



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: MAJANJA J.

CRIMINAL APPEAL NO. 78 OF 2018

GRACE ANYANGO OYANDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. C.R.T Ateya – RM

dated 28th December 2016 at the Principal Magistrate’s Court

at Ogembo in Criminal Case No. 363 of 2016)

JUDGMENT

1. The appellant, GRACE ANYANGO ONYANDO was charged and convicted of the offence of being in possession of narcotic drugs contrary to section 3(1) as read with section 3(2)(a) of the Narcotic Drugs and Psychotropic Substances Control Act, 2012 (‘the Act’). The particulars are that on 8th March 2016 at Misesi Sub-location in Gucha Sub-County within Kisii County, she was found in possession of Narcotic drugs (bhang) to wit 331 rolls of street value of Kshs. 100,000/= in contravention of the said Act. She was sentenced to serve twenty (20) years imprisonment.

2. At the hearing of the appeal the appellant prayed that the court do consider the sentence of imprisonment as it was harsh and excessive. Counsel for the respondent does not object to reduction of the sentence or reconsideration thereof.

3. I have considered the sentence, I find it unduly harsh. The trial court did not take into account that the appellant was a first offender and that the probation report showed that she did not have any criminal antecedents and in fact recommended a suspended sentence. All these factors were not brought into consideration by the trial magistrate who only emphasized that the amount of bhang was large and not for personal use.

4. I also wish to draw attention to the provisions of **Section 3** of the **Act** which provides that a person guilty of the offence of possession of narcotic substances, “shall be liable to a term of imprisonment of 20 years.” The trial magistrate appears to have been under the impression that the sentence was a mandatory sentence. The use of the word, “liable to” imports discretion so that the 20 years’ imprisonment is the maximum sentence. In *Opoya v Uganda* [1967] EA 752,754, the East Africa Court of Appeal expressed the view that:

It seems to us beyond argument the words “shall be liable to” do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it.

5. Consequently, the trial magistrate imposed the maximum sentence on a person the prosecution admitted was a first offender. I note what was stated in *Josephine Arissol v R* [1957] EA 447 that, “The general rule is that a maximum sentence should not be imposed on a first offender”.

6. I allow the appeal and reduce the sentence to three (3) years imprisonment from the date of conviction.

Dated and delivered at Kisii this 12th day of October, 2018.

D.S MAJANJA

JUDGE

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.

Appellant in person.