



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. 9 OF 2014**

*(Appeal originating from the conviction and sentence by Hon. Y. A. Shikanda-SRM in Malindi CR. NO.78 of 2014)*

**1. ELIZABETH AUMA RUGUMO**

**2. BRIAN OCHIENG.....APPELLANTS**

**=VERSUS=**

**REPUBLIC.....PROSECUTOR**

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

The Appellants were charged with the offence of being in possession of Narcotic Drugs contrary to section 3(1) (2) (a) of the Narcotic drugs and psychotropic substance Act Number 4 of 1994. The particulars of the offence for the first appellant Elizabeth Auma Ragumo. Are that on 10<sup>th</sup> February 2014 at Pentagon area in Malindi town, she was found with four rolls of cannabis sativa with street value of Kshs.800/-. Fr the 2<sup>nd</sup> Appellant, Brian Ochieng, the particulars were that on the same day 10<sup>th</sup> February 2014 he was found with five sachets (0.05 grammes) of heroin with street value of Kshs.500.

Both appellants pleaded guilty to the offence. The first appellant was sentenced to serve six (6) years while the 2<sup>nd</sup> appellant was sentenced to serve ten (10) years imprisonment. The grounds of appeal are similar. The appellants contend that they were not accorded adequate time before taking their plea, that they were not informed of the consequences of pleading guilty and that they are first offenders. The first appellant pleaded for lenience and informed the court that it was her first time to commit an offence. Similarly, the 2<sup>nd</sup> appellant pleaded for leniency. Mr. Nyongesa, prosecuting counsel submitted that the plea was properly taken and the sentence is not excessive. The pre-sentencing reports were not favourable to the appellants. The appellants were found not to be fit for non-custodial sentence.

The record before the trial court show that the appellants pleaded guilty to the charges. When the facts were read over, the 1<sup>st</sup> accused explained that the drugs were not hers and the court re-took her plea. The court took it that the 1<sup>st</sup> appellant was denying the charge while the 2<sup>nd</sup> appellant maintained that he was pleading guilty. This was on 11<sup>th</sup> February 2014. On 18<sup>th</sup> February 2014 the 1<sup>st</sup> appellant changed her plea and the charges were read over again to both appellants. The appellants pleaded guilty to both the charges as well as the facts.

Given the record of the trial court; I do find that the plea was equivocal. The appellants had all the time to change their plea. The appellants are aware that once one admit, committing an offence then what follows is the sentence.

With regard to the sentence, the appellants have served almost two years in prison. The combined street value of the drugs is Kshs.1,300. It is true even if the quantity of the drugs was small, it could still lead to disastrous effects. However, since the appellants pleaded guilty, I do find that the punishment should have been less severe. I do find the sentence of six (6) years and ten(10) years imprisonment for the first and second appellant to be excessive. The sentences are hereby set aside and replaced with the period

already serve.

In the end, the appeals on conviction fails. The sentence is set aside and replaced with the period already served. Each appellant shall be set at liberty unless otherwise lawfully held.

Dated and delivered in Malindi this **15TH** day of **FEBRUARY** 2016

**S.CHITEMBWE**

**JUDGE**