



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Criminal Appeal 217 of 2005**

**ABDALLA MOHAMED BUKU.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The appellant was charged in the lower court with being in possession of narcotic drug contrary to section 3[1] read with subsection 2[b] of the Narcotic Drugs and Psychotropic Substances Control Act, Number 4 of 1994. When the charge was read over and explained to him, he responded in Kiswahili and said that it was true.

The facts as read out by the prosecutor were that on 11<sup>th</sup> October, 2005 at Port Reitz, police officers from Changamwe police station were on patrol when they arrested the appellant with one sachet of heroin. He was arrested and charged with the offence. The heroin was of a street value of Ksh.200/=. The appellant said that the facts were true whereupon the prosecutor asked the court to treat the appellant as a first offender.

In mitigation, the appellant prayed for leniency. He further said that he did not know what he was carrying and that he would not repeat the offence as he did not even use the substance. The learned resident magistrate considered the fact that the appellant did not use the drug and ordered him to be remanded and that a community Service Officer's report be prepared for the court's consideration. When the report was availed to the court, the learned resident magistrate found that the attitude of the appellant did not warrant him to be placed on Community Service Orders. He accordingly sentenced the appellant to 5 years imprisonment with hard labour.

The appellant's appeal is against the sentence. His grounds of appeal are that he was a first offender; that he pleaded guilty to the charge; and therefore a term of imprisonment for five years was excessively harsh. At the hearing of the appeal, he appeared in person while Mrs. Mwangi represented the Republic. In his oral submissions, the appellant reiterated that he was a first offender and that the sentence meted out to him was excessive. He said that he was 30 years old, married, with children, and that even his grandparents were dependent on him. He beseeched the court to be lenient and to reduce the sentence and if possible to release him altogether. Asked by the court whether he was appealing against conviction, he said that he just wanted a reduction of the sentence.

In her response, Mrs. Mwangi conceded the appeal on a technicality. She said that when the facts were read to the appellant, it was not stated whether the substance in question was referred to the government chemist for analysis and confirmation that it was heroin. She submitted that the learned trial magistrate should have given the appellant the benefit of doubt.

I agree entirely with Mrs. Mwangi. Since there was no evidence that the substance with which the appellant was accused of being in possession was subjected to any chemical analysis and confirmed to be heroin, legally, there was no evidence that it was actually heroin. The conviction of the appellant of being in possession of heroin therefore cannot stand. For that reason, the conviction of the appellant is quashed and the sentence set aside.

The appellant is accordingly set free unless he is otherwise lawfully held.

It is so ordered.

**Dated and delivered at Mombasa this 25<sup>th</sup> day of September, 2006**

L. NJAGI

JUDGE