



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**

**Crimina Appeal no. 43 of 2011**

between

**THOMAS MWICHACHA MOI ..... APPELLANT**

**-VERSUS-**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

***(Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Kehancha, Hon. J.R. Ndururi in Criminal Case No. 231 of 2009 dated 8<sup>th</sup> October, 2009)***

The appellant, **Thomas Mwachacha Moi** was charged with the offence of trafficking in narcotic drugs contrary to section 4 (a) of the **Narcotic Drugs and Psychotropic substances (Control) Act 1994**. The particulars were that on the 16<sup>th</sup> day of April, 2008 at Ngochoni sub-location within Kuria District of the Nyanza Province trafficked in narcotic drugs in that he was found while transporting 360 kilograms of cannabis on a bicycle with a street value of kshs. 360,000/= in contravention of the **Act**. He was convicted and sentenced to serve 7 years in prison by the SRM's court at Kehancha on 8<sup>th</sup> October, 2009.

The prosecution's case against the appellant was that on the material date i.e. 16<sup>th</sup> April, 2008 at around 8.00p.m the appellant was found offloading suspicious goods at a tobacco drying shed. He was arrested while his accomplice escaped. According to PW1, **AP Inspector David Kiptoo**, the police were acting on a tip off earlier given by a member of the public to **APC Kennedy Nyamosi**. A total of six sacks containing the suspect drug were recovered and the appellant taken to Isebania police station.

Samples of the drug were prepared by **PC Stanley Korir** who testified as PW3 and taken to the Government chemist for analysis. The report produced in court certified that the drug was cannabis.

The appellant when put on his defence gave unsworn testimony denying having committed the offence. He was however found guilty and convicted.

On 9<sup>th</sup> March, 2011, the appellant filed the present appeal. In his petition, he listed the following grounds:-

- *That the trial court accepted a confession which was not given under caution.*
- *That the prosecution evidence was contradictory.*

- *That he had been discharged earlier then rearrested and charged afresh.*
- *That he was implicated in the offence and that the witnesses were not independent.*

The state through learned counsel **Mr. Mutai** opposed the appeal. He submitted that the prosecution proved its case and that the appellant was convicted on sound evidence. He also submitted that upon conviction the appellant was given a lenient sentence as the appellant ought to have been fined three times the value of the narcotic and sentenced to life imprisonment.

As a first appellate court, I am under duty to subject the evidence in the lower court to a fresh evaluation and come to an independent decision. In so doing I am guided by the Court of Appeal decision in **Okeno –vs- Republic (1972) E.A 32. See also Pandya –vs- Republic (1957) E.A 336.**

The appellant has stated that the court used his confession to convict him. There is no evidence of that in the record. The trial court heard four prosecution witnesses and convicted on the basis of their testimony. This ground of appeal therefore fails as it is without basis. I have also evaluated the evidence tendered. I find that the same is cogent and not contradictory as submitted by the appellant. I am satisfied that the conviction was based on sound evidence. I find further that although the appellant has insinuated that he was maliciously prosecuted, there is no evidence of the same on record.

The appellant was sentenced under section 4 (a) of the **Act**. As rightly submitted by the state, he ought to have been sentenced to life imprisonment. The section provides that on conviction “..... *an accused should be fined three times the value of the drug or fined kshs. One million whichever is greater*”. The fine is in addition to the imprisonment. The state has urged the court to correct the sentence by imposing the higher sentence provided under the section.

I have considered the submissions of counsel. However, the appellant should have been warned of the possibility of the sentence being enhanced prior to the hearing his appeal. I therefore find that the appellant will suffer prejudice if the court were to enhance the sentence imposed. Needless to state then, the appellant’s appeal against sentence is misadvised. He is lucky to get away with a lesser sentence than is provided under the law.

In sum, I find that the appellant’s conviction was safe. For the reasons stated above, I confirm both the conviction and sentence. The appeal is dismissed.

**Judgment dated, signed and delivered at Kisii this 25<sup>th</sup> day of September, 2012.**

**R. LAGAT-KORIR**  
**JUDGE**

**In the presence of:**

Thomas Mwachacha Moi: appellant – (present/absent)

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

..... court clerk

**R. LAGAT-KORIR**  
**JUDGE**