



No. 223/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 163 OF 2012

NZEMBI JOHNAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Senior Resident Magistrate's Court Criminal Case No. 185/2012 by Hon. S.A. Ogot, R.M on 12/10/2012)

JUDGMENT

1. **Nzemi John**, the appellant was charged with the offence of being in possession of narcotic drugs contrary to Section **3(1) (2(a))** of the **Narcotic Drugs and Psychotropic Substances Act 4 of 1994**. Particulars thereof being that on the **27th day of August, 2012 at 10.00am** at **Mwangeni Trading Centre, Kituti Location in Ikutha District** within **Kitui County** was found being in possession of **Narcotic Drugs** namely cannabis to wit **22 sachets** of street value of **Kshs. 440-** which was not in any form of medical preparation.
2. The appellant was tried, convicted and sentenced to serve **13 years** imprisonment. Being aggrieved by the conviction and sentence she appeals on the following grounds.
 - i. *the learned magistrate erred in law and fact when she convicted the accused to serve 13 years on a defective charge.*
 - ii) *The learned magistrate erred in law and fact when he failed to appreciate that the prosecution did not prove its case beyond a reasonable doubt.*
 - iii) *The learned magistrate erred in law and fact when he handed down an excessive sentence against the appellant.*
3. Facts of the case are that PW1, **No. 2008060509 APC Jennifer Kasoa** on Company of PW3, **No. APC Justus Mwololo** acting on information received went to a hotel operated by the appellant. They found her sitting holding a black purse. Following their requests, she opened the purse. Inside were **22 sachets** of dry plant material. They escorted her to the police station. PW2, **No. 755433 P.C. Japheth Kidiavai** prepared an exhibit memo form, escorted the material to the Government Chemist for Analysis. A report was received. Hence the charge.
4. In her defence, the appellant stated that on the material date, she left the hotel going to buy beans. She returned to find PW1 at the counter. She was holding a purse. She asked her to take her to her house. They went to the house. She searched and found nothing. She then took her to the office where they found PW3. It was alleged that she sells cannabis to school children. She denied

having even seen the cannabis while at the police station.

5. This being the first appeal I have to analyse and re-consider the evidence adduced by witnesses to reach my own independent decision whether or not to uphold the conviction of the appellant. In making such an inference I must bear in mind that I neither saw nor heard the witnesses. (see ***Okeno versus Republic [1972] E.A. Pg 32***).

First and foremost, it is important to note that the charge sheet as drawn has an omission. The section of law the appellant is said to have contravened is non-existent in law.

6. This brings us to the issue whether the prosecution proved the case beyond any reasonable doubt. It is true as correctly submitted by the **Mr. Kituku** for the appellant that she was charged with being in possession of cannabis, a narcotic drug to wit **22 sachets**. The weight of the substance is not stated. Only its value is given as Kshs. 440- This was a glaring omission.
7. The Administration Police, PW1 and PW3 acted on information and moved to the appellant's kiosk. They found her sitting down holding a black purse. They forced her to open it. It contained some **22 sachets** of plant material. According to PW2 he sent the material to the Government Chemist for analysis and received a report thereof thereafter. The report was marked for identification. It is not clear from the court record as to how a report by a Government Analyst found itself on record.
8. In reaching its findings the court stated that the appellant was found in possession of narcotic drugs. Without evidence of the analyst there is no proof that the plant material alleged to have been recovered from the appellant was cannabis a narcotic drug.
9. The charge was therefore not proved beyond reasonable doubt.
10. For reasons stated, the appeal succeeds. It is allowed, the conviction is quashed and sentence set aside.

DATED, SIGNED and DELIVERED at MACHAKOS this 3RD day of APRIL, 2014.

L.N. MUTENDE

JUDGE