



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 22 OF 2018
BETWEEN
VEKLYUK MYKOLA.....APPELLANT
AND
REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in JKIA Court Cr. Case No. 10 of 2016 delivered by Hon. L.O. Onyina, SPM, on 16th January 2018).

JUDGMENT

1. The Appellant herein was charged with the offence of trafficking in narcotic drugs contrary to **Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994**. The particulars of the charge were that on the 4th day of June, 2016 at Jomo Kenyatta International Airport within Nairobi County, jointly with others not before court, unlawfully trafficked by conveying in the rectum 844.1 grams a narcotic drug namely heroin with a market value of Kshs. 2,532,300/= in contravention of the provisions of the said Act.
2. After a full trial, the Appellant was convicted accordingly and sentenced as follows: on the first limb of the sentence, to pay a fine of Kshs. 4 million, in default, serve one year imprisonment. On the second limb, to serve additional term of ten years imprisonment. He was given the right to appeal which he exercised by filing the instant appeal. The Petition of Appeal was filed on 30th January, 2018 by Gichuki Karuga and Company Advocates. In it, he raised five Grounds of Appeal against both the conviction and sentence. However, when the appeal first came up for hearing on 29th April, 2019, learned counsel for the Appellant Mr. Gichuki informed the court that the Appellant would only contest the sentence thus, conceded to the conviction.
3. In brief written submissions filed on 14th October, 2019, the main issue raised is with respect to non-compliance with **Section 333(2) of the Criminal Procedure Code** which provides that: “ **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 in this code, provided that where the person sentenced under sub-section (1) has prior to such sentence been held in custody the sentence shall take account of the period spent in custody.**”
4. Counsel also cited the Judiciary’s Sentencing Guidelines which call on the court to apply the proviso to **Section 333(2) of the Criminal Procedure Code**. That the 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. The court was referred to the case of **Ahamad Abolfathi Mohamed and another vs Republic [2018] eKLR** to buttress the submission.
5. Counsel took issue with the fact that the learned trial magistrate in passing the sentence failed to take into account the period the Appellant was in custody prior to sentencing. He urged the court to apply the law accordingly and find that the Appellant had served sufficient punishment.
6. The court was also asked to take into account that the Appellant had a family and dependants who solely relied on him for upkeep and the continued incarceration of the Appellant subjected them to suffering.
7. In opposing the appeal learned State Counsel, Mr. Momanyi relied on written submissions dated 25th October, 2019 and filed on 28th October, 2019. The gist of the of opposition was that the offence of trafficking in drugs was serious and that in passing the sentence, the court had regard to the fact that the Appellant was a first offender and further took into account the period he had stayed in custody prior to sentencing. He submitted that in any case, there was no need to disturb the sentence which he considered as fair and lenient.

8. I have accordingly considered the respective rival submissions. **Section 4(a) of the Narcotic drugs and Psychotropic Substances (Control) Act 1994** states that:

“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 shall be guilty of an offence and liable :

(a) 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 the greater, and, in addition, to imprisonment for life

9. The use of the word ‘liable’ in the main provision before the statement of the penalty speaks in loud voice that the penalty provided thereunder is not in mandatory terms. That implies that a court may impose any other sentence than is provided depending, more particularly, on the nature of the narcotic drugs, the quantity of the drugs and the previous records of the accused person.

10. The offence of trafficking in narcotic drugs cannot be underestimated. Nevertheless, the stringent penalties spelt out under the Act are mainly targeted at big drug dealers as opposed to small dealers and users of the narcotic drugs in small quantities. The court must therefore in this case re-evaluate the circumstances of the offence.

11. The value of the drug was Kshs. 2, 532,300/=. The record further shows that the Appellant did not have record of previous convictions and was therefore regarded as first offender. Although the trial court indicated that it had considered the Appellant as a first offender, and the quantity of the drugs, in my view the second limb of the sentence was harsh and excessive in the circumstances. The Appellant did not deserve the ten years imprisonment in comparison to the quantity of the drugs. Accordingly, I find this appeal merited.

12. I set aside the ten years imprisonment and substitute it with an order that the Appellant shall serve five years imprisonment. The sentence shall start running from the date the Appellant was arrested on 4th June, 2016 in adherence with Section 333(2) of the Criminal Procedure Code. For avoidance of doubt, the first limb of the sentence requiring the Appellant to pay a fine of Kshs. 4 million in default serve one year imprisonment remains undisturbed. It is so ordered.

Dated and Delivered at Nairobi This 10th day of December, 2019.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of;

1. Mr. Mwangi h/b for Gichuki for the Appellant.
2. Ms. Akunja for the Respondent.