



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 15 OF 2020

JUDAH MAUNDU KIOKO..... APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal originating from the sentence of Hon. A. Mayamba (P.M) in Kilungu Principal Magistrate's Court PMCRC No. 988 of 2019 delivered on 25th November, 2019).

JUDGMENT

1. The Appellant was charged in the magistrates' court with trafficking of cannabis sativa contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars of the charge were that on 22nd November 2019, at Kola market, Kola location, within Machakos county was found in possession of cannabis sativa (bhang) which was wrapped in 3 papers and kept in a black bag weighing 1.4 kilogrammes worth Kshs.10,000/= which was not medically prepared.

2. He was recorded as having pleaded guilty to the charge, was convicted and sentenced to pay a fine of Kshs.250,000/= or in default to serve 4 years in prison.

3. He has now come to this court on appeal against sentence on the following grounds: -

- 1) That he submits to this court his appeal against sentence only.**
- 2) That he was sentenced to a charge which he did not plead to.**
- 3) That he is not a drug peddler.**
- 4) That he is a family man aged 65 years.**
- 5) That he prays to this court to substitute his sentence with a non-custodial one.**

4. The Appellant also filed written submissions, which I have perused and considered.

5. The learned Prosecuting Counsel Ms. Gakumu opposed the appeal, and submitted that the sentence imposed was lenient as section 4(a) of the Act provided a maximum fine of Kshs.1,000,000/= or 3 times the value of the narcotics, or life imprisonment. Counsel was of the view that the cannabis sativa was for commercial purposes, not for consumption as stated by the Appellant in his mitigation, and urged this court to be slow to interfere with the trial court's discretion in sentencing.

6. This being a first appeal, I have to re-examine the entire record, as though the Appellant claims to have appealed on sentence only, he is a layman. I note from the grounds of appeal also that though the Appellant opened his grounds of appeal by stating that he was appealing only on sentence, he has also under ground 2 raised the issue of being convicted for an offence he did not plead to, which in my view, is a ground challenging the conviction.

7. Having perused and considered the whole record, in my view, the Appellant having said in mitigation that "***I was using the bhang for my own consumption.***" – the trial court should

have recorded a plea of not guilty and held a full trial for prosecution witnesses to testify and prove that indeed he was trafficking or selling the cannabis sativa. Entering a plea of not guilty would have satisfied the legal requirement that the plea of guilty was unequivocal to sustain a conviction as stated in the case of **Adan –vs- Republic (1973) E.A.** In any case, though the heading of the charge related to trafficking, the

particulars of the charge talked of possession, not selling or trafficking. The Appellant must thus have pleaded to the particulars explained to him.

8. I thus find that the trial court erred in upholding the plea of guilty of the Appellant. The trial was thus a mistrial. I will thus quash the conviction herein and set aside the sentence imposed.

9. Do I order a retrial? In the case of **Laban Kimondo Karanja –vs- Republic (2006) eKLR** the High Court stated that a retrial can only be ordered where the interests of justice require and if no prejudice will be caused on the accused person. The Appellant having been sentenced to 4 years' imprisonment on 25/11/2019 has already served 1 year and 4 months in prison. In my view, it will not be in the interest of justice for this court to order a retrial as the Appellant has already served a substantial part of the prison sentence imposed.

10. Consequently, I allow the appeal, quash the conviction and set aside the sentence. I order that the Appellant be set at liberty unless otherwise lawfully held.

DELIVERED, SIGNED & DATED THIS 21ST DAY OF APRIL 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE