

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 137 of 2008

CHARO HAMISI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Charo Hamisi, was convicted on his own plea of guilty on two counts of being in possession of (bhang) cannabis sativa contrary to section 3 (1) as read with section 2 (1) (b) of the Psychotropic Substances Control Act. He was sentenced to five years imprisonment on the first count and three years imprisonment on the second count by Mr. W. F. Andayi, Senior Resident Magistrate, Kaloleni.

The particulars of the first count were that the appellant on 19th October 2007 at Kabutuku village, Mariakani Location, in Kaloleni District, within Coast Province was found in possession of narcotic drugs (bhang) to wit 25 rolls in contravention of the said Act and the second count carried the following particulars: that the appellant on 5th May 2008, at Kabutuku village, Mariakani Location in Kaloleni District, within Coast Province, was found in possession of narcotic drugs (bhang) to wit 20 grammes in contravention of the said Act.

In the facts stated by the prosecution, the appellant is said to have initially been found in possession of 25 rolls of bhang and escaped while in the custody of police officers. On the second occasion, the appellant is stated to have been found in possession of 20 grammes of the same substance.

The appellant admitted those facts and was accordingly convicted on his own plea of guilty. The prosecutor informed the court that the appellant was a first offender. In mitigation the appellant stated that he had a family of four children who depended on him. He further stated that he would not repeat the offence.

The Learned Senior Resident Magistrate, after considering the appellant's mitigation observed that the appellant was a repeat offender as he had escaped from police custody. He further stated that the offence was serious and considered the appellant a dealer rather than a user. Those circumstances according to the Learned Senior Resident Magistrate, called for a severe penalty which he accordingly imposed.

The appellant was dissatisfied with the sentence and has appealed to this court against the same on the main ground that the sentences are manifestly excessive in the circumstances. The appellant reiterates that he is a first offender and is remorseful and further that his family depends on him as their sole breadwinner.

Mr. Onserio, the Learned State Counsel, does not support the sentences. With respect, I concur with the Learned State Counsel. The prosecution informed the Learned Senior Resident Magistrate that the appellant was a first offender. Yet the Learned Senior Resident Magistrate called him a repeat offender

because of the escape from police custody when the appellant was initially arrested. With respect, the Learned Senior Resident magistrate should not have made heavy weather of the alleged escape. The prosecution should have preferred the charge of escape from lawful custody if they desired to have the escape considered in imposing a severe sentence. The prosecution was, however, satisfied that the appellant was a first offender. The prosecution did not also suggest to the court that the appellant could have been a dealer and not a mere user. In those circumstances, I have come to the conclusion that the Learned Senior Resident Magistrate considered matters which were not urged before him when he imposed the sentences, complained of. I am in the premises inclined to interfere with the sentences imposed upon the appellant which sentences I find harsh and excessive in the circumstances. The appeal against the sentences accordingly succeeds. The sentences of five years on count one and three years on count two are hereby set aside. I substitute those terms with a sentence of imprisonment for the period already served on both counts. The appellant should be released forthwith unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 15TH DAY OF JUNE 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

The Appellant and Mr. Onserio for the Republic.

F. AZANGALALA

JUDGE

15TH JUNE 2009