> **"It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."**

7. The predecessor of the Court of Appeal in the case of **Ogolla s/o Owuor vs Republic, [1954] EACA 270**, pronounced itself on this issue as follows:-

> **"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors".**

8. To this, I would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case". **(R - v- Shershowsky (1912) CCA 28TLR 263).** In **Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003** the Court of Appeal stated thus:-

> **"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"**

9. Section 3(1) and 3(2)(a) of the ***Narcotics Drugs and Psychotropic Substances Control Act***, No. 4 of 1994 provides as follows:

> ***3. (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***

10. In this case the appellant was liable to life imprisonment. After his conviction on own plea the learned trial magistrate gave the appellant an opportunity to mitigate and the court in imposing the sentence stated that it had noted the mitigation as well as the amount of the drugs involved before imposing the said sentence.

11. I have considered the same and in my view the appellant has not made out a case that warrants inference with the said sentence.

12. However, from the charge sheet the appellant was arrested on 10th March, 2018and was convicted on 9th April, 2018. The proviso to section 333(2) of the ***Criminal Procedure Code*** provides as hereunder:

> ***(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.***
>
> ***(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.***
>
> ***Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.***

13. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced must be taken into account in meting out the sentence. While the court may in its discretion decide that the sentence shall run from the date of sentencing or conviction, it is my view that in departing from the above provisions, the court is obliged to give reasons for doing so. However, where the sentence does not indicate the date from which it ought to run the presumption must be in favour of the accused that the same will be computed inclusive of the period spent in custody.

14. I associate myself with the decision in **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR** where the Court of Appeal held that:

> **"The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by *section 333(2)* of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. *Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody.*** It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."** [Emphasis mine].

15. The same Court in **Bethwel Wilson Kibor vs. Republic [2009] eKLR** expressed itself as follows:

> **"By proviso to *section 333(2)* of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. *Ombija, J*. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents**

ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

16. According to ***The Judiciary Sentencing Policy Guidelines***:

> ***The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender,the court must take into account the period in which the offender was held in custody during the trial.***

17. In this case although the learned trial did not indicate the date when the sentence imposed was to take effect. In the premises pursuant to the above, the only legal conclusion is that the sentence imposed is to take into account the period when the applicant was in custody.

18. Therefore, the said sentence will take effect from 10th March, 2018.

19. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 11th day of December, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

The Appellant in person

Miss Mogoi for the Respondnt

CA Geoffrey