



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CRIMINAL APPEAL NO. 8 OF 2016**

**KATAMBO NYANZA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Kitui Chief Magistrate's Court Criminal Case No. 56 of 2016 by Hon. E. Boke P M on 09/02/16)*

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

1. **Katambo Nyanza**, the Appellant, was convicted on her own plea of guilty. It was stated in the statement of the charge that she was found in **Possession of Narcotic Drugs** contrary to **Section 2(1)** as read with **Section 3(1)(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 (Act)**. Particulars of the offence were that on the **18<sup>th</sup>** day of **January, 2016** at **Kombu Location** in **Matinyani District** within **Kitui County**, was found in possession of Narcotic Drug namely '**Bhang**' to wit **4½ rolls** valued at **Kshs. 500/=** which was not in any form of medicinal value.

2. When she was arraigned in Court on the 19<sup>th</sup> January, 2016 the substance of the charge was read to her and she stated thus:

***"It is true."***

A plea of guilty was entered by the trial Court. Facts of the case presented by the Prosecuting Officer were as follows:

***"On 18/1/16 at around 18.30 p.m. at Kombu Location within Matinyani District, the area chief was informed by members of public that accused person is selling bhang to members of public within Kombu Location.***

***The area chief mobilized community policing members and went to accused person's house where they conducted a search and managed to recover 4½ roles of bhang in her house.***

***She was escorted to Matinyani Police Station with the rolls. Later on, she was charged with the offence. The 4½ rolls (big rolls) are before court and they value (street value) at Kshs. 500/=. I produce them as exhibit. That is all."***

She admitted the facts and a conviction was recorded. She was sentenced to **4 years imprisonment**.

3. Aggrieved by the conviction and sentence she now appeals on grounds that:

The trial Magistrate did not consider that she was intimidated by Police Officers which led to her acceptance of the charge.

The alleged Narcotic Drug was not taken to the Government Chemist for analysis to be proved to be Narcotic Drug.

She was not accorded an opportunity to mitigate.

The sentence was harsh.

4. At the hearing of the Appeal, the Appellant submitted orally that she is **86 years old** and on HIV Drugs.

5. The Appeal was opposed by **Mr. Wanjala**, learned Counsel for the State. He submitted that having pleaded guilty to the charge, the Appellant can only appeal against the legality of sentence. He argued that the substance was indeed **Bhang**.

6. This being a first Appeal, I am duty bound to reconsider the findings of the Lower Court and come up with my own conclusion. (See **Pandya vs. Republic (1957) EA 336**).

7. **Section 348** of the **Criminal Procedure Code** provides thus:

*“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”*

8. In the case of **Laurent Mpinga vs. Republic (1983) TLR 166** the Court pronounced the criteria for interfering with a plea of guilty thus:

*“1. that even taking into consideration the admitted facts, the plea was imperfect, ambiguous or unfinished and for that reason, the lower court erred in law in treating it as a plea of guilty;*

*2. that the appellant pleaded guilty as a result of mistake or misapprehension;*

*3. that the charge laid at the appellant’s door disclosed no offence known to law; and*

*4. that upon the admitted facts the appellant could not in law have been convicted of the offence charged.”*

9. This is a case where according to facts presented a search was carried out in the house stated to be for the Appellant and some 4 rolls of some substance stated to be bhang was recovered, consequently the Appellant was charged. Some 4½ big rolls of the substance were adduced in evidence. The street value was indicated as **Kshs. 500/=**.

10. A list of Narcotic Drugs is provided in the first schedule of the Act. To determine if the substance is a Narcotic Drug, it must be analyzed. The analysis is done at the Government Chemist. This substance herein having not been subjected to testing, there was no prove that it was a Narcotic Drug as envisaged by the Act.

11. Therefore, even if the Appellant admitted, she could not have been convicted in law.

12. In the circumstances the Appeal is meritorious. The conviction is quashed and the sentence imposed set aside. The Appellant shall be at liberty forthwith unless otherwise lawfully held.

13. It is so ordered.

**Dated, Signed and Delivered at Kitui this 29<sup>th</sup> day of June, 2017.**

**L. N. MUTENDE**

**JUDGE**