



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO 53 OF 2016

MOHAMMED ALI MOHAMED.....APPELLANT

VERSUS

REPUBLIC (DPP).....RESPONDENT

(Being an appeal from the judgment and sentencing of Hon. Njeri Thuku Principal Magistrate in Lamu Criminal Case No. 77 of 2015 delivered on 16/11/2016)

JUDGMENT

1. The appellant Mohammed Ali Mohamed was the 1st accused in Criminal Case No. 77 of 2015 before the Principal Magistrate Court Lamu. He was charged with the offence of trafficking in narcotic drugs contrary to **section 4 (a) of the Narcotic Drugs and Psychotropic substances Control Act no 4 of 1994**. The particulars of the offence were that on 4th February 2015 at Langoni Location in Lamu west Sub-county in Lamu County sold narcotic drugs being 0.5 grams of heroin with an estimated market value of Kshs 1,000/=.
2. The Appellant's co-accused Isham Athuman Abdalla was charged with an additional count of being found in a place which persons resort to for smoking inhaling, sniffing or otherwise using narcotic drugs namely heroin in contravention of the Act.
3. At the conclusion of the trial, the 2nd accused was acquitted. The 1st accused (now appellant) was acquitted of the charge of trafficking but convicted on the charge of possession. He was sentenced to serve 10 years imprisonment on 16/11/2016.
4. The appellant was dissatisfied with the conviction and sentence and filed the present appeal on 5/12/2016 in which he set out 8 grounds of appeal. Ground 1 and 2 are not grounds at all as they are mere statements of the factual position that he pleaded not guilty at trial and was sentenced to 10 years imprisonment. Grounds 3, 4, 5 and 6 are statements on the appellants social circumstances to the effect that he was the bread winner of his late father's family and his own young family. While grounds 7 and 8 are an appeal for reduction of sentence. It is therefore my considered view that the appellant's appeal is against sentence only.
5. The appellant subsequently filed submissions on 25/10/2018. In the submissions, he raised a new ground that the trial court believed the false testimony of witnesses.
6. When the appeal came up for hearing on 31/10/2018 Mr.Kasyoka for respondent made oral submissions in which he opposed the appeal in its entirety. He submitted that the evidence before the trial court was water tight. He further submitted that possession was proved. On his part the Appellant abandoned any grounds challenging conviction and stated that he only prayed for leniency in the sentence. He submitted that the sentence was too high and prayed for leniency.
7. As earlier observed the Appellant's grounds of appeal were all centred on the severity of the sentence and what comes through as

mitigation not grounds of appeal. Further at the hearing the appellant was consistent that all he was seeking was leniency in the sentence. I take it therefore that the appeal is against sentence only and that being the case I will not go into an analysis of the evidence to confirm or set aside the conviction. The Respondent's counsel on his part did not address the aspect of severity of the sentence in his oral submissions.

8. I must at the outset state that the trial court meted out the sentence provided for by Section 3(2) (a) of the Narcotic Drugs and Psychotropic substances Control Act. To that extent therefore the sentence was lawful. It was not however a mandatory minimum sentence as the term "shall be liable" provides for the maximum sentence as was held by the Court of Appeal sitting in Nairobi in **Daniel Kyalo Muema V. Republic, Criminal Appeal No. 479 of 2007** which quoted with approval the decision of its predecessor (the Court of Appeal of East Africa) in **Opoya V. Uganda**(1967) E.A 752 in which it observed:

"It seems to us beyond argument the words "shall be liable" to did not in their ordinary meaning require the imposition of the stated penalty but merely expresses 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 it fit to impose it"

Similarly the Court of Appeal sitting in Malindi in **Caroline Auma Majabu V Republic, Criminal Appeal No. 65 of 2014** in finding that the term shall liable imposes a maximum sentence rather than a mandatory sentence stated:

Applying the above definition, the use of the 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 that discretion, and are the exception rather than the rule. thus, where applicable the mandatory sentence must be expressed in clear and unambiguous terms.

9. I have considered the plea by the Appellant on the sentence. I have also taken into consideration the mitigating circumstances that he has raised and which he had raised at the trial. In addition, I have considered that the Appellant was sentenced on 16/11/2016 and has served 2 ½ years in prison. I allow the appeal against sentence and hereby reduce the sentence from 10 years imprisonment to the period already served which I consider sufficient. The Appellant is set at liberty forthwith unless otherwise lawfully held.

Judgment delivered dated and Signed at Garsen on 13th day of March, 2019.

R.LAGAT KORIR

JUDGE

In the presence of:-

The Accused

Pacho Court Assistant

Mr. Kasyoka For prosecution



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