



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO. 56 OF 2012**

**SAMUEL NDERITU WAMBUGU ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(An appeal from judgment and sentence in original Nyeri CMCR 72 of 2012 delivered on 12/3/2012 by W.A. Juma – Chief Magistrate)**

**JUDGMENT**

The appellant **Samwel Nderitu Wambugu** was arraigned in the Magistrate court on 23/1/2012 and faced a charge of trafficking in Narcotic drugs contrary to section **4 (a)** of the Narcotic drugs and psychotropic substance (**control**) **Act No.4 of 1994**.

The particulars of the offence are that on the 21<sup>st</sup> day of January, 2012 at about 00.30hrs at Nyeri town within the Nyeri County in the Republic of Kenya was found trafficking in Narcotic Drugs contrary to section **4(a) of the Narcotic Drugs Act No.4 of 1994**.

The particulars of the offence are that on the 21<sup>st</sup> day of January 2012 at about 00.30hrs at Nyeri town within the Nyeri County in the Republic of Kenya was found trafficking by foot ten stones (approximately 150grams) of cannabis sativa valued at Kshs.2000 which was not in medical preparation in contravention of the act.

The appellant pleaded guilty to the charge on 12/3/2012 and was convicted on own plea of guilty and sentenced to serve ten (10) years imprisonment.

The appellant filed this appeal faulting the trial magistrate's conviction in the basis that the appellant pleaded guilty to a detective charge, that the trial magistrate did not take into account his mitigation in sentencing; in his written submissions in support of the appeal the appellant submits that the charge sheet does not disclose the offence of trafficking as the act that constituted trafficking is not stated and that the facts as narrated by the prosecution did not disclose any element of trafficking as required by section 2 of the act, appellant further submits that no proper interpretation was done to him in a Kiswahili language which he understands; finally appellant submits that no government analyst report was produced to confirm that the plant material was cannabis sativa.

Mr. Njue for the state submitted that charge as framed is defective in failure to describe the act of trafficking. The appellant contends in this appeal that it was not established whether the plant material he was allegedly found in possession of was cannabis sativa as no report from government analyst was produced. On perusal of the original file, there is indeed a report of the Government analyst dated

24/2/2012 and signed by J M Welimo and which was alluded to by the prosecution in the statement of the facts. This ground of appeal therefore fails.

The appellant in faulting the trial court for convicting him on a defective charge,

**In the Tanzanian case Isidori Patroze – VS – Republic Tanzania Cr. App 224 of 2007 it was stated**

**“it is mandatory statutory requirement that every charge in a subordinate court shall contain not only a statement of the specific offence with what the accused is charged but such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. It is now law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence that the prosecution has to prove the accused the essential elements of the offence charged with the necessary mens rea. We take it as settled law that where the definition of the offence charged specifies factual circumstances without which an offence cannot be committed; they must be included in the particulars of the offence.**

The appellant was charged with the offence of trafficking Narcotic drug contrary to section 4 (a) of the act. Section 2 of the Act defines trafficking as

**“ ‘trafficking’ means the importation, exportation, manufacture, buying, sale, giving, Sampling, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance or making of any offer in respect thereof”**

The particulars of the offence in the charge the appellant faced was that on the material day he was found trafficking the ten stones of cannabis by foot. It is a clear understanding that the appellant was conveying or carrying from one place to another while walking on foot and not say by a motor vehicle or bicycle. In my understanding the particulars disclosed the essential element of the charge of trafficking a narcotic drug sufficiently from the appellant to understand the charge he was facing.

I therefore hold that the charge as drawn was not defective as the appellant and state submits.

The appellant submits that there was no interpretation done to the Kiswahili language which he understands and contends that it is not true that what is recorded on the proceedings are his response. The record of the proceedings before Hon W.A Juma shows

Court: accused reminded of the charge in Kiswahili he replies

**Accused – ni kweli**

**Court – plea of guilty entered. “”**

After the facts were read the appellant admitted the facts as true. After conviction the appellant mitigated stating

**“I stay in Chania with my grandmother who does not know that I was arrested. I ask for pardon”**

The above engagement with the trial court does not appear to me to lead credence to the appellant’s assertion that he did not follow the proceedings. For clarification, when the accused speaks in Kiswahili in court the trial magistrate will record what he has said in English. It is therefore not true that .....what appellant said is not recorded in Kiswahili, that the English translation is not a translation of what he stated. I find no merit in this ground of appeal.

The last ground raised by the appellant is that the sentence of 10 years imprisonment .....was harsh in the circumstances and that the trial magistrate did not consider his mitigation. The offence for which accused was charged attracts a sentence.

4(a) in respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance whichever is the greater and in addition imprisonment for life”.

The appellant was sentenced to 10 years imprisonment, authority the maximum term of imprisonment is life. However in sentencing the court takes into account factors such as the quantity of the drug, the mode of trafficking, the personal circumstances of the accused, which are brought out in mitigation; whether accused is first offender, age of the accused and ..... to rehabilitate the offender or protect society from the offender among others. These are factors that influence the sentencing. In the present appeal the appellant was a first offender, the quantity of drug was 10 stones and the appellant was remorseful.

I find that the sentence of 10 years was on a higher side. I set aside the 10 years imprisonment and substitute of the appellant to serve five (5) years imprisonment from the date of the conviction on 12/3/2012. It is so ordered.

Dated and signed at Nyeri this 5<sup>th</sup> October, 2015.

**S N RIECHI**

**JUDGE**

**31/3/2016**

Before – **S N RIECHI JUDGE**

Catherine – Court Clerk

Appellant – present

Njue for Respondent – present

**Court** – judgment read over and delivered in open court in presence of appellant and Njue for the Respondent this 31<sup>st</sup> March, 2016.

**S N RIECHI JUDGE**

**31/3/2016**