REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 2 OF 2016

GASTON JANUARY STEPHEN.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(An appeal on a sentence from the original conviction and sentence in Criminal Case No. 833 of 2014 in the Chief Magistrate's Court at Kajiado before Hon. M.A. Ochieng (SRM)

JUDGEMENT

The appellant GASTON JANUARY STEPHEN was charged with trafficking in narcotic drugs contrary to section 4 (A) of the Narcotic Drugs and Psychotrophic Substance Control Act No. 4 of 1994. The particulars of the offence alleged that the appellant on the 8th day of June 2014 at Imbirikani area road block along Loitokitok Emali tarmac road in Kajiado South District within Kajiado County he was found trafficking in narcotic drugs (cannabis sativa) to wit six (6) stones with a street value of Ksh.3000 in contravention of the said Act.

The appellant pleaded guilty to the charge and particulars as set out by the prosecution. He was sentenced to serve life imprisonment and in addition to pay a fine of one million (1,000,000) in default of payment to serve one (1) year imprisonment. The sentences are to run concurrently as per order of the trial court. Being dissatisfied with the order on sentence the appellant filed an appeal before this court challenging the decision of the learned trial magistrate.

In the grounds of appeal together with amended supplementary grounds the appellant contends as follows:

(1) That the sentence imposed is manifestly excessive more so in view of the circumstances of the case.

(2) That, although the trial magistrate convicted the appellant on his own plea of guilty the trial magistrate nonetheless lost sight of the fact that his sentiments that the said cannabis was solely for his own consumption.

(3) That this honourable court do consider the request for reduction of the sentence as prayed in this appeal.

SUBMISSIONS BY THE APPELLANT:

In his brief written submissions the appellant submitted that the six (6) stones of cannabis sativa were not meant for sale but for his own personal consumption. The appellant further submitted that his admission

of facts was under the presumption that the sentence to be imposed will be commensurable with the items found in his possession. He further argued that during sentencing hearings the trial magistrate never warned him of the consequences of entering a plea of guilty of the charge. The appellant relied on the decision of the Court of Appeal in the case of ***Adan v Republic [1973] EA***. The proposition that the appellant should be made to understand the consequences of a plea of guilty. He further relied on the case of ***Ngige v Republic [1987] KLR 98*** on the proposition that the accused should be required to admit or deny every element of the charge unequivocally. In addition to the above authorities the appellant also cited the case of ***Njuki v Republic [1990] KLR 334, Olel v Republic [1989] KLR 444*** and ***Mangwera v Republic [1952] 18 EACA 150***. The appellant further contended that he was unlawfully detained in police custody from 8/6/2014 to the 12/6/2014 when he appeared before the court at Kajiado for the charge to be read following his indictment. The appellant submits that such detention in police custody was in contravention of Article 49 (1) (f) of the Constitution. He urged this court to consider the submissions and allow the appeal more specifically an order of sentence to be in conformity with section 3 (1) and (2) of the Narcotic Drug and Psychotropic Substance Act of 1994.

Mr. Akula the Senior Prosecution Counsel submitted and opposed to the appeal. The learned senior prosecution counsel urged this court to take notice that the appellant is not necessary challenging the conviction of the offence of trafficking but the sentence imposed by the trial court. Mr. Akula contended that the case against the appellant involved trafficking of drugs. In his view the trial magistrate applied the law given the circumstances of the case appellant was facing. According to Mr. Akula the appeal by the appellant on sentence being excessive and harsh lacks merit and this court has no basis to entertain it.

I have considered the rival submissions by the appellant and that of the senior prosecution counsel as well as reading the record by the trial court. The duty of the first appellate court is well spelt out in the case of ***Odhiambo v Republic Cr. Appeal No. 280 of 2004 [2005] KLR*** as follows:

> **"That the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. The court has a duty to ensure that it subject the entire evidence tendered before the trial court to a close and fresh scrutiny and reassess it and reach its own determination based on the evidence."**

It is pertinent to note that in this appeal the appellant in the course of the matter set for trial he pleaded guilty to the charge against him. The appellant in his submissions touched on the issue of the plea not being unequivocal. To this extent on the facts, memorandum of appeal in order to decide appellant's appeal. Formal I see the following points for determination formulated as critical:

> **(1) Whether the appellant's plea of guilty was unequivocal.**
>
> **(2) Whether the trial court proceeded on the assumption that for determining the quantum of sentence under section 4 (b) of the Narcotic Drugs and Psychotropic Substances Act is convicted in mandatory terms.**
>
> **(3) Whether the quantum of sentence imposed against the appellant under section 4 (a) of Narcotic & Strophic Act was commensurate to the quantity found in possession of the appellant.**

It is now my duty to appraise and evaluate the record in answer to the issues to settle this appeal.

Issue No. 1 – On plea taking and whether the plea by the appellant was unequivocal.

The trial court read and explained the charge of trafficking in narcotic drugs contrary to section 4 (a) on 3/11/2014. From the record the proceedings capture the following:

> "Charge read and explained to the accused in Kiswahili and he states: it is true.
>
> COURT: Plea of guilty entered.

MWENDA: Read facts that on 8/6/2014 Corporal Kitonyi and APC Toita were at Imbirikani road block barrier. They stopped a matatu. Inside the accused was found carrying a bag. In checking they found the bag had six (6) stones of bhang. He was arrested and charged in court on 12/6/2014. On 20/8/2014 a report of samples taken to the government chemist showed the six stones were bhang. The six stones of bhang are in court. I produce the 6 stones of bhang as prosecution exhibit 1 and the report as exhibit 2.

ACCUSED: I admit the facts.

Court convicted on admission.

MITIGATION BY ACCUSED

I am sorry the bhang was mine. I pray the sentence be reduced. My family resides in Kimana. They do not know where I am. I am a Tanzanian. I was raised in Kenya.

COURT: I call the pre-sentence report from the probation officer before sentencing."

THE LAW:

Section 348 of the Criminal Procedure Code Cap 75 of the Laws of Kenya provides as follows:

> **"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."**

The procedure on plea taking is well laid down in the celebrated case of ***Adan v Republic [1973] 445*** where the Court of Appeal held as follows:

> **"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and when the statement is complete should give the accused an opportunity to dispute or explain the facts. If the accused does not agree with the statement of facts or asserts additional facts which if true right raise a question as to his guilt, the magistrate should record a change of plea to not guilty and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must of course be recorded."**

I have considered the lower court record and it is clear that the charge was read and explained to the appellant by the trial magistrate. In my evaluation there was compliance with the procedure and principles in the case of ***Adan v Republic (Supra)***. The main point taken up by the appellant was that his admission of the facts was influenced by a believe that the sentence to be imposed will be commensurate to the quantity of the bhang recovered.

In the circumstances of this case I am of the conceded view the plea of guilty recorded by the learned trial magistrate was satisfactory. It is clear that upon the appellant admitting the facts samples were taken to the government analyst for analysis and confirmation. The government analyst report formed the integral part of the ingredients of the offence in identifying the type narcotic and psychotropic substance found with the appellant. In producing the report the prosecution was in compliance with section 77 of the Evidence Act Cap 80 of the Laws of Kenya.

I am therefore unable to hold that the plea taken by the appellant was not unequivocal. That therefore rests that ground of appeal.

Issue No. 2 and 3 consolidated:

The appellant was charged with the offence under section 4 (a) of the Narcotic Drugs and Psychotropic Substances Act (Supra) which provides as follows:

> **"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, which is ever is the greater, and in addition to imprisonment for life."**

This is the section the appellant contested under section 4 (a) the offence of trafficking involves, ***"importation, exportation, manufacture, buying, giving, supplying, conveyance, delivery or distribution by any person….. of a narcotic drug or substance represented or held out by such person to be a narcotic durg or substance….."***

It is clear from the facts read by the prosecution that the appellant was travelling in a public service vehicle which the police on patrol stopped and conducted a search. The passengers were searched together with their personal belongings. The appellant in this case was in possession of a bag positively identified and admitted as belonging to him at the time of his arrest. The recovery of the six stones suspected to be bhang (cannabis) was recovered from the bag belonging to the appellant. The appellant in this case was not in his fixed abode or residence. It is not disputed that the appellant is a Tanzanian national arrested within Kenya. The consignment of six stones in my view was meant to be conveyed and delivered to some known person or markets only known to the appellant. The defence by the appellant that he was in possession of cannabis solely intended for his own consumption is neither here nor there. I reach that conclusion because the cannabis the appellant was arrested with had not undergone the processes necessary to adopt it for medicinal use. See section 2 of the Act).

The provisions of section 4 have set out the nature of punishment to be imposed by our courts on conviction of the offence of trafficking. The reading of section 4 (a) reproduced above reveals that an accused person convicted of an offence for purposes of sentencing is liable to a fine of one million shillings (1,000,000) or three times the market value of the narcotic drugs or psychotropic substance and in addition to imprisonment of life. The trial court therefore under section 4 (a) must satisfy itself as to the quantity of the recovered narcotic or psychotropic substance as a factor in imposing sentence against an offender.

It is against this background I must restate the law on the laid down principles upon which an appellate court has to interfere or not with sentence of a trial court. These has been considered and deliberated in a number of decided cases some of which I do hereby cite for guidance:

In the case of ***Macharia v Republic [2003] EA 559*** the Court of Appeal held that, ***"an appellate court will not review or alter a sentence imposed by the trial court on the mere ground that of the appellate court had been trying the appellant it would have passed a somewhat different sentence, and will not ordinarily interfere with the discretion of a trial judge unless the judge acted on some wrong principle or overlooked some material factors or issued a sentence that was manifestly excessive."***

In a persuasive authority from Uganda in the case ***of Livingstone Kakooza v Uganda SC Criminal Appeal No. 17 of 1993*** the court held thus:

> **"An appellate court will only alter sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor or f the sentence is manifestly**

excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration. See Ogalo S/O Owuora v Republic [1954] 21 EACA 270."

The manner in which courts should go about interpreting section 4 (a) of the Narcotic and Psychotropic Act was succinctly buttressed by the Court of Appeal in the case of ***Carolina Auma v Republic [2014] eKLR***. The court giving due consideration to the holding in an earlier decided case of ***Kingsley Chaikwu v Republic Cr. Appeal No. 259 of 2006*** held interalia that section 4 (a) of the Act does not provide mandatory sentence and stated as follows:

"The use of the word liable on section 4 (a) of the Narcotic Drugs and Psychotropic Substances Control Act merely gives a likely maximum sentences thereby allowing a measure of discretion to the trial court. In imposing sentence with the maximum limit being indicated it should be noted that sentencing is an exercise of judicial discretion, and therefore provisions which provide for mandatory sentence comprise this discretion, and are the exception rather than the rule……this where applicable a mandatory sentence must be expressed in clear and ambiguous terms.

In the case of section 4 (a) of the Narcotics Act the provision does not contain such clear and ambiguous language with regard to the mandatory sentence. In our view this leaves room for judicial discretion and we would be reluctant to adopt an interpretation that would defeat or muzzle the exercise of such judicial discretion."

What can be deduced from this decision of the Court of Appeal the operative word under section 4 (a) is liable which gives the sentencing court a measure of judicial discretion in imposing punishment. The life sentence and in addition a fine of Ksh.1,000,000 is not mandatory. In this appeal the learned trial magistrate proceeded under section 4 (a) as if the provisions are couched in a mandatory language *"shall"*.

From the record the accused pleaded guilty to the charge. He therefore saved the court precious judicial time to spend resources in a long protracted trial. The prosecution counsel submitted that the appellant had no previous convictions or record associated with the current indictment. It is crystal clear that in mitigation the appellant pleaded for leniency anchoring his argument that the bhang was for his own consumption. I consider this to be away he wanted the court to impose lenient terms. I also take notice that the street value of the bhang found with the appellant was Ksh.3,000 as particularized in the charge sheet. In scrutinizing the application the learned trial magistrate did not take into account that factor of value of the drug and substance recovered from the appellant. It would be absurd under the sentencing police guidance and principles of proportionality to sentence an offender to life imprisonment and in addition to pay a fine of Ksh.1,000,000 for a drug valued at Ksh.3,000. There were no other exceptional circumstances availed to the trial court that influenced the imposition of a harsh and excessive sentence. It is appropriate to reiterate that trial courts in exercising discretion should at all times ought to factor the sentencing guidelines policy, principles and commentaries developed overtime court decisions. I have in mind the proposition in the following cases of ***Republic v Jayani & Another KLR [2001] KLR 593*** the court had this to say:

"The purpose of sentence is usually to disapprove or denounce unlawful conduct as a deterrent to deter the offender from committing the offence to separate offenders from society if necessary to assist in rehabilitation of offenders, and in rehabilitation by providing for reparation for harm done to victims in particular to and to society in general. This is also seen as promoting a source of responsibility in offenders."

And also in the case of **Yussuf Dahar Arog v Republic High Court Criminal Appeal No. 110 of 2006 Ojwang J** as he then was observed interalia on the principles of sentencing:

"Such is of course, a maximum sentence and within that constraint the court has a wide discretion which it exercises on judicial principles. Such principles would I believe take into

account the ordinary span of life of a human being, the general circumstances surrounding the commission of the offence, the possibility that the culprit may reform and become law abiding; the goals of peace and mutual tolerance and accommodation among people. Those who are injured and those who have occasioned injury."

It is trite that the appellant court will not normally interfere with the discretion of the trial court unless the following circumstances exist as elucidated by the Court of Appeal. In the case of ***Benard Kimani Gacheru v Republic [2002] eKLR***:

"Sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case on appeal, the appellate court will not easily interfere with the sentence unless: that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material' or acted on a wrong principle."

What therefore do I find is the position with the sentence imposed by the trial court. The learned trial magistrate acted on wrong principles by proceeding to interpret section 4 (a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 is couched in mandatory terms on sentence.

Secondly, on the issue of the charge and arrest of the accused it is a requirement of the law under section 74 (a) of the Narcotic Drugs and Psychotropic Substances Act the police ought to have weighed the cannabis in the presence of the accused. Sometimes the interpretation of section 74 (a) appears to be couched in a mandatory terms. In order to give section 74 (a) a purposeful interpretation the Court of Appeal in the case of ***Moses Banda Daniel v Republic [2016] eKLR*** where it was stated as follows:

"After the seizure, an expert opinion must be obtained to ascertain the nature and the weight of the drugs. This is to be done where practicable, in the presence of the accused person, his advocate, if any, an analyst, if any appointed by the accused person and the designated analyst.

The use in the section of phrases like where practicable and if any convey the meaning that the procedure is not mandatory but directory and the use of the word "*shall*"must be so interpreted. A procedural provision would be regarded as not being mandatory if no prejudice is likely to be caused to the other party or if there is substantial compliance with the procedure."

As regards compliance with section 74(a) of the Act, the police stopped a public service vehicle travelling along Loitokitok Emali Highway. It is clear from the charge sheet that pursuant to the search conducted the appellant was found with 6 stones of what the police suspected to be cannabis sativa. The distance from where the appellant was arrested to the next government analyst office is over two hundred and fifty kilometers (250kms). It was not practicable that the appellant was capable of having the presence of an advocate or an expert to participate during the weighing or analysis. The officers who seized the cannabis sativa took samples for analysis to the government chemist whose report was admitted in evidence. The analyst confirmed that the six stones seized from the appellant was cannabis sativa. The procedural omission not to have the process of analysis and weighing done in the presence of the appellant did not therefore cause any prejudice or injustice to warrant this court to interfere with the trial court decision. The charge sheet indicated the nature of the drug seized. The proximate street value of Ksh.3,000 and the person to whom the police found conveying the drug. I am therefore more that satisfied that the appellant plea taken before the trial magistrate was unequivocal and no procedural deficiency occurred under section 74 (a) to warrant this court set aside the conviction. That therefore rests this legal issue in this appeal.

I have further alluded to the circumstances surrounding the offence, the weight and street value of the six stones stated to be Ksh.3,000. The principles in the case law cited together with the jurisdiction conferred upon this court under section 361(2) of the Criminal Procedure Code do hereby interfere with the decision on sentence by the learned trial magistrate as follows:

It will be an absurdity of law and the principles of sentencing in our criminal justice system to sentence an offender to life imprisonment in addition to a fine of Ksh.1,000,000 for trafficking in cannabis sativa under Narcotic and Psychotropic Substances Act with a street value of Ksh.3,000. The appeal on sentence by the appellant has merit and guided by the law and legal principles elucidated herein above do interfere with sentence by the trial magistrate court in the following terms: that the sentence of life imprisonment and in addition to a fine of Ksh. One million (1,000,000) is hereby set aside as being a misdirection of the law and also of being harsh and excessive in the circumstances of this offence.

In the result this appeal on sentence is allowed to the extent that the earlier order on sentence by the learned trial magistrate is varied and substituted with a two (2) years term of imprisonment to run from the date of conviction of the appellant.

It is so ordered.

Dated, delivered and signed in open court at Kajiado on 21st day of February, 2017

……..

R. NYAKUNDI

JUDGE

Representation:

Appellant present in person

Mr. Akula Senior Prosecution Counsel - present

Mr. Mutisya Court Assistant - present