



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 19 OF 2017

JAMES KIMARU WAMBUGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Sentence imposed in Mukurweini Criminal Case No.109 of 2017 by

Hon. V.O. Chianda, SRM on 29.3.17)

JUDGMENT

The Trial

The Appellant herein **James Kimaru Wambugu** has filed this appeal against conviction and sentence on a charge of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars of the offence are that:-

On 27.3.17 at Mihuti village in Mukurweini Sub- County within Nyeri County was found carrying 7 stones of cannabis sativa which was not in medicinal preparation

The appellant pleaded guilty to the charge and was convicted and sentenced to 10 years imprisonment on his own plea of guilty.

The appeal

Aggrieved by this decision, the appellant lodged the instant appeal. In his Grounds of Appeal filed on 9th June 2017, the appellant set out 4 grounds of appeal which I have summarized into 3 grounds to wit:-

- 1. The element of trafficking was not proved as the facts read shows that he was arrested in his homestead***
- 2. The sentence imposed was harsh and excessive given that he was a first offender and advanced in age***
- 3. That he pleaded guilty on the promise by police of a lesser sentence or reprimand***

When the appeal came up for hearing; appellant wholly relied on his grounds of appeal and written submissions filed on 9th June 2017. Mr. Nyamache, learned counsel for the state submitted that appellant was liable to a maximum sentence of life sentence but was sentenced to 10 years. He however urged the court to review the sentence if it deems fit to do so.

Analysis and Determination

This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of **Okeno vs. Republic [1972] E.A.32**. The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that.

I have considered the submission for the appellant and by the state and I will address the issues raised as follows:

1. Was the element of trafficking proved?

The correct manner of recording a plea of guilty and the steps to be followed by the court was laid down in the celebrated case of **Adan V Republic**, (1973) EA 446 where Spry V.P. laid the procedure at page 446 in the following terms:

“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused’s reply must of course be recorded.”

The facts before the trial court are that appellant was spotted carrying a black paper bag. That upon his arrest, 7 stones of cannabis sativa were recovered from the black polythene paper bag.

Section 2 of the Narcotic Drugs and Psychotropic Substances (Control) Act interprets trafficking to mean:

the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance or making of any offer in respect thereof, but does not include—

(a) the importation or exportation of any narcotic drug or psychotropic substance or the making of any offer in respect thereof by or on behalf of any person who holds a licence therefore under this Act in accordance with the licence;

(b) the manufacturing, buying, sale, giving, supplying, administering, conveying, delivery or distribution of any narcotic drug or psychotropic substance or the making of any offer in respect thereof, by or on behalf of any person who has a licence therefore under this Act in accordance with the licence; or

(c) the selling or supplying or administering for medicinal purposes, and in accordance with the provisions of this Act, of any narcotic drug or psychotropic substance or the making of any offer in respect thereof, by a medical practitioner or veterinary surgeon or dentist or by any other person qualified to do so on the instructions of the medical practitioner or veterinary surgeon or dentist; or

(d) the selling or supplying in accordance with the provisions of this Act, of any narcotic

drugs or psychotropic substances by a registered pharmacist

It is evident from the above statement of facts that particulars of trafficking were not disclosed.

Appellant has appealed on sentence only. He does not appear to deny that the 7 stones of cannabis sativa were recovered from him. That being the case, the trial court is required to satisfy itself as to the intended purpose of the cannabis, under the provisions of Section (2) of the Act, before conviction.

Decision

Accordingly, it is hereby ordered that the appellant shall be retried on the same charge before a Magistrate of competent jurisdiction other than *Hon. V.O. Chianda, SRM*. It is further ordered that the appellant be produced before the court within seven (7) days of the judgment date. He shall thereafter be tried in accordance with the law.

DATED THIS 20th DAY OF July 2017

T. W. CHERERE

JUDGE

DELIVERED ON THIS 31ST DAY OF JULY 2017

BY: - Ngaah J.

JUDGE

In the presence of-

Court Assistant -

Appellant -

For the State -