



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL REVISION NO 5 OF 2014**

REPUBLIC.....APPLICANT

VERSUS

RAPHAEL MATI MUSEE.....RESPONDENT

**RULING ON REVISION**

Raphael Mati Musee, the Respondent, was charged with being in possession of *cannabis sativa* contrary to **Section 3(1) and 2(a)** of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 (the Act). It was alleged that on 6<sup>th</sup> December 2013 at Migwani Market, Migwani Location in Migwani District of Kitui County was found in possession of *cannabis sativa* (bhang) to wit one roll with a street value of Kshs 20 which was not medically prepared.

He pleaded guilty to the charges and admitted the facts. He was convicted and sentenced to serve two years imprisonment.

The lower court file being **Criminal Case No. 659 of 2013** in the Senior Resident Magistrates Court at Mwingi was forwarded to this court for revision by the Acting Senior Principal Magistrate by a letter dated 26<sup>th</sup> February 2014 with regard to the sentence imposed.

The power of this court to revise is derived from section 362 of the Criminal Procedure Code which allows the High Court to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any findings, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

I have examined the record of proceedings from the lower court. The trial magistrate imposed a sentence of two years. The penalty section, being **Section 3 (2) (a) of the Act**, provides for imprisonment for a period of 10 years in cases where the person had the *cannabis sativa* for his/her own consumption. The section provides thus:

**“A person guilty of an offence under subsection (1) shall be liable to, in respect to cannabis sativa, where the person satisfied the court that the cannabis was intended solely for his own consumption, to imprisonment for 10 years and in any other case to imprisonment for 20 years.”**

The Court of Appeal in **Criminal Appeal No. 479 of 2007 Daniel Kyalo Muema v. R (2009) eKLR**

referred to the phrase “*shall be liable*” in regard to its construction. The court cited **Section 66 (1)** of the *Interpretation and General Provisions Act* (Cap 2 Laws of Kenya) which provides:

**“Where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punishable by a penalty not exceeding the penalty prescribed”.**

**Section 26 (2) and (3)** of the Penal Code seems to capture the spirit of the above section when it provides:

**“(2) Save as may be expressly provided by the law under which the offence concerned in punishable, a person liable to imprisonment for life or any other shorter period may be sentenced to any shorter term.**

**(3) A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment”.**

See also **Kolongei vs. Republic [2005] 1 KLR 7**, where the appellant who was convicted of trafficking in 27.8 Kgs. of heroin was sentenced to 18 years imprisonment plus a fine and not to the prescribed life imprisonment plus a fine and **Gathara vs. Republic [2005] 2 KLR 58** where the appellant was sentenced to 10 years imprisonment plus a fine for trafficking in eleven (11) bags of *cannabis sativa*.

The phrase “*shall be liable to*” as used in Penal statutes was judicially construed by the Court in **Opoya vs. Uganda [1967] EA 752 at 754** paragraph B as follows:

**“It seems to us beyond argument the words “shall be liable to” do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it”.**

In **Danied Kyalo Muema case**, above, the Court of Appeal stated that:

**“We have no doubt that the sentence of 10 years imprisonment and 20 years imprisonment prescribed in Section 3 (2) (a) of the Act for the possession of *cannabis sativa* are the maxima and that the court can lawfully impose any shorter term of imprisonment. Furthermore, although Section 3 (2) (a) of the Act does not expressly provide for a fine, the court can lawfully in accordance with Section 26 (3) of the Penal Code sentence the offender to pay a reasonable fine in substitution for imprisonment.”**

I think I have said enough to demonstrate that the trial court was not in error in sentencing the Respondent for 2 years imprisonment for being in possession of one roll of *cannabis sativa* where the sentence is 10 years. That sentence in view of the cases above is the maximum sentence under **Section 3 (2) (a)** of the Act.

Before concluding this matter I wish to point out that the manner in which the proceedings were done in the lower court in this matter is not without errors. Firstly, the language of the court is not indicated; secondly, after the charges were read out and Raphael replied by stating that “**it is true**”, the trial court ought to have stated: **“Plea of guilty entered.”**

Thirdly, after the prosecutor presented facts and the reply by the accused, the trial court ought to have recorded: **“Accused person convicted on his own plea of guilty.”** Fourthly, the trial court would have called for the previous records of the accused and ask for mitigation from the accused after which he would have proceeded to sentence.

The record as it stands does not show the trial magistrate convicted Raphael. He has been serving

sentence for which he was not convicted. The sentence is an illegality and for this reason, I hereby set it aside. Consequently, I hereby discharge Raphael Mati Musee unconditionally. I make orders accordingly.

**Dated, signed and delivered this 26<sup>th</sup> March 2014.**

**S.N.MUTUKU**

**JUDGE**