



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL 250 OF 2008

KAMITI MUCHIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Kamiti Muchiri, the appellant herein, was convicted under the **Narcotics Drugs and Psychotropic Substances Act (No. 4 of 1994)**, having pleaded guilty to two counts preferred against him thereunder as follows:

- 1) *Cultivating cannabis sativa (bhang) contrary to section 6(a) of the Act.*
- 2) *Being in possession of cannabis sativa (bhang) contrary to section 3(1)(2) of the Act.*

In his petition of appeal, which is in the nature of mitigation, the appellant contends that the seven years imprisonment term handed down on him was harsh and excessive, given the appellants mitigation before the trial court. He asks the court to be lenient and reduce the sentence and/or pardon him.

The State, represented by the learned State Counsel **Mr. Mugambi** has conceded the appeal on the basis that the prosecution, having not exhibited an analyst's report from the Government Chemist to prove that the substance found in the appellant's possession was actually cannabis sativa, then the offence was not proved and a conviction ought not to have been entered.

I have examined the proceedings of the trial court and have noted that the facts, as stated, were that the appellant was found growing bhang, following information received by police while on patrol. On searching the appellant, 50 grammes of bhang were found in his pockets. He led the police officers to his farm where they found bhang growing thereon. They uprooted 58 plants therefrom and then escorted the appellant to Rumuruti police station where he was charged with the two offences. The appellant's mitigation was that he was allowed to smoke bhang by the government and that a former President had permitted him to grow it.

Section 74A of the Act requires, in mandatory terms, that, where any narcotic drug or psychotropic substance has been seized to be used in evidence, it shall be weighed and analyzed for the purpose of ascertaining the quantity and identifying the same. An appropriate analysts' certificate shall then be issued for production in court, alongside samples taken of the drug or substance. The production in court of the sample or samples together with the analyst's certificate shall be conclusive proof as to the nature and quantity of the drug or psychotropic substance concerned.

In view of the non-compliance with the above in this case, I accept the State's submission that the offence herein was not proved by the prosecution to warrant a conviction. Despite the fact that the appellant pleaded guilty and admitted the facts as being correct, the prosecution did not discharge its statutory duty under section 74 of the Act. The charge was therefore not proved beyond all reasonable doubt as required by the law.

For the above reason, the conviction and sentence cannot stand and are hereby quashed and set aside respectively. The appellant is accordingly acquitted and set at liberty. He shall be released from jail forthwith unless he is otherwise legally held. I should mention in passing however that the appellant's mitigation cannot be believed and could not have been considered in his favour even by the lower court.

Dated signed and delivered at Nakuru this 26th day of June 2009

M. G. MUGO

JUDGE

In the presence of:

Mr. Mugambi - For State

N/A - For Appellant

Appellant present in person