

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 278 of 2003

(From Original conviction (s) and Sentence (s) in Criminal Case No. 140 of 2003 of the Resident Magistrate's Court at Tawa P.N. Morigori on 20/6/03)

MUASYA KONDO MUEMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

This is an appeal against sentence in Criminal Case 140/03, Tawa Resident Magistrate's Court. The appellant Muasya Kondo Muema, was charged with the offence of possession of Cannabis Sativa Contrary to Section 3 (1) (2) as read with Section 3 (2) (a) of Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. He pleaded guilty and was sentenced to serve 7 years imprisonment. It is against that sentence that this appeal is preferred.

Though the appellant was in court, he had not wished to be present at the hearing of the appeal. He opted to remain silent.

The state did not oppose the appeal. Mr O'Mirera, for the state observed that the prosecutor who conducted the proceedings was unqualified rendering the proceedings a nullity; the plea was not properly taken and that the sentence of 7 years imprisonment for possession of two rolls of Cannabis Sativa was harsh bearing in mind that the accused had pleaded guilty; that the appellant has already served two years and the state did not urge for a retrial.

The proceedings in the lower court were conducted by Corporal Otieno. He is not a police officer above the rank of acting Inspector of police or an Advocate of the high Court as required by Section 85 (2) Criminal procedure Code as read with Section 88 Criminal Procedure Code. This rendered the proceedings before the lower court a nullity.

In addition to the above, the plea was not properly taken. The language in which the charge was read to the appellant is not disclosed and no plea of guilty was entered before the facts were read to appellant.

The sentence was harsh because the appellant was said to be a first offender and there were no aggravating circumstances to warrant such a harsh sentence. At least appellant could have been fined or placed on Community Service Order.

The prosecution did not pray for a retrial. The appellant has served over two years already. The two years in prison is excessive already.

From the foregoing, having found the proceedings in the lower court to have been defective and hence a nullity, the conviction is hereby quashed, sentence set aside and appellant set free unless otherwise lawfully held.

R.V. WENDOH

JUDGE

Dated at Machakos this 12th day of October 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE