



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 253 OF 2009

(From Original Conviction and Sentence in Criminal Case No. 633 of 2009 of the Senior Resident Magistrate's Court

at Voi: Nyakundi L.M. – R.M.)

DANIEL KATOBO.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

JUDGEMENT

This is the appeal of one **DANIEL KATOBO** (hereinafter referred to as '*the Appellant*'), against his conviction and sentence by the learned Resident Magistrate sitting at Voi Law Courts. The Appellant had been arraigned in court on 24th July 2009 charged with the offence of '***POSSESSION OF NARCOTIC DRUGS CONTRARY TO SECTION 3(1) as read with SECTION 3(2)(a) OF THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES (CONTROL) ACT, 1994***'.

Upon having the charge read out and explained to him the Appellant entered a plea of guilty. The facts were then read out as required by law. The accused maintained his plea of guilty. He was then convicted and sentenced to serve six (6) years. It is against that conviction and sentence that the Appellant now appeals.

MR. ONSERIO learned State Counsel conceded the appeal. Having perused the proceedings it is not difficult to see why. In reading out the facts the court prosecutor did produce the 100 rolls of plant material allegedly recovered from the accused. However there was nothing to prove that the 100 rolls were indeed bhang. No report was availed from the Government Chemist to certify that the 100 rolls were indeed cannabis sativa. This was a fatal omission by the prosecution. The law places the onus at all times on the prosecution to prove each and every element of the charge beyond reasonable doubt. There was no proof tendered that the 100 rolls contained cannabis sativa. As such the prosecution failed to discharge their burden of proof in this regard. As such this appeal succeeds. The Appellant's conviction is hereby quashed and his six (6) year sentence is also set aside. The Appellant is to be set at liberty unless he is otherwise lawfully held.

It is so ordered.

Dated and Delivered in Mombasa this 16th day of November 2011.

M. ODERO
JUDGE

In the presence of:
Mr. Onserio for State
Appellant in person