REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
(CHERERE-J)
HCCRA E044 OF 2024

BETWEEN
DUKE NYAKOE ABUGA.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(Being an appeal against sentence in Keroka MCCR E192 of 2020 by Hon. C.Ombija on 19th August 2024)

JUDGMENT

1. The Appellant was charged with the offence of being in possession of narcotic drugs, namely cannabis sativa (bhang), contrary to section 3(1) as read with section 3(2) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994. The particulars of the charge were that on 14th December 2020 at Nyabasa South Sub-Location within Kisii County, he was found in possession of 80 big rolls of cannabis sativa with a market value of Kenya Shillings Twelve Thousand (KES. 12,000).

2. Upon conclusion of the trial, Appellant was convicted and was on 19th August 2024 sentenced to serve twenty (20) years' imprisonment.

3. Being dissatisfied with the sentence imposed, the Appellant lodged this appeal and filed written submissions dated 05th February 2026. The Appellant contends that the sentence of 20 years' imprisonment was harsh, excessive and manifestly punitive in the circumstances of the case.

4. He argues that the quantity of cannabis recovered, being 80 big rolls valued at KES. 12,000, did not justify the imposition of the statutory maximum penalty. He further submits that he was a first offender and that the trial court failed to give due consideration to his mitigation. It is his position that the statute provides for a fine as an alternative sentencing option and that the court ought to have considered imposing a fine or a lesser custodial sentence rather than the maximum term. He also urges the Court to take into account his background and personal circumstances, including his claim that he comes from a poor family and did not appreciate the seriousness of the offence.

5. This appeal therefore raises the question whether the sentence imposed was mandatory, whether the trial court properly exercised its discretion, and whether the sentence was proportionate in the circumstances of the offence and the offender.

6. The Appellant was charged under section 3(1) as read with section 3(2) of the Narcotic Drugs and Psychotropic Substances (Control) Act. Section 3(1) provides that "Subject to this Act, no person shall have in his possession any narcotic drug or psychotropic substance."

7. Section 3(2)(a) provides that:

> "**Any person who contravenes subsection (1) shall be guilty of an offence and liable—**
>
> **(a) in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for twenty years; and in every other case to imprisonment for twenty years or to a fine of one million shillings**

or three times the market value of the cannabis, whichever is the greater, or to both such fine and imprisonment."

8. The operative phrase in that provision is "shall be guilty of an offence and liable." The question that arises is whether the words "liable to imprisonment for twenty years" impose a mandatory sentence or merely prescribe the maximum penalty that may be imposed.

9. Section 66(1) of the Interpretation and General Provisions Act provides that where a penalty is prescribed for an offence, that provision shall, unless a contrary intention appears, mean that the offence shall be punishable by a penalty not exceeding the penalty prescribed.

10. Section 26(2) of the Penal Code further provides that "Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other shorter period may be sentenced to any shorter term."

11. The Court of Appeal in **Daniel Kyalo Mwema v Republic [2009] eKLR** adopted the construction in **Opoya v Uganda [1967] EA 752**, where it was held that the words "shall be liable to" do not require the imposition of the stated penalty but merely express the maximum penalty which may be imposed at the discretion of the court.

12. The Court of Appeal was clear that such wording provides a ceiling and not a mandatory minimum.

13. It follows that section 3(2) of the Narcotic Drugs and Psychotropic Substances (Control) Act does not compel a court to impose a sentence of 20 years' imprisonment in every case of possession of cannabis. Rather, it grants the court discretion to impose imprisonment, a fine, or both, provided that the sentence does not exceed the statutory maximum.

14. The sentence imposed in the present case was within the statutory limit and was therefore lawful. However, lawfulness alone does not conclude the inquiry. An appellate court is entitled to interfere with a sentence where it is manifestly excessive, where relevant factors were not considered, or where discretion was not properly exercised.

15. In the present case, the Appellant was found in possession of cannabis valued at KES. 12,000. There was no evidence that he was engaged in trafficking, that he was part of an organized distribution network, or that there were any aggravating circumstances beyond possession itself. The Appellant was a first offender and there is nothing on record to suggest prior criminal conduct. The statute expressly provides for the option of a fine, yet the maximum custodial term was imposed without any indication that alternative sentencing options were meaningfully considered.

16. Maximum sentences are ordinarily reserved for the most aggravated instances of an offence. In the absence of demonstrated aggravating factors, the imposition of the statutory maximum for possession of cannabis valued at KES. 12,000 was, in my considered view, disproportionate to the circumstances of the offence and the offender.

17. The Appellant was arrested on 14th December 2020 and released on bond on 16th December 2020. His bond was cancelled on 19th March 2024, and he remained in custody until his conviction and sentence on 19th August 2024. He has continued to remain in custody to date, having served approximately 23 months in total. In view of the discretionary nature of the penalty, the absence of aggravating circumstances, his status as a first offender, and the substantial period already served, I am satisfied that the interests of justice would be met by reducing the sentence to the period already served.

18. For the avoidance of doubt, this Court has not in any way trivialised the offence or treated it lightly. The offence remains serious and punishable under the law. The reduction of sentence is informed solely by the particular circumstances of this case, the mitigating factors on record, and the period already spent in custody. The Court has carefully balanced the gravity of the offence with the principles of proportionality and fairness in sentencing, and is satisfied that the sentence as varied sufficiently meets the ends of justice.

19. In the result, the sentence of twenty (20) years' imprisonment imposed on 19th August 2024 is hereby set aside and substituted with a sentence equivalent to the period already served. The Appellant shall be released forthwith unless otherwise lawfully held.

DELIVERED AT NYAMIRA THIS 19th DAY OF February 2026

WAMAE.T. W. CHERERE
JUDGE

Appearances

Court Assistant - Anita

Accused - Present in person

For the DPP - Mr. Chirchir (SADPP)