REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 93 of 2007

FRANCIS MBUGUA WAINAINA …… APP ELANT

VERSUS

REPUBLIC…… RESPONDENT

(From the original conviction and sentence in Criminal Case No. 888 of 2006 of the Resident Magistrate at Gatundu – A, Lorot (RM)

JUDGEMENT

The appellant, FRANCIS MBUGUA WAINAINA, was charged with two counts before the subordinate court. Count 1 was for cultivating bhang contrary to Section 3 (1) (2) (a) of the Narcotic Drugs and Psychotropic Substances Control Act 1994. The particulars were that on 29th September 2006 at Mandoro village in Thika District of Central Province was found having cultivated about 900 plants of bhang (cannabis sativa) valued at Kshs. 90,000/= from a land parcel number not known of one WAINAINA GACHUI. Count 2 was for trafficking in Narcotic Drugs (bhang) contrary to Section 4 (a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars were that on 29th September 2006 at Mandoro Village in Thika District within the Central Province was found trafficking 1½ bundles of cannabis sativa valued at Kshs.150/= which was not in the form of medical preparation for the purposes of selling it.

He was recorded as having pleaded guilty were to the two counts. He was convicted and sentenced to serve 7 years imprisonment on each of the two counts. The sentences to run concurrently. He has now appealed to this court against sentence.

Learned state counsel, Ms. Gateru, opposed the appeal against sentence. Counsel contended that the sentences were justified, especially on count 2 where the maximum sentence was life imprisonment.

This is an appeal against sentence. Sentencing is essentially the discretion of the sentencing court. An appellant court will be slow to interfere with the exercise of that discretion unless it is shown that the sentencing court took into account an irrelevant factor or that it failed to take into account a relevant factor, or it applied a wrong principle or short of these the sentence is so harsh and excessive that an error of principle must be inferred.

Even though the appeal is against sentence I note some other irregularities which I will have to address as they may dispose of the appeal. Under count 1, the appellant was charged with contravention of the provisions of Seciton3 of the Act. The proper section for cultivation of bhang is Section 6 (a) of the Act. I however, find no prejudice occasioned to the appellant by the citation of the wrong provision of the law.

There is a more serious irregularity committed by the prosecution.

In my view, the plea of guilty on both counts was equivocal. Though appellant is recorded as having pleaded guilty, in my view the facts given by the prosecution did not disclose the offences charged. The reasons, is that there was no proof that the substance alleged to be bhang (or cannabis sativa) was actually bhang. It was important for the prosecution to have produced the Government Analyst's report to

establish that the substance was, indeed, bhang. They did not do so. Thus it cannot be said with certainty that the substance was indeed bhang. On that account, the plea of guilty cannot be said to unequivocal. The offences were not disclosed and therefore the pleas did not relate to any offences known in law. The convictions and sentences cannot therefore stand.

Consequently, I allow the appeal quash the convictions the two counts and set aside the sentences. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 12th day of March 2008.

George Dulu

Judge

In the presence of:-

Appellant in person

Ms. Gateru for state

Mwangi – court clerk