



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CRIMINAL APPEAL NO. 209 OF 2013**  
**SIMON NGATIA MWANGI.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....STATE**

*(Appeal from the Ruling of the Chief Magistrate's Court at Nyahururu Hon. D. K. Mikoyan –Ag. Senior Principal Magistrate delivered on the 17<sup>th</sup> September, 2013 in CMCR Case No. 1162 of 2013)*

**JUDGMENT**

The appellant herein **SIMON NGATIA MWANGI** was on 22/9/2013 arraigned before the Resident Magistrate sitting at Nyahururu Law Courts on a first Count of **BEING IN POSSESSION OF GANNABIS SATIVA CONTRARY TO SECTION 3 (1) as read with 3(2) (THE NARCOTIC AND PSYCHOTROPIC SUBSTANCES (CONTROL) ACT 1994** and a second count of **MALICIOUS DAMAGEE TO PROPERTY CONTRARY TO SECTION 339 (1) PENAL CODE.**

The appellant pleaded guilty to both counts. On 17/9/2013 the facts were read out to the appellant and he maintained his plea of Guilty on both counts. The trial magistrate then convicted the appellant on both count. After listening to his mitigation the court then sentenced the appellant to serve ten (10) years imprisonment for Count No. 1 and two (2) years imprisonment for Count No. 2. Having been sentenced on 17/9/2013, the appellant has completed his sentence in respect of count No. 2.

**MR MBURU** Advocate who represented the appellant told the court that his client did not seek to appeal against his conviction at all. He however sought to appeal against the ten (10) year sentence imposed in respect of Count No. 1.

Mr Mburu submitted that section 3 (2) of the Narcotic Drugs and Psychotropic Substances Act is not mandatory. The trial judge had the leeway to impose a lesser sentence.

**MR CHIGITI** learned State Counsel however opposed the appeal and submitted that section 3 (2) provided for mandatory sentence upon conviction. This appeal therefore revolves solely around the interpretation of section 3 (2) of the Narcotic Drugs and Psychotropic Substances (control) Act.

Section 3 (2) provides as follows –

*“ (2) A person guilty of an offence under subsection (1) shall be liable –*

*(a) In respect of cannabis where the person satisfies the court that the cannabis was*

*intended solely for his consumption, to imprisonment for ten years and in every other case imprisonment for twenty years.*

*(b) .....*”

In this case the appellant was found to have been in possession of only one (1) roll of cannabis sativa. This small amount could only have been intended for private consumption and not for sale, thus Section 3 (2) (a) would be applicable.

The words used in Section 3 (2) (a) are that a convicted person ‘**shall be liable**’ as opposed to the more stringent or mandatory phrase ‘**shall be sentenced to .....**’

In the case of **DANIEL KYALO MUEWA – Vs REPUBLIC (2009)eKLR** the Court of Appeal considered this very question of whether Section 3 (2) provided for a **mandatory minimum** ten (10) year sentence. In that case the court cited with approval the meaning ascribed to the term ‘**shall be liable**’ in the case of **OPOYA – Vs- UGANDA [1967] E.A 752** where it was held

*“It seems to us beyond argument that the words ‘shall be liable to’ do not in their ordinary meaning require the the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it”*

The court in the **Daniel Keyalo Muema** case went to hold that

*“We have no doubt that the sentence of 10 years imprisonment and 20 years imprisonment prescribed in Section 3 (2) (a) of the Act for the possession of ‘cannabis sativa’ are the maximum and that the court can lawfully impose any shorter term of imprisonment. Furthermore, although Section 3 (2) (a) of the Act does not expressly provide for a fine, the law can lawfully in accordance with Section 26 (3) of the Penal Code sentence the offender to pay a reasonable fine in substitution for imprisonment”*

This is a decision of the Court of Appeal which is binding on all lower courts. Secondly I am in agreement with the above reasoning as I am of the opinion that if Parliament intended Section 3(2) to impose minimum and mandatory sentences then nothing would have been easier than to specifically state so in no uncertain terms. I am aware that in other Acts of Parliament eg the Sexual Offences Act mandatory sentences are provided for and are phrased in clear and unambiguous terms as follows

*“not less than.....” or*

*“Not more than.....”*

Section 3 (2) is not framed in such clear terms

The appellant was found with only one (1) roll of bhang. To impose on him a ten (10) year sentence without option of a fine is in my view overkill. As the adage goes ‘**one does not require a hammer to kill a mosquito**’.

I therefore find that Section 3(2) does **not** provide for a minimum mandatory sentence. The trial magistrate erred in misconstruing this to be the case. I therefore allow this appeal against sentence. I note that having been convicted in September 2013 the appellant has already spent about 3½ years behind bars. In my view this is sufficient punishment. I therefore set aside the ten (10) year term imposed on the appellant and substitute it with term already served. Thus the accused is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and Delivered in Nakuru this 24<sup>th</sup> day of April 2017.**

Mr Mburu for Accused

Mr Motende for State

**Maureen A. Odero**

**Judge**