



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 63 OF 2012

MAMBOLEO APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original Conviction and Sentence in Criminal Case No. 3363 of 2009 of the Chief Magistrate's Court at Mombasa – Hon. Mutende - SPM)

JUDGMENT

The Appellant was charged Convicted and Sentenced to fifteen (15) years imprisonment for the offence of trafficking Narcotic drugs contrary to Section 4 of the narcotics drugs and psychotropic substances control Act.

The particulars of the charge were that:-

“On the 14th day of October, 2009 at Shimanzi Mombasa County he trafficked in Narcotic drugs by selling seven sachets of Heroin with a street value of Ksh. 1,750/= in contravention of the said Act”.

In the second Count the Accused was charged with trafficking. The particulars being that on the 14th day of October, 2009 he trafficked by way of selling six rolls of Cannabis Sativa with street value of Ksh. 60/= in contravention of the said Act.

The prosecution called 4 Witnesses. The brief facts of this case are that **PC DAVID MWITA (PW 2)** and **PC MUTISYA (PW 3)** attached to Makupa police station were on patrol duties on the 14th day of October, 2009 when at about 7:00 a.m. they got information that the Accused was selling drugs at a certain godown at Shimanzi. They proceeded and sealed the two exits routes of the godown and managed to arrest the Accused who had taken to his heels upon seeing them. Upon search on the left hand side of his trouser pocket they recovered seven sachets of some powdery stuff which they suspected to be Heroin.

Meanwhile the Accused had resisted arrest by inciting members of public and reinforcements had to be done. At the police station a thorough search was conducted and six rolls of dry plant material were recovered inside his inner wear. Also recovered were cash Ksh. 2,406/= which was taken as proceeds from the sale of the drugs. The money was in various denominations.

The government analyst (PW 1) received two envelopes one with six cigarettes all of a dry plant material. The second one contained powder. He did examine them and from the dry plant material to be

Cannabis Sativa and the brownish powder to be diacetyl Morphine (heroin) in seven satchets and he produced the exhibit memo forms and the report.

In his grounds of appeal the appellant contends that the seized drugs were not weighed in his presence contrary to section 74A of the Narcotic drugs and Psychotropic control Act No. 4 of 1994 and secondly that there was no valuation certificate. He however, seems to have abandoned the grounds on Conviction and taken to mitigation as to the Sentence.

It is noted that apart from the money Ksh. 2,406/= which was found on the appellants pockets there is no evidence to the effect that the appellant was selling the heroin and Cannabis Sativa.

However, there is uncontroverted evidence to the effect that he was found in possession of he seven satchets of heroin and six (6) rolls of Cannabis Sativa. Same were found in his trouser pockets.

I am satisfied that the facts prove the minor offence of possession.

The Conviction for trafficking is quashed and substituted with that of possession under Section 179 of the Criminal Procedure Code. The Sentence of fifteen (15) years in respect of the first Count is reduced to seven years imprisonment.

The Sentence in the 2nd Count will not be interfered with.

The Sentences will run concurrently. The appellant will therefore serve an imprisonment term of seven (7) years from the time of Conviction.

Judgment delivered dated and signed this **31st** day of **March, 2014**.

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M. MUYA

JUDGE

31ST MARCH, 2014

In the presence of:-

Learned State Counsel Miss Mutua

The Appellant present

Court clerk Musundi