



REPUBLIC OF KENYA
IN THE HIGH OF KENYA AT NYERI
CRIMINAL APPEAL NO. 60 OF 2012

JOHN KIBOTHO GAKURE..... APPELLANT

VS

REPUBLICRESPONDENT

(Appeal from the judgment of the Hon.W.Juma (CM) delivered on 12/03/2012 in Criminal Case No. 244 of 2012)

JUDGMENT

1. The appellant, **John Kibotho Gakure**, was charged with the offence of trafficking in narcotic drugs contrary to **Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act**. The particulars of the charge are that on the 9/03/2012 at 15.13hours the area Assistant Chiefs of Ithekahuno sub-location and Thageini sub-location were on patrol and received information that the appellant was a drug peddler; they went to his house and conducted a search and found two stones and 45rolls of bhang under his bed;

FACTS

2. The appellant was subsequently charged at the Chief Magistrates Court at Nyeri and was convicted on his own plea of guilty and sentenced to serve a term of ten (10) years imprisonment.

3. Being aggrieved by both conviction and sentence, the appellant filed a Petition of Appeal on the 28th March, 2012.

4. The appeal was heard on the 11/11/2015 with Mr. Njue appearing for the State and the appellant appeared in person; both Prosecuting Counsel for the State and the appellant made oral presentations; at the hearing the appellant abandoned his appeal on conviction and proceeded only on the appeal against sentence; hereunder is a brief summary of the parties submissions.

APPELLANTS SUBMISSIONS

5. The appellant prayed that the sentence be reduced to enable him go back to serve the society.

RESPONDENTS SUBMISSIONS

6. The appeal was opposed; Counsel submitted that the appellant pleaded guilty to the charge of trafficking drugs contrary to Section 4(a) of the Narcotics Control Act Cap.245 Laws of Kenya; that the law provides for a fine of KShs.1,000,000/- or a life sentence; that the sentence imposed by the trial court of ten (10) years was lenient.

7. Counsel prayed that the sentence be upheld.

ANALYSIS

8. It is this courts considered view that the trial court overlooked material factors; that the appellant in this case was charged with trafficking but it is noted that the prosecution did not elaborate on the method used for trafficking as provided by the section; the drugs were also found in his house under his bed and the evidence points to being found in possession as opposed to trafficking; this court also takes into account the fact that the search conducted by the two assistant chiefs though the act may have been noble it smacked of illegality; nor was an analysts certificate on the nature and value of the drugs availed to the trial.

9. For the reasons stated above this court invokes the provisions of section 179(2) of the Criminal Procedure Code and substitutes the charge to the lesser offence of possession under Section 3(a) of the Act;

FINDINGS

10. The conviction is found to be unsafe but nevertheless this court substitutes the conviction to that of the lesser charge and sets aside the sentence imposed and substitutes it to the term served.

DETERMINATION

11. The appeal is found to be meritorious and it is hereby allowed.

Orders accordingly.

Dated, Signed and Delivered at NYERI this 29th day of September, 2016.

A. MSHILA

JUDGE.