



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Criminal Appeal 134 of 2011**

***(From Original Conviction and Sentence in Criminal Case No. 398 of 2011 of the Chief Magistrate's Court at Mombasa – R. Mutoka (CM))***

**NABIL SHABIR ABED ..... APPELLANT**

**- Versus -**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The Appellant was charged with two counts. The first one is that of trafficking in Narcotic Drugs contrary to Section 4(1) as read with Section 2(a) of the Narcotic and Psychotropic Substances Control Act NO. 4 of 1994.

In the second count he was charged with being in possession of Narcotic Drugs contrary to Section 3(1) (a) as read with Section 2(a) of Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.

In the first count he was alleged to have trafficked in Narcotic Drugs by way of conveyance to wit 215 rolls of cannabis sativa with a street value of Kshs. 33,250/- in contravention of the said Act.

In the 2<sup>nd</sup> count it is alleged that on the same day 30<sup>th</sup> January 2011 in Old Town Kibokoni he was found in possession of 4 tablets of Rohypnol with the street value of Kshs. 40/-.

Two police officers (PW1 and PW2) and the Chairman Community Policy Central Mombasa acting on information received proceeded to Marikiti area old town and to a flat whereby at the roof top they found the Accused holding a white polythene bag in one hand and a manila bag in the other hand.

Inside the polythene bag they recovered 125 rolls of cannabis sativa and in the manila one they recovered 90 rolls. A search conducted on the Accused revealed that in his rear right pocket of his trouser he had 4 tablets of a substance written "**Rohypnol**". He was arrested and taken to police station where he was later charged with the two charges.

In his defence the Accused in his unsworn statement told the Court that he was arrested on 3<sup>rd</sup> November 2011 from his house at Marikiti area and taken to the roof top of his house where it was alleged that he was found in possession of bhang. He was later taken to police station and charged. In her judgment the trial Magistrate found that there was overwhelming evidence against the Accused person. She noted that the Accused person was found in possession of the Narcotic Drugs. She proceeded to find the Accused guilty as charged and convicted him accordingly.

She does not seem to have addressed her mind on the issue of trafficking on the 1<sup>st</sup> count and if she did she found the Accused guilty of possession but she did not state in her judgment whether she had reduced the charge of trafficking to the lesser one of possession.

On the first count the Accused is charged of trafficking by way of conveyance. There is no evidence to the effect that he was conveying the drugs to a particular place. It is alleged that he was found on the roof of his house. If it was on his house where was he conveying the drugs to?

No evidence was adduced as to whether the drugs were for his own consumption or for selling. I do find that the trial Court should have clearly indicated that she was convicting the Accused on the lesser offence of possession. This she did not but I do not think that it was fatal to the prosecution case.

On the second count the Court was not informed what the tablets with marks Rohypnol were and in what schedule of the Act they fall in. The conviction on the second count was not safe and the conviction is quashed. There does not seem to have been any sentence on it.

In respect of the 1<sup>st</sup> count upon evaluation of the evidence before the trial Magistrate I am satisfied that the lesser offence (charge of possession of Narcotic Drugs was proved).

The conviction for possession under Section 3(1)(a) is upheld. The sentence of 17 years imprisonment is reduced to 5 years from the time of conviction.

**Judgment read and delivered in open Court this 30<sup>th</sup> day of May, 2013.**

**M. MUYA**  
**JUDGE**

**In the presence of:-**

**Mr. Ayodo for the State**

**Appellant - present**

**Court clerk – Mr. Musundi**