

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
Criminal Appeal 143 of 2004

**(From original conviction (s) and Sentence(s) in Criminal case No. 6524 of 2004 of the
Chief Magistrate's Court at Madadara (Mr. Nyakundi – S.R.M.)**

MARCY WACHUKA MBUGUA.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellant **MARCY WACHUKA MBUGUA** pleaded guilty to the offence of **BEING IN POSSESSION OF NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES** contrary to Section 3(1) as read with Section 3(2) of the **NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES CONTROL ACT No. 4 of 1994**. She admitted that on 14th March 2004 at Muthurwa Railway Estate Nairobi she was found in possession of 14 rolls of Cannabis Sativa which was not in medicinal preparation form. She was sentenced to 36 months imprisonment from date of sentence which was 16th March 2004.

The Appellant has not challenged the conviction. She has instead challenged the sentence submitting that she was remorseful and had reformed and that she intended to take up a different trade which she had learnt while in prison. She also said that she had a two year old child whom she left with her blind grandmother.

MISS OKUMU learned Counsel for the State opposed the Appeal against sentence. She submitted that the maximum sentence provided under the law was 20 years. That in that respect 36 months imprisonment was lenient.

Even though the conviction was not challenged, this Court notes that the trial before the plea court was defective. The Appellant was alleged to have been found in possession of 14 rolls of Cannabis Sativa. It was imperative for the prosecution to produce the alleged drug before the Court as an exhibit. It was not produced and marked as required. Over and above marking the alleged drug as an exhibit, the prosecution had the duty to produce an analyst's expert report to prove that the alleged drug was examined and found to be the drug alleged in the charge. No such a report was before the Court and neither was it alleged that such an examination was carried out or intended. That means that there was no expert evidence before the Court to prove that the substance found with the Appellant was indeed cannabis sativa. The omission is fatal to the prosecution case and rendered the trial defective. Accordingly, I quash the conviction and set aside the sentence.

On the issue of a retrial, there is no guarantee that the drug in question will be availed for a retrial. There is no guarantee that there will be an analyst report on the alleged drug. The Appellant has served more than a third of her sentence. Considering all these circumstances, I find that it will prejudice the Appellant to order a retrial of the case. I decline to make the order for retrial. I direct rather that the Appellant should be set at liberty unless she is otherwise lawfully held.

Dated at Nairobi this 8th day of June 2005.

LESIT, J.

JUDGE

Read, signed and delivered in the presence of,

LESIT, J.

JUDGE