

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.39 OF 2018

(An Appeal arising out of the conviction and sentence of Hon. H.M. Nyaga - CM delivered on 31st August 2017 in Makadara CMC. CR. Case No.450 of 2016)

HASSAN ADHAN AINASHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Hassan Adhan Ainasha was charged with another with the offence of **trafficking in narcotic drugs** contrary to **Section 4(a) of Narcotic and Psychotropic Substances Control Act**. The particulars of the offence were that on 8th February 2016 at Eastleigh in Nairobi County, the Appellant was unlawfully found in trafficking in narcotic drugs namely cannabis sativa (bhang) to wit 70 stones with a street value of Kshs.70,000/- by transporting the same in contravention of the said **Act**. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged and sentenced to serve five (5) years imprisonment. He was fined Kshs.1,000,000/- in addition to the custodial sentence or in default he was to serve one (1) year imprisonment. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.

During the hearing of the appeal, the Appellant abandoned his appeal on sentence and instead pleaded with the court to review his sentence. He told the court that he was in the remand custody for a period of one and half (1^{1/2}) years before he was convicted. He was convicted with his wife. His young children were left without parental care. He told the court that he had reformed and regrets the offence that he had committed. He pleaded with the court to exercise leniency on him taking into consideration that he was a first offender. Ms. Atina for the State submitted that the sentence imposed on the Appellant was legal. However, she was of the view that the court should give the Appellant a second opportunity at life. She was not averse to the court relooking the custodial sentence of the Appellant.

When the trial magistrate sentenced the Applicant to serve the custodial sentence, it was exercising judicial discretion. This court can only interfere with such exercise of discretion if it is established, either that the sentence was too harsh or too lenient in the circumstances. The court will also interfere with the imposition of the custodial sentence if it is established that the trial magistrate applied the wrong principles of the law in sentencing the Applicant or that the sentence was illegal. In the present appeal, it was clear to this court that the trial court sentenced the Applicant to serve a legal custodial sentence. However, taking into consideration the entire circumstances of this case, and the fact that the Appellant has been in lawful custody for a period of two and a half (2^{1/2}) years, this court is of the view that the custodial sentence that was imposed on the Appellant was harsh in the circumstances. The Appellant is a first offender. He is remorseful and appears to have learnt his lesson during the period of his incarceration.

In the premises therefore, this court will favourably consider the Appellant's plea for review of sentence. Before this court can determine what sentence to impose on the Appellant, it will require a probation report to be prepared. In the circumstances therefore, a probation report shall be prepared and the same presented to court on 11th October 2018. It is so ordered.

DATED AT NAIROBI THIS 9TH DAY OF OCTOBER 2018

L. KIMARU

JUDGE