



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Criminal Appeal 479 of 2007

DANIEL KYALO MUEMA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from sentence of the High Court of Kenya at Machakos (Sitati, J.) dated 19th October, 2007

in

H.C.CR.A. NO. 49 OF 2005)

JUDGMENT OF THE COURT

The appellant was convicted on his own plea of guilty by Senior Resident Magistrate, Kangundo for the offence of being in possession of *cannabis sativa* contrary to **Section 3 (1)** as read with **Section 3 (2)** of the *Narcotic Drugs and Psychotropic Substances (Control) Act, Act No. 4 of 1994* (Act) and sentenced to six years imprisonment.

The particulars of the charge and the facts stated in court disclosed that the police acting on a tip-off went to the house of the appellant on 15th September, 2004 and found the appellant in possession of 18 rolls and 100 grammes of bhang which were later confirmed by the Government Chemist to be *cannabis sativa*.

The appellant was aggrieved by the sentence and appealed to the superior court against it. At the hearing of the appeal, the appellant presented written submissions which contained the mitigating circumstances. On his part, Mr. Wangondu, a Principal State Counsel, submitted, thus:

“I oppose the appeal on the question of sentence. The appellant was found in possession of 18 rolls of cannabis sativa and 100 grammes of the same. He pleaded guilty and sentenced to six years imprisonment. According to section 3 (2) of Act No. 4 of 1994 the offence carries twenty (20) years imprisonment. Because of the quantity of bhang found on the appellant, we urge court to enhance the prison term accordingly”.

The superior court (Sitati J) considered the provisions of **Section 3 (1)** and **Section 3 (2)** of the Act, and concluded:

“In the circumstances of this case, I agree with learned State Counsel that the learned trial magistrate misapplied the law in sentencing the appellant to six (6) years imprisonment. In the result, I dismiss the appellant’s appeal which has no merit on conviction. As regards sentence, and in accordance with the provisions of Section 3 (2) (a) of the Act, set aside the sentence of (6) years imprisonment and substitute the same with twenty (20) years imprisonment as by law provided”.

The appellant who was not represented by a counsel in the two courts below or in this Court has filed a memorandum of appeal containing three grounds which in essence raise the issue of the severity of the sentence.

Section 361 (1) of the Criminal Procedure Code, (Code) allows a second appeal to this Court on a matter of law. That section in addition specifically prohibits this Court from entertaining an appeal against a matter of fact which includes the severity of sentence. However, **Section 361 (1)** of the Code provides in part:

“..... and the Court of Appeal shall not hear an appeal under this Section –

(a)

(b) Against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under Section 7 to pass that sentence”.

Thus, this Court has jurisdiction to hear this appeal against sentence since the superior court enhanced the sentence from 6 years to 20 years imprisonment.

Mr. Kaigai, learned Principal State Counsel conceded the appeal against sentence, submitting in part:

“High Court misdirected itself on sentence by misinterpreting Section 3 (2) as either carrying a mandatory sentence or minimum sentence.

The court had discretion to pass any sentence below 20 years”.

He supported the sentence of 6 years imprisonment imposed by the trial magistrate.

Section 3 (1) of the Act codifies the offence of possession of any narcotic drug which includes *cannabis sativa* or possession of psychotropic substances.

Section 3 (2) (a) of the Act prescribes the sentence for possession of *cannabis sativa* while **Section 3 (2) (b)** prescribes the sentence for possession of other narcotic drugs and psychotropic substances. We are concerned here with punishment for possession of *cannabis sativa*. **Section 3 (2) (a)** provides:

“Any person guilty of an offence under subsection (1) shall be 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 ten years and in every other case to imprisonment for twenty years;

It is manifest from the judgment of the superior court that the court understood the phrase “*shall be liable*” in **Section 3 (2) (a)** of the Act as prescribing both a mandatory and minimum sentence for the offence of possession of *cannabis sativa*. However, according to Mr. Kaigai, the section does not provide a mandatory or minimum sentence and the court has discretion to pass any sentence below the sentence of 10 years imprisonment or 20 years imprisonment as the case may be.

What is the true construction of the words “*shall be liable*” in the context of **Section 3 (2) (a)** of the Act?

In searching for the intention of the Parliament, the first observation to make is that generally speaking, the penalty prescribed by a written law for an offence, unless a contrary intention appears, is the maximum penalty. This principle is contained in **Section 66 (1)** of the *Interpretation and General Provisions Act* (Cap 2 Laws of Kenya) which provides:

“Where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punishable by a penalty not exceeding the penalty prescribed”.

The second observation is that the principle of law in **Section 66** aforesaid is entrenched in **Section 26** of the Penal Code which expressly authorizes a court to sentence the offender to a shorter term than the maximum provided by any written law and further authorizes the court to pass a sentence of a fine in addition to or in substitution for imprisonment except where the law provides for a minimum sentence of imprisonment. In particular, **Section 26 (2)** and **(3)** of the Penal Code provides:

“(2) Save as may be expressly provided by the law under which the offence concerned in punishable, a person liable to imprisonment for life or any other shorter period may be sentenced to any shorter term.

(3) A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment”.

There is however a proviso to **Section 26 (3)** that a fine cannot be substituted for imprisonment where the law concerned provides for a minimum sentence of imprisonment. **Section 28 (1) (a)** of the Penal Code provides that where the Court imposes a fine under any law but the law does not expressly provide for the amount of the fine that can be imposed, then, the amount of fine that may be imposed is unlimited but shall not be excessive.

From the language of **Section 26** and **28** of the Penal Code, it is clear that those are general provisions of law which apply not only to the offences prescribed in the Penal Code but also to offences under other written laws.

Thirdly, the preamble to the Act does not show that one of the purposes of the Act is to provide for mandatory sentences. Indeed, for the more serious offence of trafficking in narcotic or psychotropic substances in **Section 4**, for example, the Parliament uses the phrase – “*shall be guilty of an offence and liable*” – which phrase does not import a mandatory sentence. That is why in **Kolongei vs. Republic** [2005] 1 KLR 7, the appellant who was convicted of trafficking in 27.8 Kgs. of heroin was sentenced to 18 years imprisonment plus a fine and not to the prescribed life imprisonment plus a fine (see also **Gathara vs. Republic** [2005] 2 KLR 58 where the appellant was sentence to 10 years imprisonment plus a fine for trafficking in eleven (11) bags of cannabis sativa.

The last observation we want to make is that the phrase as used in Penal statutes was judicially construed by the predecessor of this Court in **Opoya vs. Uganda** [1967] EA 752 where the Court said at page 754 paragraph B:

“It seems to us beyond argument the words “shall be liable to” do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it”.

We respectfully adopt that construction which conforms with the opinion of Mr. Kaigai and which is supported by our preceding observations. We have no doubt that the sentences of 10 years imprisonment and 20 years imprisonment prescribed in **Section 3 (2) (a)** of the Act for the possession of *cannabis sativa* are the maxima and that the court can lawfully impose any shorter term of imprisonment. Furthermore, although **Section 3 (2) (a)** of the Act does not expressly provide for a fine, the court can lawfully in accordance with **Section 26 (3)** of the Penal Code sentence the offender to pay a reasonable

fine in substitution for imprisonment.

From the foregoing, we conclude that the superior court misconstrued **Section 3 (2) (a)** of the Act and erred in enhancing the sentence of imprisonment.

For those reasons, we allow the appeal against sentence and set aside the sentence of 20 years imprisonment and restore the sentence of six years imprisonment imposed by the trial magistrate effective from 13th October, 2004 when the appellant was convicted and sentenced.

We so order.

Dated and delivered at Nairobi this 9th day of October, 2009.

E. M. GITHINJI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR