

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 129 of 2005

(From the original conviction and sentence in Criminal Case No. 11 of 2005 of the Senior Resident Magistrate's Court at Voi)

HAMATONE MNDWANJALA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

Hamatone Mndwanjala, the appellant herein, was tried for the offence of cultivating Cannabis Sativa contrary to Section 3(2)(b) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. After undergoing a full trial, the appellant was convicted as charged. He was however sentenced to pay a fine of Kshs.250,000/- in default to serve 15 years in prison under Section 6(a) of the same Act. Being aggrieved, the appellant preferred this appeal.

The appellant put forward 8 grounds of appeal in his amended petition of appeal. When the appeal came up for hearing, Mr. Monda, the learned Senior State Counsel conceded to the appeal.

It is the submission of Mr. Muhuri, learned advocate for the appellant that, the learned trial Senior Resident Magistrate erred when he convicted the appellant for an unspecified charge. It is argued that the trial magistrate substituted the charge after the trial and proceeded to convict without giving the appellant the right of hearing. It is also argued that the trial magistrate introduced extraneous matters in arriving at his decision. Mr. Monda, learned Senior State Counsel conceded the appeal on three grounds. First, it is said that the trial magistrate convicted on an improper charge. Secondly, it is said that the trial magistrate erred in convicting the appellant yet the charge was not proved to the required standards of beyond reasonable doubt. Thirdly, the sentence in default is contrary to section 28 of the Penal Code.

I have considered the oral arguments of Mr. Muhuni, and learned advocate for the appellant, Mr. Monda and learned Senior State Counsel. I have also perused the written submissions prepared by the appellant. This being the first appellate court, the appellant is entitled to have his case to be re-evaluated by this court.

The facts leading to this appeal appear to be short and straightforward. The prosecution tendered the evidence of five(5) witnesses to support its case before the trial court. A.P.C. Kennedy Mwambilu (P.W.1) received a report on 4.1.2005 to the effect that the appellant had planted cannabis sativa plants in his shamba. P.W.1 with Naftali Mwadiwisi (P.W.3) and another colleague of P.W.1 visited Plot No. 2090 where they found one old man known as Mwambela. The old man was shown 7 plants which had been uprooted from plot No. 2090 upon which he told P.W.1 and P.W.3 that the land was tilled by his son called Hamatone Mndwanjala, the appellant herein. Mwambela was arrested and presented to the police with the seven plants. The old man was placed in police cells at Voi Police Station and shortly, Gideon Mose brought the accused (Appellant) to the police station. He was arrested and the old man was released. The plants were sent to the Government Chemist for analysis. The Government analyst found proved that the plant to be *cannabis sativa*.

The appellant in his unsworn statement of defence told the trial court that he only visited the police station when he learnt of the arrest of his father. He said plot No. 2090 was accessible to his father and other brothers to cultivate. He claimed he had not seen the plants himself. He also claimed that he had a grudge with the area chief (P.W.3) who in turn threatened to have him jailed.

On appeal, three grounds were argued. First, it is said that the trial Senior Resident Magistrate convicted the appellant on a non-existent charge. This ground was conceded by the learned Senior State Counsel. I have perused at the record and it is clear that the appellant was sentenced under Section 6 of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The record further shows that the Learned Senior Resident Magistrate found the appellant guilty as charged. The charge is said to be under S.3(2) (b) yet the appellant was sentenced for an offence specified under Section 6. There is confusion created here. The appellant was sentenced under section 6 yet he was not tried under that section. I agree with the submission of Mr. Muhuni that the trial magistrate should have caused the charge to be amended before or during the trial and not at the time of writing judgment. With respect, I am convinced Mr. Monda rightly conceded the appeal on this ground.

The second ground argued is that the case was not proved to the required standards in criminal cases. The main evidence relied by the trial magistrate to convict is that of Mndwanjala Mwakangalu (P.W.2). He told the trial Magistrate that he was taken by police offices to the farm where he had given his son (Appellant) to plough. He said he was told the plants the police had, were uprooted from the portion the appellant had been given to plough. This cannot obviously prove the offence the appellant faced. The appellant's brothers should have testified to establish the fact that the appellant ploughed the portion the plants were uprooted. In fact the appellant had raised the issue in his defence which the trial magistrate did not seriously consider. The appellant had stated that his other brothers were accessible to the farm hence it is possible they too may have ploughed the offending plants. It is obvious that some doubt has been created in my mind which should have given in favour of the appellant. Again, I agree that Mr. Monda rightly conceded this appeal on this ground.

The third and final ground is the fact that the default sentence was made contrary to section 28 of the penal code. I agree that the learned Senior Resident Magistrate erred when he pronounced a default sentence of 15 years yet the law under section 28 of the penal Code puts a default maximum sentence at 12 months. For the above reasons, the appeal must succeed.

In the end I allow the appeal by quashing the conviction and setting aside the sentence. The effect is that the appellant should be set free forthwith if he is still serving the default sentence. Any fines that may have been paid must be refunded forthwith.

Dated and delivered at Mombasa this 19th day of September 2008.

J.K. SERGON

J U D G E