



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CRIMINAL APPEAL NO. 76 OF 2014

(Being appeal from original Conviction and Sentence in the Chief Magistrate's Court at Naivasha Criminal Case No. 3156 of 2011 by P. N. Gesora - SPM)

EMMANUEL OYAMO ADEYA.....APPELLANT

-VERSUS-

**REPUBLIC.....
RESPONDENT**

J U D G M E N T

1. The Appellant was charged with two counts. The first count is Trafficking in cannabis sativa (sic) Contrary to Section 4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act. In that “on the 25th day of October 2011 along Nakuru-Nairobi Highway in Nakuru County, he was found trafficking 116 stones of cannabis sativa with a street value of Kshs. 23,200/= using a motor vehicle registration number KAR 965F which was not in medical preparation form.” (sic)
2. The second count was Failing to stop Contrary to Section 52 (1) c) of the Traffic Act. The particulars state that on the 25th day of October 2011 at about 3.30pm along Gilgil - Nakuru road in Gilgil municipality of Nakuru County, being the driver of motor vehicle registration number KAR 965F Toyota Saloon he did drive the said vehicle along the said road, and failed to stop on being so required by a police officer in uniform.
3. The Appellant denied the charges. After a full hearing the court found both charges proven. The Appellant was convicted and sentenced. His original memorandum of appeal to this court lists 12 grounds, all targeting the evidence which formed the basis of his conviction. On the day his appeal was set for hearing, the Appellant abandoned these grounds and instead raised a five-point plea supported by written submissions, urging for his jail sentence to be reviewed and converted into a non-custodial one, and further in the alternative that the court directs that the sentences imposed do run concurrently.
4. The Director of Public Prosecutions through Mr. Kibelion argued that the sentence meted out was legal under Section 4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, albeit there was an anomaly due to the failure of the trial court to connect the sentence with either of the two counts. He therefore invited the court to invoke the provisions of Section 354 (3) a) iii) of the Criminal Procedure Code and proceed to rectify the anomaly.
5. It is evident from the judgment of the trial court delivered on 26/11/2014 that the Appellant was convicted on the two counts facing him. However in sentencing the Appellant the court did not

expressly indicate the specific sentence that applied to either count. This is what the court stated:-

“I accordingly order that convict pays fine of Kshs 1,000,000/- (One million) in default serve twelve months imprisonment and in addition to serve 3 years imprisonment.”

6. Reading the court’s notes on sentence it does appear that the court had in mind only the first count as it observed;

“This is by all means a serious offence. Drug menace in this country and globally cannot be over emphasised.”

7. It would seem therefore that the sentence meted out was in respect to the first count.”Broadly speaking the sentence in question is, *prima facie*, a legal sentence. What I understand the Appellant to be adverting to in his new grounds and submissions is that the said sentence is excessive, based on his personal circumstances.

8. In **Carolyne Auma Majabu –Vs- Republic [2014] eKLR** the Court of Appeal considered the “mandatory nature” of sentences prescribed in the Narcotic Drugs and Psychotropic Substances (Control) Act and stated:-

“[12] Section 4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, set out the penalty for trafficking in the following terms...

...Any person who trafficks in any 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..., and in addition, to imprisonment for life”**

[13] In our view the word “shall” is used in relation to the guilty offender and the word used in relation to the sentence is “liable”. The Concise English Dictionary 12th Edition defines the word “liable as:

- i. Responsible by law, legally answerable, (liable to) Subject by law to;**
- ii. (Liable to do something) likely to do something**
- iii. (Liable to) likely to experience (something undesirable) Black’s law Dictionary defines “liable” as Responsible or answerable in law; legally obligated, Subject to or likely to incur (a fine, penalty etc.)**

[14] Applying the above definition, the use of word “liable” in section 4 (a) of Narcotic Drugs and Psychotropic Substance Control Act merely gives a likely maximum sentence 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 compromise such, discretion, and are the exception rather than the rule. Thus, where applicable the mandatory sentence must be expressed in clear and unambiguous terms....”

9. The Court of Appeal has restated in other subsequent decisions that under the Narcotic Drugs and Psychotropic Substances (Control) Act, the matter of sentence is still in the discretion of the court. In one such decision **Kabibi Kalume Katsui –Vs- Republic [2015] eKLR** the court observed:

“This court followed same reasoning in Mombasa Criminal Appeal No. 59 of 2104 (U.R.). Our attention has not been drawn to any contrary view or opinion. In the

premises, we shall state without tiring, that under the Narcotic Drugs and Psychotropic Substances (Control) Act, sentence is still discretionary. We are of course in no way suggesting that under this Act this Court or the High Court has an automatic duty to interfere with the exercise of discretion as sentencing is discretionary. That an intervention on discretion is only justified when it is wrongly exercised such as when the court takes in irrelevant facts or leaves out relevant ones and it is automatic when the wrong sentence is imposed which is legally erroneous. See *Wanjema –Vs- Republic* [1971] EA 493 and *Diego –Vs- Republic* [1985] KLR 621. The trial Court and High Court meted out a life imprisonment inclusive of a one million fine, on the premise that such sentence was mandatory hence they misdirected themselves. That misdirection calls for our intervention. In arriving at the appropriate sentence that we should substitute we are bound to consider the quantity of the drugs, its value, the mitigation canvassed by the appellant and her antecedents if at all relating to the same offence. It was established that the appellant was found storing 187 sachets of heroin valued at a street-value of Kshs. 187,000.00. The Narcotic Drugs and Psychotropic Substances (Control) Act refers to market-value and not street value. This should not split any hairs as it is fundamentally one and the same thing as both terms refer to a situation of a willing seller-willing buyer even though the thing traded in is illicit. This court differently constituted in the case of *Priscilla Jemutai Kolongei –Vs- Republic* [2005] eKLR ironed out the doubt in the use of these terminologies. It held:-

“We do not find any definition of “market value” in the Act as contended by Mr. Obuo, although those are the words used in relevant section. In common parlance it connotes the price which an item ought reasonably to be expected to fetch on a sale in the open market that is between a willing seller and a willing buyer. When the market is legal, formal, free and aboveboard, no questions would of course arise. It is however a matter of notoriety, and we take judicial notice of it, that prohibited or illegal transactions would normally be carried out in the “black market” or the ‘street market’. There would still be a willing seller and a willing buyer there and it is no less a ‘market’ in that sense. The illegal item would have its ‘market value’ there.”

10. Before meting out the sentence herein, the trial court considered the mitigation address of the Appellant and circumstances of the offence, noting the seriousness of drug offences. The sentence awarded does not in any way suggest that the court was unaware of its discretion on sentence under the Act, or that the trial magistrate misdirected himself.
11. Under Section 4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act the upper limit of the prescribed sentence is one million shillings or three times the market value of the drug, whichever is greater, and in addition imprisonment for life. Apart from the sentence of the Shs. 1 million fine, obviously greater than 3 times the value of the drug, the court set the imprisonment term at only 3 years.
12. The Appellant was trafficking 116 stones of cannabis with a street value of about Shs 23,200/= at the time of arrest. This is by no means a negligible amount. The Appellant was engaged in an illicit business for personal gain.
13. In my own view, the sentence of 3 years imprisonment was deserved. However, the additional punishment of a Shs. 1 million fine with a default sentence was probably excessive in circumstances of this case where the drug street value is about Shs 23,000/=. I do therefore set aside the sentence of Shs 1 million fine with a default sentence of 12 months imprisonment. In the result, this court upholds the sentence of 3 years imprisonment on the first count.
14. Before leaving the matter, let me observe that the statement of offence should have been drafted in accordance with the general offence created under Section 4 (a) of the Act, namely, Trafficking

in a narcotic drug Contrary to Section 4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, rather than Trafficking in cannabis sativa etc. This is a minor matter that did not prejudice the Appellant in any way. The record of the trial indicated that he clearly understood the charges facing him. The statement of offence is adequate for purposes of Section 134 of the Criminal Procedure Code.

15. Clearly the trial court did not impose a sentence in respect of the second count. An offence Contrary to Section 52 (c) of the Traffic Act attracts a fine of Kshs 1,000/= in default 3 months in the first instance. In the circumstances of present case I will impose a prison term of 2 months imprisonment in respect of the second count. The two terms of imprisonment in respect of the 1st and 2nd counts will run concurrently from the date of sentence. The appeal succeeds to that effect.

Delivered and signed at Naivasha, this 15th day of **October, 2015.**

In the presence of:-

State Counsel : Mr. Kibelion

For the Appellant : N/A

C/C : Steven

Appellant : Present

C. MEOLI

JUDGE