IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 410/2018

In the matter between:

NDUMISO NKOSIKHONA DLAMINI

V

REX

Neutral citation: *Ndumiso Nkosikhona Dlamini vs Rex* [*410/2018] [2019] SZHC 04 (7th February, 2019)*

Coram: FAKUDZE, J

Heard: 30th November, 2018

Delivered: 7th February, 2019

Summary: *Criminal law – Appeal from Magistrate's Court – accused convicted of possessing 13.35kg of dagga – sentenced to*

eight (8) years imprisonment or Eight Thousand Emalangeni (E8 000.00) – Appeal based on the fact that sentence was too high and harsh – held that Magistrate failed to take into account the personal circumstances of the accused and also the fact that the fine was unaffordable – Held further that no proof that accused was a wholesale dealer – sentence set aside – Appellant sentenced to Six Thousand Emalangeni (E6,000.00) or to imprisonment for a period of six (6) years. Half of the sentence is suspended for a period of three (3) years on condition that the Appellant does not commit a similar offence.

JUDGMENT

INTRODUCTION

[1] The Appellant was convicted and sentenced by the Principal Magistrate F. Msibi sitting at Nhlangano Magistrate's Court under **Criminal Case No. LAV 185/2018**. This was on or about 18th day of August, 2018. The court

aquo imposed a fine of Eight Thousand Emalangeni (E8,000.00) and in default thereof, to a term of imprisonment of eight (8) years.

[2] The Appellant now seeks the above Honourable Court to review, correct and set aside the sentence imposed by the court *aquo*. The Appellant is not appealing the conviction, but the sentence thereof.

The grounds of Appeal

[3] The Appellant noted an Appeal under the following grounds:

3.1 That the Learned Magistrate misdirected herself and erred in law and infact by meting out a sentence which is harsh thus inducing a sense of shock;

3.2 That the Learned Magistrate erred in law and in fact by failing into account the mitigating factors of the Appellant being a first offender and having pleaded guilty to the charge preferred against him;

3.3 That the Learned Magistrate erred in law and infact by failing to take into account the personal circumstances of the Appellant and imposing a fine which is unaffordable to him;

3.4 That the Learned Magistrate erred in law infact by imposing a sentence which is not commensurate to the quantity of dagga found in possession of the Appellant.

3.5 That the Learned Magistrate in law and in fact by imposing a sentence so harsh and severe where no evidence was led in proof that the Appellant had propensity to deal with dagga nor that same was intended for retail.

The Parties' Contention

The Applicant

[4] The Appellant contends that the court *aquo* did not spell out the reasons for the sentence imposed on the Appellant and that Her Worship did not consider the fact that he was a first offender and as such failed to consider this as a mitigating factor when sentencing him.

[5] The Appellant further contends that he pleaded guilty to the charge, a plea that was demonstrative of his remorse but was rejected by the Court. If the plea had been considered, then the sentence would have been far less. The court *aquo* erred by failing to take into consideration the Appellant's

personal circumstances in imposing a fine which was unaffordable for him to pay.

[6] The Appellant contends that there was no proof before the court *aquo* that he was a wholesale dealer in dagga; thus the sentence that was imposed should have considered that.

The Crown or Respondent.

[7] The Crown contends that the issue of sentence lies predominantly within the discretion of the trial court and that an Appellate Court will only interfere where there has been a misdirection in such sentencing leading to a miscarriage of justice.

[8] The Crown further contends that in **Mlungu Nkosingiphile Makhanya V Rex, Criminal Appeal 09/2014**, the Supreme Court confirmed a five (5) year imprisonment sentence without an option of a fine meted against the accused person for being found in possession of fifty five (55) kilograms of dagga. Likewise, in the **Mduduzi Mohale and 11 Others, Case Nos: 138/16, 139/16/, 146/16 and 147/16,** the Full Bench confirmed a sentence of a fine of Ten Thousand Emalangeni (E10,000.00) for possession of 8.5 kilograms of dagga.

[9] On the issue of the Appellant being first offender, the Crown argues that in the **Mlungu Nkosingiphile Makhanya Case** (Supra) the accused was a first offender. The court imposed a five year sentence without an option of fine.

[10] Finally, the Crown states that before sentencing, the courts have to consider all the relevant factors including the interests of society. In the present case it is submitted that there was no legal duty upon the learned Magistrate to be lenient in sentencing the Appellant just because he was a first offender. All other factors pertaining to sentence were considered.

The Applicable law

[11] It is settled law that sentencing is predominantly a matter for the discretion of the trial court. The trial court has the opportunity to see and hear the witnesses and is thus in a better position to issue a proper sentence based upon the peculiar factors and circumstances of the case. An Appellate Court will only interfere with the exercise of discretion if there has been improper exercise of same in the sense of a material misdirection or irregularity resulting in a miscarriage of justice. See **Johannes Khoza V Rex, Criminal Appeal Case No. 76/2006**.

[12] In **Philile Dlamini and Another/ The Senior Magistrate N.O. (Nhlangano and Another Criminal Appeal Case No. 4345/2007** (High Court), Mamba J. observed as follows:

> *"The Magistrate seems to have given undue consideration to the message, which the imposition of the fine would be to other potential offenders. In so doing, the personal circumstances of the Appellant, the fact that he is a first offender and what we will hope is genuine remorse, evidenced by his plea of guilty have not been given sufficient weight."*

[13] His Lordship continued to state that:

> *"As a general rule in this jurisdiction, first offenders should normally be afforded the opportunity to pay a fine……. The fine imposed must also be within the capacity of the offender to pay. This is a salutary rule aimed at giving first offenders the chance not to go to jail and be contaminated by hardened and serious offenders and recidivists."*

[14] In **Mlungu Nkosingiphile Makhanya and three Others V The King, Criminal Case No. 24/2013**, it was stated that:

"A distinction should normally be drawn between the offender who is engaged in an isolated transaction and one who is part of a continuing enterprise. Depending on the scale of transcation the sentence in such a case should be somewhat less and a partly suspended sentence may be considered."

Court's analysis and conclusion

[15] This court appreciates the fact that sentencing is a discretion of the trial court. An appeal court will not interfere in the exercise of the trial court's discretion just because the trial court has arrived at a decision different from that which the appeal court or judge would have arrived at. It is this court's humble view that the court *aquo* gave a clear message that other to be offenders would receive a stiffer sentence in the event they commit a similar offence under similar circumstances. This court is also mindful that the court *aquo* was considerate in giving the Appellant an option to pay a fine.

[16] Notwithstanding the above observations, it is this court's considered view that the Learned Magistrate's failure to consider the financial implications of

imposing a fine and the ability of the Appellant to pay the fine is a misdirection. This is particularly so given the fact no evidence was led to show that the Appellant was a wholesale dealer. The argument by the Crown in its Heads of Argument that the dagga was neatly stached and packed and the arrest took place at Lavumisa does not appear *ex facie* the record of proceedings of the court *aquo*. If same had appeared that would have been sufficient evidence to establish that the Appellant was a whole sale dealer.

[17] The court *aquo* has also failed to take into account the salutary principle stated in **Philile Dlamini V Rex** (Supra) that "the fine imposed must also be within the capacity of the offender to pay." This gives an opportunity to the first offender to rehabilitate. The Appellant pleaded guilty to the offence as a sign of remorse and the fact that he was a first offender should have been given sufficient weight.

[18] The Appellant was found in possession of 13.35kg of dagga. He was then sentenced to imprisonment for a period of Eight (8) years or to a fine of Eight Thousand Emalangeni (E8,000.00). As indicated earlier there is nothing to suggest that he was a wholesale dealer. When compared to the

Mlungu Makhanya Case (Supra) which I was referred to by the Crown the Appellant in that case carried dagga worth 55 kilograms. He was sentenced to 5 years no fine. 13.35kg of dagga is not as much as 55kg, particularly if it has not been established that the 13.35kg was for wholesale purposes. It is my considered view that the sentence was a bit harsh.

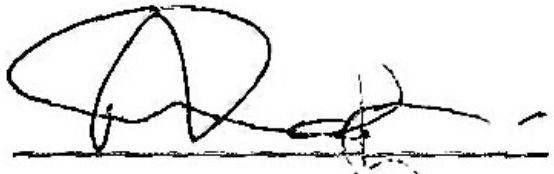
[19] Before I impose what I consider to be the appropriate sentence, let me refer to the following wise words that were used or adopted in **Mduduzi Vincent Vilakati and Another V The King, High Court Criminal Case No. 20/2009**

where it was stated at paragraph 20 that:

"[20] It is also in the public interest, particularly in the case of serious and prevalent offences, that the message should be crystal clear so that the full effect of deterrent sentences may be realised and that the public may be satisfied that the court has taken adequate measures within the law to project them of serious offenders. By the same token, a sentence should not be of such severity as to be out of proportion to the offence, or to be manifestly excessive or to break the offender, or to produce in the minds of the public a feeling that he has been unfairly and harshly treated."

[20] Considering all that has been said above, I now substitute the sentence imposed by the court *aquo* with the following new sentence:

"The Appellant is sentenced to a fine of Six Thousand Emalangeni (E6000.00) or to imprisonment for a period of six (6) years. Half of the sentence is suspended for a period of three (3) years on condition that the Appellant does not commit a similar offence."



FAKUDZE J.

JUDGE OF THE HIGH COURT

FOR APPELLANT: D.M. DLAMINI

FOR: RESPONDENT: L. DLAMINI