



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Appeal 183 of 2007

MUSYOKI MUTAVI APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G E M E N T

The Appellant was convicted upon his own plea of the offence of cultivating a prohibited plant (bhang) contrary to section 6 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, No. 4 of 1994. The particulars of offence in the charge were that on 28th November 2006 at Ilawani Village, Kiima Kiu Location in Makueni District within Eastern Province, he was found unlawfully having cultivated eighty plants of a prohibited plant namely bhang. He was sentenced to serve 10 years imprisonment. He has appealed against both conviction and sentence.

The main ground of appeal against the conviction is that the plea of guilty was equivocal in that the alleged prohibited plants were not subjected to a scientific analysis by the Government Analyst in order to confirm that the plants were indeed prohibited. It was also pointed out during arguments that the market value of the prohibited plant cultivated was not indicated in the charge as required by section 6 of the Act.

Regarding sentence, it was submitted that the maximum sentence for the offence being 20 years, the sentence of 10 years imprisonment imposed upon a first offender who had pleaded guilty and who was 61 years old was unduly harsh. It was also observed that the record of the trial court did not support the trial magistrate's observation that the Appellant was not remorseful.

The Republic conceded the appeal upon the ground that the plea was equivocal, and further, that only bare facts were given at the trial. The Republic did not wish to seek a retrial of the Appellant who has already served three years of his sentence.

I have considered the submissions of the learned counsels appearing. The Appellant was charged with cultivating a prohibited substance. "Prohibited plant" as defined in section 2 of the Act means "any plant specified in the Third Schedule of the Act". The Third Schedule lists some four prohibited plants namely:

1. Cannabis.
2. Coca bush.
3. Papaver somniferum (opium poppy)
4. Papaver setigerum.

“Bhang” is not listed as a prohibited plant in the Third Schedule. If bhang is a common or popular name of one of the listed plants, most likely cannabis, that fact ought to have been indicated in the charge.

It is also apparent from the provisions of section 6 of the Act that the market value of the alleged prohibited plant ought to be given in the charge for purposes of sentencing. Section 6 aforesaid provides as follows:-

“Any person who-

- (a) cultivates any prohibited plant; or
- (b) being the owner, occupier or concerned in the management of any premises, permits the premises to be used for the purpose of the cultivation, gathering or production of any prohibited plant,

shall be guilty of an offence and liable to a fine of two hundred and fifty thousand shillings or three times the market value of the prohibited plant, whichever is the greater, or to imprisonment for a term not exceeding twenty years or to both such fine and imprisonment.”

More importantly the alleged prohibited plant ought to have been subjected to a scientific analysis in order to establish whether it was one of the prohibited plants listed in the Third Schedule. This was not done.

The plea was clearly equivocal, and the Republic properly conceded the appeal.

In the circumstances this appeal is allowed. The conviction is quashed and the sentence imposed upon the Appellant is hereby set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT MACHAKOS THIS 15TH DAY OF JULY 2010

H.P.G. WAWERU
JUDGE

DELIVERED THIS 16TH DAY OF JULY 2010