

IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL NO 84 OF 2016

(Appeal from original Conviction and Sentence in Kigumo SPM Criminal Case No 854 of 2015 – A Mwangi, SRM)

MILKA WAITAGA NDUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant, **Milka Waitaga Ndung'u**, was convicted upon her own plea of three offences as follows –

Count 1: *Trafficking in narcotic drugs* contrary to section 4(a) and (b) of the *Narcotic Drugs and Psychotropic Substances (Control) Act, No 4 of 1994*.

Count 2: *Cultivating bhang* contrary to section 3(1) (a) as read with sub-section (2) (a) of the same Act No 4 of 1994.

Count 3: *Selling sniffing tobacco product* contrary to section 21(1) of the *Tobacco Control Act, 2007*.

2. For each of counts 1 and 2 the Appellant was fined KShs 100,000/00 and in default of payment to serve 2 years imprisonment. For count 3 she was fined KShs 10,000/00 and in default to serve six(6) months imprisonment.

3. The Appellant appealed against sentence only; that notwithstanding, the court has had to look at the convictions as well.

4. In count 1 the Appellant was charged under both **section 4(a)** and **section 4(b)** of the Act. This was wrong as the paragraphs are alternative to each other and not conjunctive. The use of the word “or” after paragraph (a) clearly indicates this. Charging the Appellant under both paragraphs rendered the charge in respect to that count incurably defective, and the Appellant’s conviction thereof cannot be sustained and must be quashed.

5. As for count 2, section 3 of the Act is about possession, not cultivation; cultivation is prohibited under section 6 of the Act. The charge in count 2 was also thus fatally defective. The conviction therefor must also be set aside.

6. The Appellant was properly convicted in count 3. However, the default sentence of 6 months imprisonment was clearly unlawful. Under **section 28(2)** of the Penal Code, the default sentence for KShs 10,000/00 fine is 3 months imprisonment.

7. It was for the above reasons that on 11/07/2017 I allowed the Appellant’s appeal in its entirety in respect to counts 1 and 2, and also allowed her appeal in respect to sentence in count 3.

DATED AND SIGNED AT MURANG'A THIS 19TH DAY OF APRIL 2018

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 20TH DAY OF APRIL 2018