



**RREPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO.1 OF 2016**

*(Appeal originating from the conviction and sentence by Hon. Y. A. Shikanda -SRM in Malindi CR NO.107 of 2014)*

**IDRIS AZUWAJ.....APPELLANT**

**=VERSUS=**

**REPUBLIC.....PROSECUTOR**

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

The appellant was charged with the offence of being in possession of Narcotic drugs contrary to section 3(1) as read with sub-section (2) (b) of the Narcotic drugs and Psychotropic Substance Act No. 4 of 1994. The particulars of the offence are that on the 25<sup>th</sup> February 2014 at around 11:30 at Lamu Road area in Malindi District within Kilifi County, the appellant was found in possession of narcotic drugs namely heroin to wit two (2) small satchets (0.02 grammes) with a street value of Kshs.200/- in contravention of the said Act.

The appellant pleaded guilty and was sentenced to serve five (5) years imprisonment. The main grounds of Appeal are that the appellant is remorseful and has reformed. He is disabled and walks with crutches. He has now served 22 months in prison. He has now reformed.

Mr. Nyongesa, prosecuting counsel, opposed the appeal. Counsel submitted that the sentence is lawful. The appellant is not a first offender. He had two other cases involving drugs. He could not be rehabilitated as he is a habitual offender.

The appeal is only on sentence. The court noted that the accused walks through the use of crutches. The record of the trial court confirms that he has been using crutches even during the trial. He was with a co-accused who denied the charges. The appellant pleaded guilty and now pleads with the court for leniency. He pleaded with the court to reduce the sentence as life in prison is difficult. He relies on his colleagues to carry water for him but at times they refuse.

Given the circumstances of the case, although the appellant is not a first offender, I do find that the sentence is excessive. The drugs were assessed to have a street value of Kshs.200. It is true even a small content of that magnitude can have disastrous effects, however, one should be excessively punished where a lesser sentence can achieve the same results. The sentence is retributive. The appellant has now served exactly two years from the 25<sup>th</sup> February 2014 when he was charged. He has been in custody since then.

I do find that the period served is enough punishment for the offence. The five year imprisonment sentence is hereby set aside and replaced with the period already served. The appellant shall be set at liberty unless otherwise lawfully held.

Dated and delivered in Malindi this **29<sup>th</sup>** day of **February**, 2016

**S.CHITEMBWE**

**JUDGE**