



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

**Criminal Appeal 228 of 2009**

*(From Original Conviction and Sentence in Criminal Case No. 3634 of 2009 of the Chief Magistrate's Court at Mombasa:: L. Mutende – S.P.M.)*

**WILLY ASEKA ..... APPELLANT  
VERSUS  
REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**WILLY ASEKA** the Appellant herein has appealed against his conviction and sentence by the learned Senior Principal Magistrate sitting at Mombasa Law Courts on a charge of **BEING IN POSSESSION OF NARCOTIC DRUGS CONTRARY TO SECTION 3(1) AS READ WITH SUB-SECTION 2(a) OF NARCOTICS DRUGS AND PSYCHOTROPIC SUBSTANCE ACT**. The Appellant was arraigned before the lower court on 11<sup>th</sup> November 2009 and entered a plea of guilty to the charge. The facts were read out to him and he maintained his plea of guilty. The exhibit plant material 2 rolls and the report of the Government Chemist were both produced as exhibits. The learned trial magistrate convicted the Appellant and after listening to his mitigation sentenced him to serve three (3) years imprisonment. I am satisfied that the trial court did follow the correct laid down procedure in recording the Appellant's plea of guilty and the conviction was lawful. Despite this I am in agreement with the decision of **MR. ONSERIO**, learned State Counsel to concede this appeal for two main reasons.

Firstly the record shows that the Appellant was arrested on 9<sup>th</sup> October 2009. He was not arraigned in court until 11<sup>th</sup> November 2009, one full month later. This was a misdemeanour offence and the police have not given any reasonable explanation for this delay in bringing the accused to court. It is my view that in the circumstances this delay was excessive and inordinate and amounted to a blatant violation of the Appellant's pre-trial rights. Even if it could be argued that the Report of the Government Chemist took time to obtain, there was no need to keep the Appellant in police custody pending the availability of this report. The police ought to have arraigned the Appellant in court within 24 hours as required by law and applied in court for time to source for the report. I find absolutely no defence for this inordinate delay and on this basis the subsequent trial is null and void.

Secondly and even if I had not so found the three (3) year sentence imposed by the learned trial magistrate for possession of only two (2) rolls of bhang a mere Kshs.20/- was in my view harsh, excessive and unmerited. There is no indication that the Appellant was a repeat offender. The trial magistrate ought to have considered an alternative sentence like a fine, probation or community service. As it is the Appellant having been sentenced on 11<sup>th</sup> November 2009 has spent close to eight (8) months behind bars for a relatively minor offence. In my view the time he has spent in custody is sufficient and he has no doubt learnt his lesson.

Finally this appeal against both conviction and sentence is allowed. The Appellant to be released forthwith unless he is otherwise lawfully held.

**Dated and Delivered in Mombasa this 16<sup>th</sup> day of September 2010.**

**M. ODERO**  
**JUDGE**

Read in open court in the presence of:-

Appellant in person

Mr. Onserio for State

**M. ODERO**

**JUDGE**

**16/09/2010**