

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 287 of 2008

MICHAEL MUTUKU MUTUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Michael Mutuku Mutua together with three others, were charged with two offences namely stealing contrary to section 275 of the Penal Code and being in possession of narcotic drugs and psychotropic substances contrary to section 3 (1) as read with section 3 (2) (a) of the Narcotics Drugs and Psychotropic Substance Control Act No. 4 of 1994. The particulars of the first offence were that the appellant and his co-accused on the 30th day of August 2008 at about 17.30 hours between Tsavo and Kyulu Railway section in Taita-Taveta District within Coast Province, jointly with others not before the court, stole railways telecom cable of about 70 metres valued at Kshs. 280,000/= the property of Rift Valley Railways. The second count carried the following facts that the appellant on the 20th day of August 2006 at Voi Railway Police Station within Taita-Taveta District of Coast Province was found in possession of cannabis (bhang) to wit three rolls which was not in any form of medical preparation.

The appellant appeared before J. M. Gandani, then a Senior Resident Magistrate on 1st September 2008 and pleaded guilty to both counts. The prosecution then stated the facts of the case and when the appellant was invited to react to the same he informed the court that all the facts were true whereupon, the Learned Senior Resident Magistrate convicted the appellant on his own plea of guilty. The prosecutor informed the court that the appellant was a first offender. In mitigation the appellant informed the court that he was 17 years old and asked for forgiveness. The Learned Senior Resident Magistrate called for age assessment and a probation report of the appellant. The report was tendered in court on 15th September 2008 and stated that the appellant was aged 20 years. The probation officer did not recommend probation and the Learned Senior Resident Magistrate sentenced the appellant to six (6) years imprisonment on the first count and imposed a fine of Shs. 10,000/= in default six (6) months imprisonment on the second count. The sentences are to run consecutively.

The appellant was dissatisfied with the sentences and has appealed to this court on the grounds that the sentences are manifestly harsh in view of his circumstances. The appellant maintains that he is a first offender and adds that he looks after his single parent and siblings. In the premises, the appellant pleads that his appeal be allowed.

Mr. Onserio, Learned State Counsel did not support the sentences and the conviction of the appellant on the second count. With regard to the latter, he contended that the appellant's plea was not unequivocal as the prosecution did not tender an analyst's report of the narcotic drug allegedly found with the appellant.

I have considered the record of the Learned Senior Resident Magistrate and note with respect to the second count that indeed, the narcotic was not proved to have been cannabis sativa (bhang). The appellant's plea of guilty to possession of narcotic drugs and psychotic substances was therefore not unequivocal.

The appellant's conviction on count one of stealing contrary to section 75 of the Penal Code was however sound and cannot be interfered with. With regard to sentence however, the Learned Senior Resident Magistrate does not appear to have considered the mitigating circumstances of the appellant before

sentencing him. I am not therefore surprised that the Learned State Counsel does not support the same. The sentence in my view is manifestly excessive in the circumstances of the case especially as the stolen cable was recovered. The appellant was a first offender and pleaded for forgiveness.

In the premises, I will interfere with the sentence of imprisonment. The appellant has been in prison for one (1) year. He has in my view learnt that crime does not pay. His appeal against sentence is allowed. The sentence of six (6) years is hereby set aside and substituted with a sentence of imprisonment for the period already served. The appellant's conviction on count two is quashed and the sentence imposed thereon is set aside. The end result is that the appellant should be released forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

The Appellant and Mr. Onserio for the State.

F. AZANGALALA

JUDGE

22ND SEPTEMBER 2009