



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MAKUENI

HC MISC APP NO. 165 OF 2017

DENNIS MBITHUKA APPELLANT

-VERSUS-

REPUBLIC PROSECUTION

JUDGEMENT

1. The Appellant was charged with offence of:-

TRAFFICKING OF NARCOTIC DRUG (BHANG) CONTRARY TO SECTION 4(A) OF THE NARCOTIC DRUG AND PSYCHOTROPIC SUBSTANCES CONTROL ACT NO. 4 OF 1994

On the 14th day of July 2016, at Kyatuku Village, Nduu Sub-location, Kithembe Location in Mukaa Sub-county within Makueni County, he was found conveying by preparation for sale cannabis sativa (bhang) to wit 7 rolls, and 125 grams valued at Kshs. 12,540/= street value which was not medically prepared.

2. On 21/11/2016 the Appellant pleaded guilty to the charge. On 22/11/2016 the facts were read to him and he confirmed the same to be correct. He was convicted on his own plea and after mitigation he was sentenced to a fine of 1 million shillings and in addition to serve 10 years imprisonment.

3. The Appellant then lodged a review complaining and stating his case as follows:-

i. THAT the Appellant is in no dispute of the charges and sentence as was meted by the trial court of 10 years.

ii. THAT this honorable court be pleased and find that the sentence imposed by the trial court is harsh given that the Appellant was only found in possession of five rolls of bhang hence review the sentence under the powers bestowed to it under article 165 (7) of the Supreme Law.

iii. THAT the Appellant is the sole breadwinner of a young family who has been depending on him hence will suffer a great damage in case of his overstaying under confinement.

iv. THAT the Appellant is remorseful and repentant on the offence that he had committed.

v. THAT the Appellant beg the honourable court to be present during the dispensation of the application.

4. He later during the hearing lodged handwritten Amended Supplementary Grounds and Submissions to

the effect.

APPELLANT'S AMENDED GROUNDS OF APPEAL

5. The Appellant having received and perused the certified copy of the trial record, he do beg leave of the Hon. Court to substitute his grounds of appeal in accordance with the provisions of section 350(v) CPC, that may his appeal be heard and decided on the following grounds instead of the former grounds lodged as the time of petitioning viz:-

- i. THAT the Appellant's appeal is against the sentence only and not against the conviction.**
- ii. THAT the learned trial magistrate awarded an excessively harsh sentence against the sentencing policy.**
- iii. THAT the learned trial magistrate did not consider the Appellant mitigation at all when passing the sentence.**
- iv. THAT the reasons wherefore the Appellant prays that his appeal be allowed and sentence imposed be set aside.**

APPELLANT'S SUBMISSIONS

6. The appellant submits that his appeal is against the sentence only and not conviction as he was convicted on a plea of guilty. This was after he requested the court to re-read the charges to him afresh on 21/11/2016. From the above, he submits that the conviction cannot be said to be unsafe, however his appeal is against the sentence which he submits to be hard and excessive.

7. After the conviction was entered, the learned trial magistrate proceeded to pass and pronounce the sentence. He terms the same as excessive and very harsh. He says that he was a first offender who pleaded guilty to the charges. He expressed remorse and in his mitigation, he told the court that he was the sole breadwinner for a family supported.

8. He submitted that had the learned trial magistrate observed the sentencing policy that first offenders are entitled to leniency and to be accorded a minimum sentence upon conviction as opposed to habitual offenders.

9. And thus as a first offender who pleaded guilty to the charge and presented mitigation is entitled to leniency. He invites the Honorable Court to intervene and by exercising the powers bestowed on it by the constitution be pleased to find that the sentence is harsh and accord him a more lenient sentence.

10. This will enable him rejoin the family he left at home. The Appellant relied fully on his grounds and written submissions and sought court's mercy by way of scaling down the sentence meted out to him.

RESPONDENT SUBMISSIONS

11. Mr. Kihara state counsel submitted that the court was very lenient as it could have sentenced the Appellant to life imprisonment instead of 10 years and a fine of Kshs. 1 Million.

12. The charge before court started that the Applicant was found ***"conveying by preparation for sale cannabis sativa;***

- 7 rolls**
- 125 grams"**

13. The facts read to the Applicant stated that ***"he was found in the house having 2 small basins containing bhang and rolling them into cigarettes namely;***

125 grams

5 rolls....”

14. The government analyst report dated 10/11/2016 received

“5 rolls (4.5 gms)

77 gms plant material”.

15. The discrepancies in the 3 situations is not explained further did the act of being found with such small quantity constitute trafficking narcotics?

16. The definition of trafficking means **“importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering conveyance, deliver or distribution of narcotic drugs.....”**

17. The charge talks of **“Accused being found conveying by preparation for sale....”**

18. The facts read to the accused talk of **“being found sitting in his house rolling some into cigarettes.”**

19. The above facts do not fit within the definition of trafficking an defined by the provision of Section 2 of the Act thus the accused pleaded guilty and convicted on facts not disclosing the offence charged.

20. The aforesaid finding constrains the court to quash conviction and set aside conviction.

21. The accused has already served one year imprisonment and was in custody before sentencing for over 4 months **(14/07/2016 to 22/11/2016).**

22. There is no assurance that the exhibit will be availed or the witness.

23. In any case there were discrepancies of the exhibits produced and the ones taken to the government analyst vide report produced.

24. Thus the court orders that,;

i. The accused be released forthwith unless he is otherwise held.

SIGNED, DATED AND DELIVERED THIS 11TH DAY OF DECEMBER, 2017.

C. KARIUKI

JUDGE

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