REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
Criminal Appeal 149 of 2003 (B)

DANIEL NDERITU WACHIRA……..APPELLANT

Versus

REPUBLIC……RESPONDENT

(Being Appeal against Conviction and Sentence of

L. W. Gitari, Principal Magistrate, dated 28th April, 2003 in Criminal Case No. 1103 of 2002 in the Principal Magistrate's Court at Kerugoya)

JUDGMENT

The Charge against the Appellant stated "**Being in possession of cannabis sativa, contrary to Section 3(1) 2(a) of the Narcotic Drugs and Psychotropic Substances Control Act 4/94."** In the particulars it was alleged that on the 15th day of July 2002 at Kagumo Market in Kirinyaga District within Central Province, the Appellant was found in possession of nine (9) stones and eighty one (81) rolls of cannabis sativa which was not in medicinal form.

To support that charge, evidence was adduced that Administration Policemen went to the house of the Appellant and found him holding a paper-bag, which they checked and found containing nine stones, 13 big rolls of cannabis sativa. The Appellant was arrested and charged with the offence in this appeal. Administration policemen were acting on information the source of which is not disclosed.

The Appellant denied the offence stating that no such substance was recovered by the said Administration Policemen from him or his house. He said before his arrest he had disagreed with the area chief from whose office the Administration Policemen subsequently came. According to his defence, the case was a frame up against him.

The learned trial magistrate rejected that defence saying it was not truth. The magistrate said there was tangible evidence against the Appellant. He therefore found the Appellant guilty as charged and convicted him. The Appellant was sentenced to serve three years imprisonment.

He filed this appeal through his lawyers M/S Bali-Sharma & Bali-Sharma relying on five grounds of appeal which have been argued by Mr. Mahan. There was no reply to Mr. Mahan's submissions as there was no appearance for the Respondent although the Respondent was aware of the hearing date.

In the circumstances, I do not find it necessary to go into details in this judgment. But I will highlight one or two things.

First, the learned trial magistrate did not permit the Appellant's witness who had been sitting in the court to give evidence although the Appellant wanted her to give evidence. She was the Appellant's wife. The

Appellant feels that that action by the magistrate was prejudicial to the Appellant's case. He goes on to say that the action contravened express provisions of *Section 211* of the Criminal Procedure Act.

In my view the learned trial magistrate ought to have allowed the witness to give evidence bearing in mind that the weight to be put on her evidence was going to be affected by her presence in court during the trial before she gave the evidence. By completely denying the Appellant the benefit of the evidence of his witness, the trial magistrate prejudiced the Appellant's case.

Secondly, there was no finding of fact by the trial magistrate that indeed the Appellant was in possession of cannabis sativa.

Thirdly, the charge was badly set out as checking through the Act, it is difficult to find *Section 3(1) 2(a)*. The typed copy of the charge sheet makes the situation worse by having "*Section 3012 (a)"*.

But assuming the charge was under *Section 3 (1)* as read with Subsection (2) (a), that charge alleges that the Appellant was in possession of Cannabis Sativa, and this is the fourth problem. That substance was supposed to be a Narcotic Drug or a Psychotropic substance.

A "narcotic drug", according to the interpretation of *Section 2* of the Act, means substances specified in the First Schedule or anything that contains any substance specified in that schedule.

"Psychotropic substance" means any substance specified in the second schedule or anything that contains any substance specified in that schedule.

Neither of those two schedules contains a drug or a substance known as "Cannabis Sativa".

Moreover, and this is the fifth problem, S*ection 74* A of the Act does not appear to have been complied with in the trial.

Sixthly, looking at the charge sheet, the Exhibit memo sent to the Government Analyst and the report of the said Government Analyst, it becomes very doubtful whether the exhibits produced in court by P.W.3 Julius Ngugi were the exact exhibits purportedly seized from the Appellant's house.

I think the problems I have so far highlighted in this case are sufficient to show that there should have been no conviction of the Appellant in this case. I do not have to add more.

Accordingly, I do hereby allow the Appellant's appeal. Quash his conviction and set aside the sentence imposed upon him. He be set at liberty forthwith unless lawfully detained in some other cause.

Dated this 5th day of May 2005.

J. M. KHAMONI

JUDGE

Delivered by HON. LADY JUSTICE H. M. OKWENGU