



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 124 OF 2015

BETWEEN

SAMSON AMBANI INGATA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

CORAM: HON.LADY JUSTICE RUTH N. SITATI

(Being an appeal against sentence of a fine of Kenya shillings one million

in addition to a term of life imprisonment by Hon. James Ong'ondo

in Kakamega Criminal Case No. 3194 of 2015)

JUDGMENT

INTRODUCTION

1. The appellant was the first of five accused persons who were charged with two counts under the Narcotic and Psychotropic Substances Act No. 4 of 1994. In Count 1, they were charged with trafficking in narcotics contrary to Section 4(a) of the said Act, the particulars being that on the 20th day of October 2015, at Shikhambi area of Shieywe location in Kakamega Central District within Kakamega County trafficked by selling narcotic rolls with a street value of Kshs.640.00 in contravention of the said Act.

2. In the alternative to count 1, the appellant and his co-accused were charged with being in possession of narcotic drugs contrary to Section 3(1) and 3(2) of the Act, the particulars thereof being that on the 20th day of October 2015, at Shikhambi area, in Shieywe location of Kakamega Central District, within Kakamega County, was found in possession of narcotic drug namely cannabis, to wit 32 rolls with a street value of Kshs.640.00 in contravention of the said Act.

3. In count 11, the appellant and his co-accused were charged with being in a place to which persons resort for the purpose of smoking, inhaling sniffing, or otherwise using narcotic drugs or psychotropic substances contrary to Section 5(1) (b) of the Act. The particulars are that on the 20th day of October 2015 at Shikhambi area in Shieywe location of Kakamega Central District within Kakamega County, were unlawfully and without excuse found in a place to which persons resort for the purpose of smoking, inhaling, sniffing or otherwise using any narcotic drugs or psychotropic substance in contravention of the said Act.

4. The appellant pleaded guilty to both counts and convicted accordingly.

In count 1, he was sentenced to pay a fine of Kshs.1,000,000(Kenya shillings one million) in addition to serve imprisonment for life.

In count 11, he was fined Kshs.10,000.00(Kenya shillings ten thousand) in default to serve 3 months imprisonment. The sentences were to run concurrently.

THE APPEAL

5. The appellant was aggrieved by the sentence and he thus filed this appeal. The appellant in his home made petition of appeal contends that he was coerced into pleading guilty, that he was confused and out of his mind on the day of the plea; he was not given time to prepare for his defence and that the sentence was harsh and excessive in the circumstances, considering the fact that he was first offender.

6. During the hearing of the appeal, the appellant pleaded for a review of his sentence. He did not contest the conviction. As this is a first appeal, it is the duty of this court to consider whether it can, in the circumstances of this case, interfere with the sentence which is always a matter of discretion on the part of a trial court. It is trite that an appellate court may interfere with sentence imposed by a trial court only if the sentence is illegal or is too harsh or too low in the circumstances and not on any other ground.

THE FACTS

7. The facts to which the appellant pleaded guilty are as follows:-

On 20th October 2015 at about 5.00 p.m. officers from the Anti-Narcotics Department Kakamega Security intelligence went to Shieywe location and ambushed the appellant and his co-accused who were suspected of peddling bhang as well as smoking or sniffing the same. The appellant herein was the caretaker of a house in which the suspects were caught and in which 32 rolls of bhang were recovered. Some other items used for rolling bhang were found. The rolls of bhang and other items recovered from the suspect were produced in court as P exhibits 2(a) and 2(b). The smoking pipe was also produced in court. The appellant was arrested and charged.

8. The appellant's co-accused pleaded not guilty and went through a full trial. At the close of the hearing, they were all found guilty, convicted and sentenced to a fine of Kshs.2000.00 in default 2 months imprisonment.

ISSUES AND SUBMISSION

9. Since the appellant is not contesting the conviction, the issue that arises for determination is whether this court in its appellate jurisdiction can interfere with the sentence. The respondent concedes the appeal, contending that the disparity in sentences passed in respect of the same offence as between the appellant and his co-accused is prejudicial to the appellant.

ANALYSIS AND DETERMINATION

10. Upon a careful analysis of the submissions and the grounds of appeal as well as the law, I am of the considered view that this appeal has merit and ought to be allowed. In *Karanja Vs Republic(1985)KLR 348*, the court persuasively held that when a trial court fails to enquire into the capacity of the appellants to pay the fines before imposing them, and where such fines are excessive, then they should be reduced. In *Diego Vs Republic (1985) KLR 621*, the High Court also persuasively held, inter alia, That "an appellate court should not interfere with the discretion by a trial judge as to the sentence except in such cases where it appears that in assessing the sentence, the judge acted on some wrong principle or has imposed a sentence which is manifestly inadequate or manifestly excessive.

11. In the instant case, it is true bhang is classified as a narcotic drug and upon conviction on a charge on the same, the fine is what was imposed by the court. That notwithstanding, the record does not show that the trial court enquired into the appellant's ability to pay the fine considering the appellant's circumstances. Secondly, the appellant's co-accused who were found guilty and convicted after a trial were fined only Kshs.2000.00 in default 2 months imprisonment. Even if the conviction was in respect of count 11 under Section 5(1) (b) of the Act which calls for a sentence of a fine of two hundred and fifty thousand shillings or to imprisonment for a term not exceeding 10 years or to both such fine and imprisonment.

12. My considered view of this matter is that the sentence in this case was excessive in the circumstances. I accordingly allow the appeal set aside the fine of Kshs.1,000,000.00 in default imprisonment for life and thereof I sentence the appellant to the term already served, without the element of a fine.

CONCLUSION

13. In light of the above, the appeal on sentence be and is hereby allowed. The sentence imposed by the learned trial court be and is hereby set aside and in lieu thereof, the appellant is sentenced to the period already served without the additional element of a fine. Unless otherwise lawfully held, the appellant shall be released from prison custody forthwith.

Orders accordingly.

Judgment delivered, dated and signed in open court at Kakamega on this 24th day of May, 2019.

R.N. SITATI

JUDGE

In the presence of

.....Present in person.....for appellant

.....Mr. Juma - presentfor respondent

.....Polycap and Erick.....Court Assistant