



## **REPUBLIC OF KENYA**

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

#### **CRIMINAL APPEAL NO. 9 OF 2016**

**K N.....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 03/02/16)*

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

1. **K N**, the Appellant, was jointly charged with another with the offence of **Being in Possession of Cannabis Sativa** 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 **17<sup>th</sup>** day of **January, 2016** at around **0730 hours** in **Matinyani District** within **Kitui County**, was found in possession of Narcotic Drug namely **Canabis Sativa** to wit **2 rolls** and **750 gms** valued at **Kshs. 1,000/=** which was not in any form of medicine preparation.

2. She was convicted on her own plea of guilty and sentenced to **three and a half (3½) years imprisonment**.

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

- She was convicted and sentenced without a consideration that following police intimidation she admitted the charge and it was the first time she was arraigned in Court.
- The alleged Narcotic Drug were not taken to the Government Chemist for testing as required by the law.
- She was not given an opportunity to mitigate.
- Her health is deteriorating as she is **86 years old** and HIV Positive.
- The sentence was cruel and harsh.

4. On being arraigned before Court she pleaded guilty to the charges. A plea of guilty was entered and facts were presented thus:

*“On 17/1/16 around 7.30 p.m. at Kombu Village, the OCS Matinyani police station and his officers were on normal patrol within that location. They went to Accused 2's house one K N in company of Accused 1 who is son of the 2<sup>nd</sup> accused person.*

*They searched the house and recovered 2 rolls and 750gms of bhang kept in a plastic basin. The officers on seeing those exhibits accused persons escaped to the nearby bush and since it was a bit dark, the officers took the exhibits for Matinyani police station.*

*The OCS communicated with the area chief, who went to the house of 2<sup>nd</sup> accused on the following day 18<sup>th</sup> where he recovered 4½ rolls of which she has been charged with in Cr.C.56/16 in which case she has also pleaded guilty.*

*Accused persons were arrested, escorted to Matinyani police station and was identified by the officers as the ones who had escaped on 17<sup>th</sup> from the house.*

*They were both charged with the offence. The two (2) rolls are before court (2 big rolls) plus the 700 gms of loose plant material in a plastic container and the plastic container whitish in colour. I produce them as exh.1, 2, and 3 respectively. The street value of the bhang is Kshs. 1000/=. That's all.”*

5. At the hearing the Appellant relied on her grounds of Appeal and added that she is a widow and HIV Positive.
6. The State through **Mr. Mamba** learned Counsel opposed the Appeal on grounds that pursuant to **Section 348** of the **Criminal Procedure Code** she could only appeal on the legality of sentence.
7. 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**).
8. **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.”*

9. Circumstances in which an accused person who was convicted on his/her own plea of guilty may appeal were set out by **Samatta J** (As he then was) in the case of **Laurent Mpinga vs. Republic (1983) TLR 166** who had this to say:

*“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.”*

10. The Appellant was accused of having contravened the law by being in possession of **cannabis sativa**, a Narcotic Drug. The substance that was recovered was not submitted to the Government Chemist for analysis to establish if it was indeed **cannabis** and if it was included in the Narcotic Drugs listed in the first schedule of the Act.

11. As a result, even if the Appellant admitted having been in possession of the substance, the Court should not have proceeded to convict her for the admitted facts did not disclose the offence envisaged. She should not have been convicted in law.

12. From the foregoing the Appeal has merit. The conviction is quashed and the sentence meted out is set aside. The Appellant shall be set free forthwith unless otherwise lawfully held.

13. It is so ordered.

**Dated, Signed and Delivered at Kitui this 28<sup>th</sup> day of June, 2017.**

**L. N. MUTENDE**

**JUDGE**