



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**CRIMINAL APPEAL NO 79 OF 2015**

**(Appeal from original Conviction and Sentence in Kandara**

**SPM Criminal Case No 433 of 2015 – P Nditika, SPM)**

**HARON GITHIGA MWANGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The Appellant herein, **Haron Githiga Mwangi**, pleaded guilty to and was convicted of the offence of **trafficking in narcotic drugs** contrary to **section 4 (a) of Narcotic Drugs and Psychotropic Substances (Control) Act, No 4 of 1994**. He was sentenced to a fine of KShs 1 million, and in addition to serve imprisonment for life. He has appealed against both conviction and sentence.

2. The particulars of the charge were that

**“...on 6<sup>th</sup> July 2015 at about 16.30 hours at Muthuru Trading Centre in Kandara Sub County within Murang’a County, he trafficked in narcotic drugs by possessing 5kg of bhang valued at kshs.15,000/00, which was not for medical preparation, three rolling sticks, three pairs of scissors, one packet of unused rolling paper, in contravention of the Act”.**

3. As correctly pointed out by the learned prosecution counsel, the particulars of the offence set out in the charge disclosed the offence of **possession** contrary to **section 3 (1)** of the Act, **not** trafficking contrary to section 4 (a). The Appellant was thus wrongly convicted despite his plea of guilty, and the trial court should not have accepted the plea without appropriate amendment to the charge. The charge was fatally defective as the particulars thereof did not disclose the offence charged, and the Appellant could not properly plead to it, let alone be convicted upon it.

4. Learned prosecution counsel was of the view that this court can properly convict the Appellant of possession contrary to section 3 (1) of the Act, that being the offence disclosed by the particulars, an offence that is minor but cognate to the offence charged. I respectfully differ. A charge that is fatally defective is so for all purposes. And in any event, the offence that the Appellant purported to plead to was trafficking, not possession.

5. Learned counsel also sought an order for retrial of the Appellant should his appeal be allowed. I would not grant such an order as he cannot be retried on a charge that is fatally defective, and amendment of that charge in a retrial would mean exposing him to double jeopardy.

6. In the event, the Appellant’s appeal is allowed in its entirety. His conviction is quashed and the sentences imposed upon him set aside. He shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AND SIGNED AT MURANG'A THIS 15<sup>TH</sup> DAY MARCH 2018**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT MURANG'A THIS 16<sup>TH</sup> DAY OF MARCH 2018**