REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 329 of 2008

EMMANUEL MWITA MARWA……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

JUDGMENT

The appellant was charged jointly with two others with the offence of **being in possession of narcotic drugs** contrary to **section 3(1)** of the **Narcotic Drugs and Psychotropic Substances Control Act No.4** of **1994** as read with **section 2A** of the said **Act** and **being in possession of utensils for use in connection with narcotic drugs** contrary to **section 5(1)(d)** of the said **Act.**

One of the appellant's co-accused was his wife who absconded. The case against her was withdrawn while the third co-accused died.

It was the prosecution case that **P.W.1, P.C. Churchil Owili** together with **P.W.2, P.C. Josphat Murage** in the company of other police officers, acting on a tip-off raided a house in Upper Majengo Estate, Narok where they found the appellant and the other two working on some plant leaves. Also found were rizla papers, a pair of scissors and a rolling stick suspected to be used in the preparation of the drugs. The three were arrested and the leaves submitted for analysis to the Government Chemist who confirmed that they were cannabis sativa. The appellant and co-accused were then charged.

After a full trial, the court below concluded that the appellant was caught *"red handed"* and the prosecution case was proved beyond reasonable doubt. The appellant was sentenced, upon conviction, to ten (10) years imprisonment on each count, to run concurrently.

The appellant was not satisfied and has brought this appeal challenging both the conviction and sentence on the grounds that:

i) the arresting officer failed to testify

ii) the drugs were not linked with him

iii) there was no evidence from the scene of the crime

iv) the appellant's defence was overlooked

Learned counsel for the respondent supported the conviction and sentence and submitted that there was overwhelming evidence against the appellant.

In his written submissions, the appellant has raised a new ground that his rights under **section 72(3)** of the **Constitution** were violated. Additional grounds not contained in the petition, by dint of **section 350(2)** of the **Criminal Procedure Code** are not permitted and cannot be relied on at the hearing. Had it been raised in the petition, the state would have respondent to it. The appellant has submitted also that there was no evidence that the house in which the

drugs were found was his; that the conviction and sentence were against the weight of the evidence.

I have considered the appeal and submissions. This being the first appeal, I must re-evaluate the evidence in order to draw my own independent conclusions based on the evidence on record.

Both **P.W. 1, P.C. Churchil Owili** and **P.W.2 P.C. Josphat Murage** were strangers to the appellant and his co-accused persons. They (the police officers) were acting on information. When they got to the house it was locked from inside but people were talking inside. Through the window, the officers could see the three occupants preparing something on the table. When the door was eventually

opened, the appellant and the 3rd accused (now deceased) were found hiding behind a curtain separating the bed area and the rest of the room. The appellant was holding an orange basin containing dry green plant material. There can be no doubt that in the circumstances, the appellant was in possession of the dry green plant material. There is evidence from the report of the Government Chemist, produced under **section 77** of the **Evidence Act** that the green plant material was cannabis sativa**.** See **Juma Mohammed Maonza** Vs. **Republic** Criminal Appeal No.78 of 2001.

Regarding sentence, in terms of **section 3(2)(b)** of the **Narcotic Drugs and Psychotropic Substance (Control) Act,** the trial magistrate had to establish before passing sentence whether the
case fell within the first or second limb of that section. Clearly, it fell under the second limb which provides, in the first instance for a fine and only in default for an imprisonment term. See **Ali Mohammed** Vs. **Republic** - Criminal Appeal No.61 of 2006.

To the extent that the trial court failed to comply with the above provision, this court is obliged to correct that error. Accordingly the sentence of ten years is set aside and substituted therefore with the minimum fine of one million shillings (Kshs.1m) provided for under **section 3(2)(b)** aforesaid and in default seven (7) years imprisonment from the date of conviction. The learned magistrate considered the appellant's defence. I also find that there was no evidence in support of the charge of being in possession of utensils for use in connection with narcotic drugs. There was, for example, no evidence of how rizla papers, a pair of scissors or a rolling stick, can be used in connection with narcotic drugs. To many people, there are specific uses for these items and it was incumbent upon the prosecution to adduce evidence on the other uses these items may be put to with regard to narcotic drugs. These are matters that cannot be left to imagination. The conviction in quashed and the five years sentence on that count is set aside. The appeal only succeeds with respect to count two.

In the result, the appeal succeeds to the extend stated

Dated, Signed and Delivered at Nakuru this 5th day of March, 2010.

W. OUKO
JUDGE