



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU**

**Criminal Appeal 70 & 71 of 2005**

*(From original conviction and sentence in Criminal Case No. 774 of 2005 of the Chief Magistrate’s Court at Nakuru – G. MUTEMBEI, CM)*

**CHRISTINE MASENO THULUYA.....1<sup>ST</sup> APPELLANT**

**VICTORIA BENARD ROBI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellants were jointly charged with trafficking in narcotic drugs contrary to **Section 4(a)** of the **Narcotic and Psychotropic Substances (Control) Act of 1994**. The particulars of the offence were that on the 18<sup>th</sup> March 2005 along Nakuru-Nairobi Road within Nakuru district they jointly trafficked in narcotic drugs, to wit 136 kgs of cannabis sativa with a street value of Kshs.272,000/- by transporting it in motor vehicle registration number KAQ 417T.

The appellants pleaded guilty to the said charge and the facts of the case were read out to the court and each one of them admitted that the facts were true and correct. The court convicted each of the appellants on their own plea of guilty. In their mitigation, the first appellant said that only one bale of the cannabis sativa was hers and the second appellant said that she had paid the driver of the said motor vehicle Kshs.10,000/- to transport the said drugs. She said that she was looking for money to pay hospital bills for one of her sick children. The trial court sentenced each of the appellants to eight years imprisonment. They were aggrieved by the said conviction and sentence and preferred appeals to this court. In their petitions of appeal which were drawn by Orina and Company Advocates, the grounds of appeal were the same. They were as follows:-

- “1. That the learned trial magistrate erred in law in convicting the appellant without taking into account that absence of the alleged cannabis sativa as an exhibit in court or an expert’s report thereof.***
- 2. That the learned magistrate erred in law in holding that the plea of guilty was unequivocal.***
- 3. That the learned trial magistrate erred in his failure to explain the charge to the appellant in a language that she understands.***
- 4. That in the alternative and without prejudice to the foregoing the sentence meted was manifestly***

***excessive, harsh and oppressive given that the appellant was a first offender.”***

In his submissions, Mr. Orina for the appellant told the court that the cannabis sativa should have been availed to court as an exhibit or an expert's report filed to confirm that what the appellants were trafficking in was actually cannabis sativa. In his view, failure to do so was fatal to the conviction. He further submitted that the charges were not explained to the appellants in a language which they could understand. He said that the charge was read in English and the appellants did not understand that language. It was not clear whether the ingredients of the charge were explained to the appellants, he added. Counsel cited the Court of Appeal decision in ***ELIJAH AYWA ZEDEKIA VS REPUBLIC*** Criminal Appeal No. 82 of 2000 at Nairobi (unreported) where the court referred to an earlier decision of its predecessor in ***HANDO s/o ALWNAAY V REPUBLIC [1951] EACA 307*** where it was stated as follows:—

*“When a person is charged with an offence, the charge and the particulars thereof should be read out to him so far as possible in his own language, but if that is not possible, a language which he can speak and understand. Thereafter, the court should explain to him the essential ingredients of the charge and he should be asked if he admits them. If he does admit them, his answer should be recorded as nearly as possible in his own words and then a plea of guilty formally entered.”*

Mr. Orina further submitted that the trial court did not indicate the language in which the plea was taken or whether there was any interpreter and for those reasons he submitted that the plea was not unequivocal. He therefore urged the court to allow the appeal, quash the conviction and set aside the sentence. If on the other hand the court did not find it appropriate to quash the conviction, counsel urged the court to reduce the sentence that was meted out to the appellants saying that the same was harsh and excessive.

Mr. Koech, State Counsel, supported the conviction and sentence. He submitted that the plea was taken in accordance with the law and was unequivocal. He added that there were two advocates who appeared for a co-accused and there was nothing to indicate that the appellants did not follow the proceedings. To the contrary, the appellants admitted the facts of the case and mitigated. He further submitted that the appellants, having pleaded guilty and admitted that the facts of the case were true and correct there was no need of producing a certificate from an expert to confirm the substance that the appellants were trafficking in was cannabis sativa.

With regard to the sentence, Mr. Koech submitted that the same was reasonable as the appellants were trafficking in the cannabis sativa for sale. He further submitted that the sentence that was passed was not excessive.

I have considered the entire record of appeal and the submissions that were made by both the appellants' counsel and the state counsel. With regard to the first ground of appeal, the appellants admitted that they were trafficking in cannabis sativa and having done so, there was no need for the prosecution to produce a report of a Government Analyst as required under **Section 67 of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994**. Such a report would only have been necessary if the appellants had denied the charge. In respect of the appellants' co-accused who denied the charge, the prosecution produced the appropriate report of a Government Analyst which established that the substance that the appellants and the co-accused were trafficking in was actually cannabis sativa. I therefore reject the first ground of appeal.

Turning to the second and third grounds of appeal, I do not find that there was anything to indicate that the appellants' plea of guilty was equivocal. Even though the typed proceedings do not indicate the language in which the charge was read to the appellants, the original court file that was also before this court clearly showed that the charge was read to the appellants in English and was interpreted into Swahili and the court clerk/interpreter was one Mr. Kihara. The appellants then stated that the charge was true and when the facts of the case were read out to them, they admitted the same and the trial court proceeded to convict them accordingly. The appellants were given an opportunity to mitigate before they were sentenced and the kind of mitigation that they gave left no doubt that they clearly understood the

charge to which they had pleaded guilty. I therefore reject grounds two and three of the petition of appeal.

The maximum sentence that the appellants could be ordered to serve was life imprisonment but the trial court sentenced them to eight years' imprisonment. It must be remembered that the appellants were trafficking in a huge amount of cannabis sativa that was for sale. The trial magistrate exercised his discretion in sentencing the appellants. As was held in **WANJEMA V REPUBLIC [1971] EA at page 494:-**

*“An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case”.*

I adopt the aforesaid principles entirely. I do not see any basis upon which I can interfere with the sentence that was handed down by the trial court. I therefore reject the fourth ground of the appellants' appeal. The end result is that the appellants' appeals fail in their entirety.

DATED, SIGNED and DELIVERED at Nakuru this 20<sup>th</sup> day of July, 2006.

**D. MUSINGA**

**JUDGE**

Judgment delivered in open court in the presence of Mr. Mbiyu holding brief for Mr. Orina for both appellants.

**D. MUSINGA**

**JUDGE**