



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL REVISION NO 1 OF 2018

LINET WEKOTA MALENYA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No 882 of 2016 in the Senior Principal Magistrate's Court at Voi delivered by Hon E. G. Nderitu (SPM) on 22nd December 2017)

RULING ON REVISION

1. By a letter dated 10th January 2018 filed on 12th January 2018, the Applicant moved the court for a revision of the sentence that was meted upon him on 22nd December 2017 by the Learned Trial Magistrate, Hon E. G. Nderitu, Senior Principal Magistrate in **Cr Case No 882 of 2017 Republic vs Linet Wekota Malenya** at Voi Law Courts.

2. The Applicant had been charged with the offence of trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act Cap 245 (Laws of Kenya). The particulars of the offence were that on 26th October 2016 at Kaloleni within Taita Taveta County she was found trafficking in narcotic drugs by selling and storing *cannabis* with 12 rolled brooms, ninety (90) big rolls and thirty eight (38) sticks with a street value of Kshs 30,000/= in contravention of the said Act.

3. On 27th October 2016, the Applicant pleaded not guilty whereupon a plea of not guilty was entered. The matter subsequently proceeded for hearing. Upon hearing the case to its conclusion, the Learned Trial Magistrate convicted her of the said offence. The Prosecutor asked that she be treated as a first offender.

4. In mitigation, the Applicant sought forgiveness and informed her that she was the sole breadwinner of her three (3) children. The said Learned Trial Magistrate fined her Kshs 300,000/= or in default to serve four (4) years imprisonment.

5. The State submitted that Section 4(a) of the Narcotic Drugs and Psychotropic Substance Act provided that a person who was convicted of the offence thereunder was liable to a fine of Kshs 1,000,000/= or three (3) times of the value of the drugs he had been found in possession of. It argued that the term **"liable"** in the said Section implied that a trial court had discretion to estimate the fine it would impose on a convicted person.

6. It pointed out that the Applicant did not have a problem with the default sentence but that she was only seeking that the fine be reduced to Kshs 100,000/=, which the State said it was not objecting to because the fine would be three (3) times the value of the narcotic drugs she was trafficking.

7. Section 4 (a) of the Narcotic drug and Psychotropic Substance Control Act provides as follows:-

"Any person who trafficks 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."**

8. Section 362 of the Criminal Procedure Code Cap 75 (Laws of Kenya), the High Court has power to satisfy itself that a decision by a subordinate court is correct, legal and proper. The said Section provides as follows:-

"The High Court may call and examine any record of any criminal proceedings before any subordinate court for the

purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded, and as to the regularity of any proceedings of any such court.”

9. As sentencing is an exercise of discretion by a trial court, an appellate court ought not to interfere with such sentence unless the same is manifestly excessive, harsh and severe. It was evident from Section 4(a) of the Narcotic Drugs and Psychotropic Substances Act does not prescribe a minimum sentence. It provides that a convicted person would be liable to be fined Kshs 1,000,000/= or three (3) times the value of the drug whichever was higher.

10. The understanding of this court was not that a convicted person could be fined three (3) times the value of the market value of the drug but that was not the maximum a court could impose as the State seemed to suggest. It could also impose a fine upto Kshs 1,000,000/=. The penalty to be meted out on such convicted person would be the greater of the two (2) fines. In addition, a convicted person could also be liable to life imprisonment. This means that the sentence of life imprisonment is not the minimum but rather it is the maximum.

11. Whereas the Learned Trial Magistrate imposed a sentence that was correct, legal and proper, it was the view of this court that she ought to have considered the street value of the drugs the Applicant was found to have been trafficking. Indeed, it would be prudent and proper to consider the value of the drugs or psychotropic substances with a view to arriving at a fair and objective assessment of what would be the appropriate penalty.

12. In determining what would be a reasonable assessment in this case, this court had due regard to several cases that had come before it on Appeal and on Revision.

13. In the case of **Lawrence Mitelian Ngaluma vs Republic [2017] eKLR**, on appeal, this court upheld the sentence of five (5) years imprisonment that Hon E.G. Nderitu, SPM, the Learned Trial Magistrate in the case herein had imposed on the appellant therein for conveying *cannabis sativa* with a street value of Kshs 360,000/=.

14. In the case of **William Mwanyumba Mwasaru vs Republic [2017] eKLR**, this court reduced the sentence of four (4) years to twelve (12) months where the applicant therein had been found in possession of *cannabis sativa* that had a street value of Kshs 1,000/=.

15. In the case of **Juma Issa Mohammed vs Republic [2017] eKLR**, this court reduced the penalty of Kshs 1,000,000/= and life imprisonment where the appellant therein had been found in possession of *cannabis sativa* with a street value of Kshs 160,000/= to four (4) years imprisonment.

16. In the case of **Jackson Rangasi vs Republic [2017] eKLR**, this court reduced the sentence of five (5) years to twelve (12) months where the appellant therein had been found in possession with *cannabis sativa* with a street value of Kshs 2,000/=.

17. In the case of **Beatrice Maganga vs Republic [2016] eKLR**, this court upheld a fine of Kshs 100,000/= or default sentence of two (2) years where the applicant therein had been found with *cannabis sativa* with a street value of Kshs 5,500/=.

18. Whereas the Narcotics and Psychotropic Substances Control Act prescribes different penalties under different sections therein, it was the considered view of this court that an objective assessment of the fine to be imposed in any particular case would benefit from considering the street value of the narcotic and psychotropic substances that a person has been charged with so as to avoid having great disparities in the penalties that are to be meted out to offenders who have been convicted with similar offences. Indeed, the Sentencing Policy offers a guideline to avoid wide disparities.

19. In the circumstances foregoing, having considered the value of the *cannabis sativa* the Applicant herein was trafficking at the material time against the backdrop of cases this court had dealt with on, it was its considered view that a fine of Kshs 200,000/= or in default a sentence of two and a half (2½) years would be a reasonable penalty.

20. Indeed, a fine ought not to be what an applicant can afford. Rather it is expected to punish an offender so that he or she does not re-offend.

DISPOSITION

21. Accordingly, considering the value of the *cannabis sativa* the Applicant herein was found to have been trafficking, this court hereby allows the Applicant's application of Revision dated 10th January 2018 and filed on 12th January 2018 by setting aside the fine of Kshs 300,000/= or in default imprisonment of four (4) years and replacing the same with a fine of Kshs 200,000/= or in default to serve two and a half (2½) years' imprisonment.

22. It is so ordered.

DATED and DELIVERED at VOI this 6th day of March 2018

J. KAMAU

JUDGE

In the presence of:-

Linet Wekota Malenya - Applicant

Miss Anyumba - for State

Susan Sarikoki- Court Clerk