REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CRIMINAL APPEAL NO. 43 OF 2008

(From the original sentence and conviction of SRM CR. Case No. 73 of 2008 of the Senior Resident Magistrate's Court at Kaloleni)

DAMA KENGA …………………………………………..APPELLANT

VERSUS

REPUBLIC …………………………………………….RESPONDENT

J U D G M E N T

Dama Kenga, the appellant herein pleaded guilty to the offence of being in possession of narcotic drugs contrary to Section (1) as read with Section 3(2) of the Narcotic Drugs and Psychotropic substances Control Act No. 4 of 1994. She was convicted and then sentenced to serve 4 years imprisonment. The particulars of the offence are that on the 4th day of February 2008, at about 11.30 p.m. at Kitengwani sub-location in Kaloleni District within Coast Province the appellant was found in possession of two rolls of cannabis sativa valued at Kshs.100/- in contravention of the law. Being aggrieved with the sentence slapped on her, the appellant filed this appeal.

The appellant in her petition put forward three grounds of appeal which may be summarized to two. First, it is alleged that the sentence is harsh and excessive. Secondly, it is argued that the learned trial magistrate did not consider the appellant's mitigation. On the first ground, it is argued that the appellant being a first offender should have been given a lesser sentence than that imposed. It is said that the 4 years imprisonment is harsh and excessive. Mr. Gunga learned advocate for the appellant took issue with the fact that the learned trial magistrate formed the opinion that the appellant was a dealer in narcotic drugs. It is the submission of Mr. Gunga that the aforesaid opinion made the learned magistrate to pronounce a harsh sentence. In the case of **Diego =vs= Republic [1985] K.Ll.R. 621** this court held as follows:

"**An appellate court should not interfere with the discretion by a trial judge as to sentence except in such cases where it appears that in assessing the sentence which is manifestly inadequate or manifestly excessive. The appellate court would not interfere with the sentence imposed on the appellant."**

Under Section 3(2)(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994, a maximum sentence of 10 years is prescribed for an offence under section 3(1). The trial magistrate inferred that the appellant was a dealer in cannabis sativa in view of the quantity she was found with. Such an offence does not exist in the Act. I can only assume that the trial magistrate may have meant that the appellant was trafficking. However the facts read do not disclose such an offence. I am of the view that the trial magistrate erred when he allowed such an inference to influence his decision on sentence. This alone entitles this court to interfere with the discretion on the sentence. I have already stated that the maximum sentence prescribed is 10 years imprisonment. The second ground argued is that the trial magistrate did not consider the appellant's mitigation. That ground cannot stand because the record clearly shows that the trial magistrate considered the appellant's mitigation and the fact that she is a first offender. In arriving at his decision the trial magistrate was of the view that a severe sentence should be imposed because the appellant was a dealer. I find that the learned magistrate fell into error. He considered an extraneous matter. For this reason I find that the sentence of 4 years imprisonment to be harsh and excessive in the circumstances of this case. Consequently the appeal as against sentence is allowed with the consequential order that the sentence imposed is set aside and substituted with a

sentence of 6 months from the date of sentence.

Dated and delivered at Mombasa this 20th day of May 2008.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Gunga for the appellant and

Mr. Monda for the state.