



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HIGH COURT CRIMINAL APPEAL NO. 62 OF 2015

(CORAM: HON. J. A. MAKAU – JUDGE)

DENNIS ONYANGO ODHIALO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against the sentence in Criminal Case No. 112 of 2015 in Ukwala Law Court before Hon. R. M. OANDA – S.R.M.)

JUDGMENT

1. The Appellant **Dennis Onyango Odhialo** was charged with an offence of being in possession of *cannabis sativa* (Bhang) Contrary to Section 3 (1) as read with **Section 3(2) (a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994**
2. The particulars of the Offence were that on 16th day of March, 2015, at around 9.00 p.m. in Siriwa village, Madungu sub-location, Ugunja sub County, within Siaya County was found in possession of *cannabis sativa (bhang)* to wit 40 grams.
3. That when the charge was read to the appellant he admitted that it was true, that he also admitted facts when they were given to be true. The Court convicted the appellant on his own plea of guilty and after mitigation sentenced him to imprisonment for 10 years.
4. Aggrieved by sentence the appellant preferred this appeal setting out the following grounds of Appeal:-
 - a) *That I pleaded guilty to the offence of being in possession of illegal drugs and was convicted and sentenced.*
 - b) *That I was not fairly judged and have excessively sentenced.*
 - c) *That my long sentence is too harsh and I pray that the honourable High Court revised my sentencing.*
 - d) *That the trial Court did not give me a chance to understand the charge against me hence a plea of guilty was entered.*

d) That the trial Court did not consider my mitigation and went on with sentencing.

e) That I have only one brother who is epileptic and as orphans, he depends on me for everything.

Reasons Whereof: the appellant prays that the honorable Court allows appeal and takes necessary steps that deem fit.

5. When the appeal came up for hearing the appellant abandoned his appeal against conviction and argued appeal on sentence, urging Court to reduce the sentence as he had only one stick and the sentence meted was excessive.

6. Mr. Ombati, Learned State Counsel did not oppose Court's interference with the sentence as the appellant had been given maximum sentence which the Counsel considered excessive in view of the quantity found with the appellant.

7. Section 3 (2) (a) of the Narcotic Drugs and Psychotropic substance (Control) Act 1994 provides.

“(2) A person guilty of an offence under Subsection (1) shall be liable:-

(a) in respect of cannabis, where the person satisfies the Court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment

for twenty years: and ...”

The above-mentioned section does not provide a mandatory sentence but gives a maximum sentence of 10 years.

8. The Appellant as per Court's record was treated as a first offender. He prayed for forgiveness stating the reasons for sniffing the stuff was to enable him do a lot of work. The trial Court on sentencing the appellant to 10 years imprisonment was informed upon the probation officer's report. The record do not reveal that the Probation Officer's report was made available to the appellant and allowed to file a response on the same. It is my view that when the Court decides to rely on Probation Officer's Report it is a constitutional right of the accused person to be informed in advance and be supplied with the probation officers report as it is evidence that the prosecution intends to rely on in determination of the sentence. The accused should have reasonable access to that evidence. (See **Article 50 (1) (2)(j) of the Constitution of Kenya 2010** which provides:-

“50 (1)Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right: –

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;”

9. It is my view and believe that had the Probation Officer's report been furnished to the appellant he would have known in advance of the intended sentence and with access of the Report he would have prepared and put further mitigating factors which are lacking in the Court file. That failure to access Probation Officers Report in advance violated, the constitutional right of the appellant that resulted into excessive and unjustified sentence of 10 years imprisonment for having been found with 40 grams of bhang which he was sniffing to enable work hard without tiring.

10. I have considered that the appellant admitted the offence, without wasting Court's valuable time, that

the amount of bhang was 40 grams, that he is remorseful and has so far served approximately 8 months and that he has learned that bhang is not good for one's health and one do not need to take it to work hard from the period he has been in prison, I therefore reduce the sentence to 8 months, thus for the period served so as to secure the appellant's release from prison forthwith.

11. The upshot is that the appeal against sentence is allowed. The sentence is set aside and reduced to eight (8) months, so far served to afford the release of the appellant forthwith. The appellant is therefore ordered released unless lawfully held.

DATED SIGNED AND DELIVERED AT SIAYA THIS 18TH DAY OF NOVEMBER, 2015.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 18TH DAY OF NOVEMBER, 2015.

In the presence of:

Mr. Ombati State Counsel – present

Appellant – Present

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akida

J. A. MAKAU

JUDGE