



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 49 OF 2017**

**MATI MWANZIA PRISCILAR.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the conviction and sentence in Mwingi SRM Criminal Case No. 501 of 2013-A. Otieno SRM)**

**JUDGEMENT**

1. The appellant was charged in the Senior Resident Magistrate's Court at Mwingi with two counts. Count 1 was threatening to kill contrary to Section 223 (1) of the Penal Code. The particulars of the offence were that on 15<sup>th</sup> September, 2013 at Kisogo Sub-location Mwingi District of Kitui County without lawful excuse uttered words threatening to kill Michael Kakai.

2. Count 2 was possession of cannabis sativa contrary to Section 3(1) 2(a) of the Narcotic (Drugs) and Psychotropic Substances Control Act of 1994.

The particulars of the offence were that on the same day and place was found in possession of cannabis sativa (bangi) 2½ rolls with a value of Kshs.50 which was not medically prepared.

3. He denied both charges. Thereafter prosecution brought five witnesses in support of their case, while the appellant gave his defence testimony on oath and did not call any additional witness.

4. After conclusion of the trial, the learned Magistrate found that count 1 for threatening to kill had not been proved by the prosecution beyond any reasonable doubt and acquitted the appellant on that account. The court however found that count 2 for possession of cannabis sativa had been proved and convicted the appellant on the same and sentenced him to serve 8 years imprisonment.

5. Dissatisfied with the conviction and sentence of the trial court, the appellant filed an appeal through a Miscellaneous Application in June 2014. It however took until July 2017 for the Criminal Registry at Garissa High Court to give this appeal a number 49 of 2017. The delay in the progress of the appeal appears to have been caused by negligence on the part of staffs in the criminal registry, as the original trial court file had been forwarded to this court way back vide letter from the trial court magistrate V. A Otieno dated 14<sup>th</sup> April, 2014.

6. Before the appeal was heard, and with the permission of this court, the appellant filed amended grounds of appeal as well as written submissions. The amended grounds of appeal are as follows:

**1. The trial magistrate erred in convicting him without considering that the charges and**

**offence were defective.**

**2. The trial magistrate failed to ascertain whether the appellant was a person from whom the cannabis sativa was recovered, as there were other persons in the crowd.**

**3. The trial magistrate erred in convicting him without considering that the prosecution failed to prove their case beyond reasonable doubt as required under Section 109 and 110 of the Evidence Act.**

**4. The trial magistrate erred in convicting him while the prosecution witnesses evidence was contradictory.**

**5. The Government Analysis report was dubious.**

7. At the hearing of the appeal, the appellant relied on his amended petition of appeal and written submissions. I have perused and considered the written submissions of the appellant.

8. The learned Principal Prosecuting Counsel, Mr. Okemwa submitted that though the appellant was convicted of count 2, only two witnesses referred to the subject offence. Counsel further submitted that there existed discrepancies in that the particulars of the charge talked of 2½ rolls, and such description of half rod created a situation in which it was not clear whether same was a half smoked piece or full roll

9. Counsel also submitted that though eye witnesses talked of 2 rolls and tobacco, PW5 the Investigating Officer surprisingly introduced the aspect of two and a half rolls. According to counsel, as sentence in such offences was determined by the number of rolls, the charge sheet was defective.

10. Counsel submitted finally that the Government Analysis report refers of 3 rolls, which was a further discrepancy though the report confirmed that the substance found was cannabis sativa.

11. On sentence, counsel submitted that the sentence of 8 years imprisonment was excessive in the circumstances of the case.

12. This being a first appeal, I am required to evaluate the evidence on record afresh and come to my own independent conclusions and inferences. I have to bear in mind that I did not have the opportunity to see witnesses testify to determine their demeanor and give due allowance for that fact. See the case of OKENO -VS- REPUBLIC (1972) EA 32.

13. The burden is always of the prosecution in a criminal case to prove its case against an accused person beyond reasonable doubt. The accused does not have the burden of proving his innocence. See the case of LEONARD ANISETH -VS- REPUBLIC (1963) EA 206, and REPUBLIC -VS- DERRICK WASWA KULOBA (2005) eKLR.

14. In the present case, the prosecution called 5 witnesses. The trial court acquitted the appellant on count 1 of threatening to kill. It however convicted him on count 2 for possession of cannabis sativa and sentenced the appellant.

15. I have perused the charge sheet and in my view, though it was not worded in the best of terms, it is not incurably defective. The charge does not include the word “drug” in the heading which was a mistake and a defect. However, though the charge talks about 2½ rolls which the Principal Prosecuting Counsel has complained about, I find no defects in the description 2½ rolls because if two rolls had the same length and the other half the same length, then describing the rolls as 2½ rolls did not cause any prejudice or mislead to the appellant. The minor defect of missing the word “drug” is in my view curable under Section 382 of the Criminal Procedure Code (Cap.75).

16. Regarding the proof of the charge, the rolls of cannabis sativa were described by PW2, David Musiye the chief who searched the appellant and recovered 2 rolls. The rolls were also described by PW4

Muthengei Kathoka who was present during recovery as 2 rolls of bhang and tobacco. It was only PW5 PC Daniel Muteshi the Investigating Officer who came up with 2½ rolls, and the report from the Government Analyst describing them as 3 rolls.

17. From the evidence on record therefore in my view, it is not clear how the additional third or half a roll of cannabis came from. May be it was an addition made by the Investigating Officer PW4 and sent to the Government Analyst who described it as a full roll. In my view therefore the third roll or half a roll was not established by the prosecution to be part of the rolls of cannabis which were recovered from the appellant.

18. I thus find that the appellant was found with 2 rolls of cannabis, and in my view, though recovery of the half or third roll of cannabis was not proved, that did not make the charge fatally defective, as each roll was a separate item to be proved as being found in possession of the appellant, and also to be proved separately to be cannabis sativa.

19. Since the Government Analyst found that the two rolls recovered by witnesses from the appellant contained cannabis sativa, in my view the charge was proved as there was sufficient evidence establishing beyond reasonable doubt that appellant was found in possession of these two rolls of cannabis sativa. The conviction will thus stand but on the basis of only two rolls of cannabis sativa.

20. I now turn to sentence. The Principal Prosecuting Counsel has submitted that the number of rolls of cannabis could have affected the sentence imposed by the trial court. The statute law introduced in 1994 imposes severe sentences on those found guilty of dealing in drugs or psychotropic substance. Those who possess such items for personal use are however liable to lenient sentences. In my view, the items or rolls of cannabis sativa found on the appellant were for personal use, as they were a small quantity of two rolls. He was not a commercial peddler, and I thus find the sentence of 8 years imprisonment imposed by trial court to be harsh and excessive.

21. Since the appellant was sentenced to serve 8 years imprisonment on 9<sup>th</sup> December, 2013, my view is that the sentence he has already served which now totals more than 4 years in prison is adequate punishment. I will thus reduce the sentence to that already served.

22. Consequently I dismiss the appeal against conviction and uphold the conviction of the trial magistrate for possession of cannabis sativa but limited to two rolls. I however set aside the sentence imposed and order that the prison sentence already served by the appellant is adequate punishment. The appellant will thus be released from prison custody unless otherwise lawfully held.

**Dated and delivered at Garissa on 24<sup>th</sup> January, 2018**

**George Dulu**

**JUDGE**