



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL REVISION NO 160 OF 2016

BEATRICE MAGANGA..... APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

INTRODUCTION

1. By a letter dated 16th September 2016 filed on even date, the Applicant moved the court for a revision of the sentence that was meted upon her on 27th July 2016 by the Trial Magistrate, Hon E.G. Nderitu, Senior Principal Magistrate in **Cr Case No 564 of 2015 Republic vs Beatrice Maganga** at Voi Law Courts.

2. The Applicant had been charged with the offence of being in possession of narcotic drugs contrary to Section 3(1) as read with Section 3(2)(a) of the Narcotic Drugs and Psychotropic Substances Control Act No 4 of 1994.

3. The particulars of the Charge were as follows :-

On the 17th day of July 2015 at around 0800 hrs at Ndii Area within Taita Taveta County was found in possession of narcotic drugs namely cannabis (bhang) to wit (55½) fifty five and a half rolls with a street value of Kshs 5550/= (Five Thousand Five Hundred and Fifty shillings) in contravention of the said Act.

4. The Applicant pleaded not guilty and the matter proceeded for trial. It was therefore not correct as she had stated that she pleaded guilty to the Charge without knowing the consequences and the penalty the offence carried, a fact that was rightly pointed out by the State.

5. After the Applicant was convicted of the said offence, in her mitigation, she stated that she was a widow and prayed for a non-custodial sentence as she had four (4) children who would be rendered destitute by her incarceration. It was evident from the proceedings of the Trial Court that the said Learned Magistrate considered the Applicant's mitigation. She noted that lives of young people continued to be destroyed as a result of consumption of narcotic drugs. She therefore fined the Applicant Kshs 100,000/= and in default, to serve two (2) years' imprisonment.

6. In her application for Revision, the Applicant contended that a Chief who she had started cohabiting

with after the death of her husband planted the drugs in her house after they had had an argument. She reiterated that she was a widow with four (4) children aged, twelve (12), eight (8), seven (7) and five (5) years and averred that the sentence was too long and harsh and the fine was too high for the quantity of drugs that were found in her house.

7. Her Written Submissions in response to the State's Written Submissions dated 1st October 2016 and filed on 2nd October 2016 were filed on 23rd November 2016. She merely re-hashed what she had stated in her application for Revision.

8. In its written Submissions, the Respondent submitted that it was unlikely that the fifty five and a half (55½) rolls of bhang that were found in the Applicant's possession were intended for her own use due to the high quantity. It argued that the Learned Trial Magistrate was lenient in having given her the option of paying a fine because Section 3(2) of the Narcotics Drugs and Psychotropic Control Act provided for a penalty of Kshs twenty (20) years' imprisonment without the option of a fine. It this urged this court to dismiss the Applicant's application for Revision.

LEGAL ANALYSIS

9. Section 362 of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides as follows:-

“The High Court may call and examine any record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded, and as to the regularity of any proceedings of any such court.”

10. To establish whether or not the Applicant had satisfied the aforesaid provision, this court had due regard to the provisions of Section 3(2)(a) of the Narcotics Drugs and Psychotropic Substances Control Act that state as follows:-

“A person guilty of an offence under subsection (1) shall be liable—

2. (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; and

(b) in respect of a narcotic drug or psychotropic substance, other than cannabis, where the person satisfies the court that the narcotic drug or psychotropic substance was intended solely for his own consumption, to imprisonment for twenty years and in every other case to a fine of not less than one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, or to imprisonment for life or to both such fine and imprisonment.

11. As was held by the Court of Appeal in the case of **Daniel Kyalo Muema vs Republic** (Supra), unless a contrary intention is shown, where an accused person is convicted and is “liable to imprisonment for life”, it connotes the maximum penalty and not the mandatory penalty that can be handed down. Further, a court can impose a fine in place of a custodial sentence by virtue of Section 26(3) of the Penal Code.

12. In the said case, the appellant therein had been found in possession of eighteen (18) rolls and hundred (100) grammes of bhang. The Court of Appeal set aside the penalty of twenty (20) years that

had been imposed by the High Court on appeal and restored the six (6) years imprisonment that had been imposed by the trial magistrate therein.

13. Consequently, bearing in mind the quantity the appellant in the case of **Daniel Kyalo Muema vs Republic** (Supra) was found in possession with of vis-à-vis the sentence that was upheld by the Court of Appeal therein, it was the considered opinion of this court that a fine of Kshs 100,000/= or in default to serve two (2) years imprisonment that was imposed upon the Applicant herein was extremely lenient as she had been found in possession of fifty five and a half (55½) rolls of bhang.

14. Accordingly, having considered the Applicant's application for Revision and her Written Submissions together with those of the Respondent and the case law it relied upon, this court came to the firm conclusion that penalty that was meted upon the Applicant by the Learned Trial Magistrate was just, legal, correct and proper. Indeed, the Learned Trial Magistrate exercised her discretion judiciously as the maximum sentence prescribed for the offence the Applicant had been charged with was twenty (20) years imprisonment.

15. This court was therefore in agreement with the Respondent's submissions that there was no justification in this court disturbing the said Learned Trial Magistrate's conclusion.

DISPOSITION

16. In the circumstances foregoing, this court's decision was that the Applicant's application for Revision that was dated and filed on 16th September 2016 was not merited and the same is hereby dismissed. Instead, this court affirms the sentence that was meted upon her.

17. It is so ordered.

DATED and DELIVERED at VOI this 15th day of December 2016

J. KAMAU

JUDGE

In the presence of:-

Beatrice Maganga.....Applicant

Miss Anyumba.....for Respondent

Josephat Mavu– Court Clerk



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