



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 128 OF 2011

JOSEPHINE KAVINDU MUEMA APPELLANT

VERSUS

REPUBLIC

(Being an appeal from the Judgment of Hon. H. Nyakweba (S.R.M) delivered on 3/06/2010 in Kilungu Senior Resident Magistrate's Court Criminal Case No. 558 of 2009)

(Before Hon. B. Thurairaja J)

J U D G M E N T

1. The Appellant, **Josephine Kavindu Muema**, was charged as follows:-

“Being in possession of Narcotic drugs contrary to **section 3 (1)** as read with **section 4 (1)** of the **Narcotic and Psychotropic Substances Control Act, No. 4 of 1994.**”

2. When the Appellant was arraigned before the trial court, she pleaded not guilty. The case proceeded to a full trial. The Appellant was convicted and sentenced to serve twenty (20) years imprisonment.

3. The Appellant was aggrieved by both the conviction and sentence and appealed to this court on grounds that can be summarized as follows:-

- **That the conviction was against the weight of the evidence.**
- **That crucial witnesses were not called.**
- **That the defence case was not considered.**
- **That the sentence was harsh and excessive.**

4. The appeal was canvassed by way of written submissions which I have duly considered. The learned counsel for the State conceded to the appeal.

5. This being a first appeal, this court is duty bound to re-evaluate the evidence and the record afresh and come to its own conclusions and inferences – See **Okeno –vs- Republic (1972) EA 32.**

6. The evidence of PW1 AP. Sgt **Fidelis M Kahuya** and PW2 **APC Rose Mutai** while acting on a tip off, they arrested the Appellant who was travelling in a matatu to **Nunguni**. They found the Appellant with the bhang in question.

7. The Appellant denied having been arrested with the drugs in question.

8. PW4 **PC Moses Karani** escorted the drugs to the Government Chemist and PW3, the Government chemist confirmed the same to be Cannabis Sativa. However, the charge sheet is defective as it

lumps up two offences into one i.e. that of possession and that of trafficking. This is a defect that is not curable under **section 382** of the **Criminal Procedure Code**. The evidence of the witnesses from the scene (PW1 and PW2) does not clearly establish whether the Appellant was trafficking the drugs or whether she had them in her possession.

9. Consequently, the appeal has merits and is allowed. The Appellant at liberty unless otherwise lawfully held.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 30th day of October 2014.

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B. THURANIRA JADEN

JUDGE