



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 6 of 2012

*(From original conviction and sentence in Criminal Case No. 905/2011 of the Senior Resident Magistrate, Maralal – A.K. ITHUKU, SRM)*

ELIJAH KIMARU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Elijah Kimaru appeals against the decision of the Senior Resident Magistrate, Maralal in Criminal Case No. 905/2011. He was charged with two offences; stealing stock contrary to **Section 278** of the **Penal Code** and being in possession of cannabis sativa contrary to **Section 2A** as read with **Section 3(2)** of the **Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994**. He pleaded guilty, was convicted and on the first count he was sentenced to 3 years imprisonment and the 2<sup>nd</sup> count he was entered to serve one year imprisonment. He is aggrieved by the sentence meted which he complains is too harsh; that he has received vocational training; learned good skills which he can put to good use to support his young sisters. He urged the court to consider a non custodial sentence.

Ms Idagwa Learned Counsel for the State submitted that she does not support he conviction on the second count because the facts did not disclose an offence. However, on the first charge, the counsel said that the sentence is lenient and the court should not interfere.

The appellant pleaded guilty to count 2 on 31/10/2011, when he first appeared before the Senior Resident Magistrate, Mr.Ithuku. The facts were read to him and he admitted that they were correct; that he was found in possession of 6 rolls of bhang. The said rolls were not taken to the Government Analyst for analysis to determine what they were. Further when the court invited the appellant to give his mitigation, he said “ **I am sorry, I had been given a coat by a friend. I did not know the court had bhang in the pocket.**” The mitigation, was clearly a denial of the offence as he sought to qualify his admission of the facts. The plea was equivocal and the trial magistrate should have entred a plea of not guilty. The appellant was wrongly convicted on count 2 and that conviction is hereby quashed, sentence set aside.

As regards, the 1<sup>st</sup> count, the plea was properly taken and the conviction is safe. The value of the sheep that was stolen was only Kshs.2,600/-. Since the appellant was a first offender, and had pleaded guilty, I think that the sentence of 3 years was harsh. I have taken into account the appellant’s mitigation that he has reformed, has siblings to look after. He was sentenced to prison on 14/11/2011. He has already served one year imprisonment. I will therefore allow his appeal on sentence, and substitute it with the period he has already served. He is set at liberty forthwith unless otherwise lawfully held.

**DATED and DELIVERED this 7<sup>th</sup> day of December, 2012.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

The appellant – in person  
Mr. Omwenga for the State  
Kennedy – Court Clerk