



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

Criminal Appeal No. 252 of 2010

JANE ONDIBA APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

JUDGMENT

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Kilgoris, Hon. B. Ochieng in Criminal Case No. 933 of 2010 dated 26th January, 2011)

The appellant, **Jane Ondiba** was charged with the offence of being in possession of Cannabis Sativa contrary to section 3 (i) of the **Narcotic And Psychotropic Substance Control Act no. 4 of 1994**. The particulars of the offence are that on the 4th day of November, 2010 at Majengo Estate, Kilgoris in Transmara District, within the Narok County was found in possession of 29 stones of cannabis sativa of a street value of kshs. 8,700/=. She pleaded guilty to the charge and was convicted by the Senior Resident Magistrate's court, Kilgoris. On 26th January, 2011 she was sentenced to a fine of kshs. 1,000,000 or in the alternative to serve a 20 year prison term. She has now appealed against the conviction and sentence.

In her undated petition of appeal filed on 6th December, 2010 the appellant has set out four grounds of appeal. She states on ground one that she was a first offender and should have been considered from a non-custodial sentence having pleaded guilty. The second and fourth grounds indicate that the sentence meted out was too harsh and excessive. On the third ground she states that her family will suffer irreparably if she serves the long prison sentence.

When the appeal came before me for hearing, the appellant prayed for the court's leniency stating that she was poor and cannot raise the kshs. 1,000,000 imposed. She prayed for a non-custodial sentence. The appellant also submitted written submissions in which she pleads for leniency. She has stated that she is remorseful and is now fully rehabilitated.

The respondent through learned state counsel conceded the appeal against sentence. He submitted that the conviction was safe it having been based on an unequivocal plea of guilty. The appellant was however sentenced under section 3 (2) (b) of the **Act** instead of section 3 (2) (a) which applies to cannabis sativa.

The appellant's appeal against conviction must fail. She pleaded guilty to the charge. I have examined the record and find nothing to demonstrate that the plea was not unequivocal. By dint of section 348 of the **Criminal Procedure Code**, she cannot appeal against conviction. On the sentence, it is

apparent from the record as submitted by the state counsel that the sentence imposed was not lawful. The appellant was charged under section 2 (i) with being in possession of cannabis sativa. The facts upon which she was convicted confirmed the charge.

However, on being sentenced, the trial court imposed a sentence under section 3 (2) (b). This was erroneous as the sentence is in respect to a narcotic drug or psychotropic substance other than cannabis. The applicable section is section 3 (2) (a) which provides a penalty of 10 years.

I therefore move to correct the sentence by quashing the 20 year jail term and substituting therefor a sentence of 10 years as provided by law. The appeal against sentence accordingly succeeds.

I have further given due consideration to the peculiar circumstances of the appellant. I am persuaded that she is remorseful and has benefited from correction in the sentence so far served. I therefore order that a community service report be filed in court by the probation officer. The matter be mentioned on 8th October, 2012 for appropriate sentencing.

Judgment dated, signed and delivered at Kisii this 25th day of September, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

Jane Ondiba : for appellant (present/absent)

..... : for respondent (present/absent)

..... : court clerk

R. LAGAT-KORIR
JUDGE