



**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 102 OF 2014**

MOHAMED ABBAS ABDALLA ..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original Conviction and Sentence in Criminal Case No. 19 of 2014 of the Children's Court at Mombasa – Hon. Koech - **RM**)

**JUDGMENT**

The Appellant herein above mentioned was Convicted and Sentenced to three (3) years placement at a Borstal Institution at Shimo La Tewa for the offence of being found in possession of Narcotic drugs contrary to Section 3(1) as read with Section 2(a) of the Narcotic and Psychotropic substances control Act No. 4 of 1994.

He pleaded guilty to the charge and was Convicted upon his own plea of guilty. He has now lodged this appeal on the grounds that;

1. **The learned trial magistrate erred in Convicting the Appellant for an offence which he had not been tried for.**
2. **That he erred in law and in fact in finding that the offence of possession had been disclosed.**
3. **Conviction was based on presumption but not facts.**
4. **The trial magistrate did not consider mitigation factors as adduced by the Appellant.**
5. **That the particular and facts did not support the charge.**

The Appellant was charged with the offence of being in possession of Narcotic drugs contrary to section 3(1) as read with Section 2(a) of the Narcotic drugs and Psychotropic substances Control Act No. 4 of 1994.

The particulars being that:-

***“On the 7th day of March, 2014 at Majengo area Mombasa County he was found being in possession of Narcotic drugs to wit one roll of Cannabis Sativa with a street value of Ksh. 100/= in contravention of the said Act”.***

When the charge was read to him on the date of plea which was 11th March, 2014, he pleaded guilty. The case was adjourned to 14th March, 2014 so as to await a report from the Government Chemist.

The facts were read to the Appellant on 14th March, 2014 and the roll of Bhang, Government analyst report, and exhibit memo were produced as exhibits number 1 and 2 and 3 respectively. The Appellant stated that the facts were correct.

A further perusal of the record of proceedings shows that after the appellant stated that the facts were correct, the learned trial magistrate did not proceed to record a Conviction.

It is also noted that the offender was not afforded the chance to mitigate.

These two omissions are fatal to the prosecution case. As there is no Conviction, the Sentence cannot stand and it is hereby set aside.

The appeal is allowed. The appellant is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this **16th** day of **September, 2014**.

.....

**M. MUYA**

**JUDGE**

**16TH SEPTEMBER, 2014**

**In the presence of:-**

Learned Counsel for the State Mr. Jami

Learned defence Counsel Mr. Were

Court clerk Mr. Musundi