



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 111 OF 2011

HENRYH WAFULA APPELLANT

=VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant, **HENRY WAFULA**, was convicted for the offence of Unlawful Cultivation of Narcotic Drugs contrary to section 6 (a) of the Narcotic Drugs and Psychotropic Substances Act.

The facts were that the police recovered 14 bhang plants which the appellant had planted in his compound. After uprooting the plants, the police escorted the appellant to the police station.

The appellant confirmed that those facts were accurate. He was therefore convicted on his own plea of "Guilty".

During mitigation, the appellant told the learned trial magistrate that he used to smoke the bhang, because it enabled him to work better.

Thereafter, the trial court sentenced the appellant to a fine of Kshs 250,000/=, on in default 10 years imprisonment.

When the appeal came up for hearing, the appellant was represented by **Mr. Kigamwa** Advocate, whilst the Respondent was represented by **Mr. Mutuku**, learned Deputy Director at the Office of the Director of Public Prosecution.

The Respondent conceded this appeal on the grounds that there was no analysis of the plants which were uprooted from the appellant's compound.

Secondly, the exhibit which was brought before the trial court was not the 16 plants which had been uprooted from the appellant's compound.

I have perused the record of proceedings from the trial court, and ascertained the accuracy of what the Respondent told this court.

Pursuant to the provisions of Section 74 (a) of the Narcotic Drugs and Psychotropic Substances Act, the plants which were recovered should have been analyzed, to verify that they were bhang.

After conducting the necessary analysis, the Government Chemist, or whichever other person had conducted the analysis, should have made available to the trial court, a certificate verifying the nature of

the samples that he had analyzed.

The certificates would also indicate the quantity of the substance which had been recovered from the accused person.

The nature of the exhibit will enable the trial court ascertain that the accused was or was not handling, conveying or in possession of the drugs or substances cited in the charge sheet.

Meanwhile, the weight or quantity of the substance in issue would enable the court determine the appropriate sentence, as the relevant law pegs the fine to the quantity in question.

As there was no certificate, the trial court had no evidence to confirm the nature or quantity of the plants recovered from the compound of the appellant.

Secondly, the absence of the certificate deprived the appellant the opportunity to verify whether or not the substance and the quantity thereof, which were attributed to him, were actually those that were recovered from him.

In those circumstances, I find and hold that the Respondent was right to have conceded this appeal.

Accordingly, the conviction is quashed, the sentence set aside, and I order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

DATED SIGNED AND DELIVERED AT ELDORET,

THIS 22ND DAY OF OCTOBER, 2013.

FRED A. OCHIENG

JUDGE.