REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPPEAL NO 105 OF 2015

(Appeal against Conviction and Sentence in Kandara SR Criminal Case No 510 OF 2014 – C. Kithinji RM)

PATRICK NJUGUNA CHEGE.……..APPELLANT

VERSUS

REPUBLIC…….…...…...……..RESPONDENT

R U L I N G

1. The Appellant in this appeal, **Patrick Njuguna Chege**, has applied by **notice of motion dated 12/11/2015** to be admitted to bail pending disposal of his appeal. The Republic has opposed the application.

2. The Appellant, along with his co-accused, was charged in count 1 with trafficking in **Narcotic Drugs and Psychotropic Substances (Control) Act, No.4 if 1994,** and in count 2 with unlawfully being in a house used for the purpose of smoking cannabis sativa contrary to **section 5(1) (b) of the same Act.** He was tried and convicted of both counts. In count 1 he was sentenced to life imprisonment and in addition to pay a fine of Kshs. 1 million and in default to serve one year imprisonment. As for count 2, after a "pre-sentence report" the trial court said –

> **"For accused 1 (appellant) the sentence for count II is held in abeyance as he has a capital punishment."**

3. The Appellant appealed against both conviction and sentence.

4. Learned counsel for the Appellant has submitted that the Appellant's appeal has overwhelming chances of success in that his alleged trafficking in narcotic drugs was by way possession of various drugs, yet possession is not the same as trafficking as the definition of trafficking under section 2 of the Act does not include possession (which is not defined in the Act). It was his further submission that the charge was thus fatally defective in that the particulars of the offence did not disclose the offence charged.

5. Learned counsel however conceded that there was under the Act a separate offence of possession which is minor and cognate to the offence Charged, and which carries a sentence of ten (10) years imprisonment. However, he submitted that the minor offence was not proved beyond reasonable doubt by the evidence placed before the trial court.

6. In his response Learned Prosecution Counsel for the Respondent submitted that by common balance possession must include storing, which is part of the definition of trafficking under the Act, and that that was why Parliament did not deem it necessary to define possession.

7. Learned counsel further submitted that evidence placed before the trial court included various paraphanilia that showed that the Appellant was engaged in selling drugs, and further, that there were many other persons found in the Appellant's premises, some of whom escaped and others were arrested and charged with him.

8. Finally Learned Prosecution Counsel submitted that even if the court were to find that possession is not the same as storing, there was overwhelming evidence of possession, which is an offence under the Act,

minor but cognate to the offence charged, and that this court could convict the Appellant for that minor offence, which carries a maximum ten (10) years imprisonment.

9. I have perused through the record of the trial court (including the judgment) and have considered the submissions of the learned counsels. It appears to me that the various arguments presented will be best considered at the hearing of the appeal itself. I am not, for now, persuaded that this is a proper case where to admit the Appellant to bail pending disposal of his appeal. I need not say any more lest I prejudice the hearing of the appeal.

10. The application for bail pending appeal is refused. It is so ordered.

DATED, SIGNED AT MURANG'A THIS 14TH DAY OF APRIL 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 15TH DAY OF APRIL 2016