REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

HCCRA No.56 OF 2017

BETWEEN:

JOHN ONYANGO ONGWEK.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Hon. E. Nderitu SPM at SPM's

Court Voi. CR. Case No.931 of 2016 delivered on 23rd November 2016)

J U D G M E N T

Background

1. The Court has before it an Appeal from John Onyango Ongwek ("the Appellant"). The Appellant was convicted of 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***.

2. The Appellant was arrested at his home. The Prosecution's case was that Corporal Otuoma, Corporal Ochieng, PC Juma and PC Mkuta attended the home of the Appellant following a report by the Community Policing Officer. The home was searched and the officers discovered a white gunny bag containing four "big stones" of cannabis sativa and fourteen small rolls or stones and a quarter kilo of fine roasted cannabis. They were produced as Prosecution Exhibit 1-4. The Appellant was arraigned before the Court on 17th November 2016. On that day the Charge was read to him in a language that he understands. He was asked whether he admits or denies the Charge and he responded that it was true. He was remanded in custody and the following day the facts were placed before the Court. The Accused is recorded as stating that the facts were correct. As a consequence he was convicted on his own pleas of guilty and subsequently sentenced on 23rd November 2016 to four (4) years imprisonment.

3. The Accused filed a Petition of Appeal. He also filed on 27th July 2017 an application Under ***Section 349*** of the ***Criminal Procedure Code*** for leave to file his petition out of time. That leave was granted by Hon J Kamau J. The Learned Judge also admitted the appeal for hearing before a single judge. The Parties filed their Written Submissions, the Appellant on 22nd November 2017 and the Respondent on 2nd January 2018.

4. The Appellant is appealing against both conviction and sentence. The facts were provided to him the next day and he said they were correct. He did not challenge any of the facts put to him. He complains that the Prosecution was not required thereafter to prove the particulars of the offence. The Appellant is recorded as pleading guilty to both the offence and the particulars or facts. He does not say that he did not understand what he was pleading to. Nor does he say that he did not realise that he had the option to challenge any of the facts. In the face of his admission, the Prosecution was not required to prove its case. That was the logical consequence of the guilty plea and therefore cannot be grounds for appeal and is dismissed.

5. The Appellant is also appealing against the sentence on the grounds that his children, who are of school age are dependant on him and he seeks forgiveness. The Appellant was sentenced to serve 4 years imprisonment. That sentence was imposed after the Learned Trial Magistrate had the benefit of a pre-sentence probation report. The salient parts of the Report set out that the Appellant is not the primary caregiver for his children because they live in a different county with relatives.

6. In assessing whether the Appellant's sentence is excessive, the Court must have considered his antecedents. The Applicant is a repeat

offender. At the time he was arrested and charged he was in the process of serving a non-custodial sentence of 3 years on probation for possession of narcotic drugs. His re-offending came only eight months later. Prior to that he was convicted and incarcerated for 15 months at Taveta GK Prison and also 1 year at Voi GK prison.

7. In the Submissions for the State, it is argued that the appropriate sentence is half the current sentence, in other words 2 years would be appropriate. The rationale for that is to compare the sentence with others. That argument does not address the issue of repeat offending. Nor does it address repetition so soon after the last sentence. Nor does it address the seriousness of the offence. The Appellant admitted to possession of a narcotic substance, that prevented an inquiry into whether it was for supply or personal use. In fact he was charged with trafficking. The trial Court was therefore entitled to take into account the insidious nature of that offence and its effect on society.

8. Should this Court interfere with that sentence? An appeal court should only interfere with a sentence where:

1. The sentence was imposed against legal principle;

2. Relevant factors were not considered;

3. Irrelevant factors were considered

4. The sentence is manifestly excessive in the circumstances of the case.

A Court should not interfere with a sentence simply for the reason that it may have imposed a different sentence (***Kennedy Indiema Omuse v R***).

9. The Appellant has not argued any of the grounds listed above. The Submissions for the State confirm that the sentence is well within the tariff for that offence. The Court takes cognisance of the fact that the Appellant has already completed 19 months of that sentence. The period remaining after 1/3 remission is 23 months.

10. In the circumstances, the Appellant has failed to present to this Court arguable grounds on which it should interefere with the conviction and/or the sentence. As a consequence, the Appeal is dismissed.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED ON THIS the 17th day of July 2018.

In The Presence of :

Court Assistant: Josephat Mavu

Appellant: [In Person]

Respondent: [Ms Anyumba]