

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 12 OF 2017

KILULU MBITHUKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Sentence in Mutomo Principal Magistrate's Court Criminal Case No. 348 of 2016 by S. K. Ngii S R M on 28/11/16)

J U D G M E N T

1. **Kilulu Mbithuka**, the Appellant was charged with the offence of **Trafficking of Cannabis Sativa** contrary to **Section 4** of the **Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994**. Particulars of the offence were that on the **23rd** day of **August, 2016** at about **2230 hours** at **Ngaani Sub-location**, of **Mutha Location** of **Mutomo Sub-county** within **Kitui County** was found trafficking Cannabis Sativa ("bhang") 30 stones valued at **Kshs. 30,000/=** which was not in any form of medical preparation.
2. The Appellant was subjected to full trial. When put on his defence he opted to remain silent.
3. The learned Magistrate considered the charge and analyzed evidence adduced. He reached a finding that the charge was defective but went on to determine if it was substantively fatal. He opined that it was not fatal therefore proceeded to convict the Appellant and sentenced him to serve **five (5) years imprisonment**.
4. At the outset a Petition of Appeal was filed by **Muinde & Co. Advocates** who then acted for the Appellant. The Appeal was against the conviction on grounds that the Appellant was erroneously convicted since there was no evidence to prove that he was found trafficking in cannabis sativa. That he was convicted on a defective charge and the case was not proved beyond reasonable doubt.
5. When the matter came up for hearing the Appellant informed the Court that his lawyer had no practising certificate. He abandoned the Appeal against the conviction and only mitigated on sentence.
6. The State through learned State Counsel **Mr. Mamba** conceded to the application.
7. Having considered the mitigating factors and the history of the matter as set out, it is apparent that had the Appellant pursued the Appeal against conviction, it was a case with high chances of succeeding since it is apparent that the trial Magistrate misdirected himself.
8. In the circumstances I allow the Appeal and reduce the sentence to the term served. The Appellant shall be released forthwith unless otherwise lawfully held.
9. It is so ordered.

Dated, Signed and Delivered at Kitui this 21st day of June, 2018.

L. N. MUTENDE

JUDGE