

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 112 OF 2003

ALBANUS MUTUA LEMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G E M E N T

The appellant has appealed against both conviction and sentence for the offence of cultivating prohibited plant contrary to section 6(a) of the narcotic drugs and psychotropic substances control Act. No. 4 of 1994. He was arraigned before Resident Magistrate's court Makueni on 2.4.2003 where he pleaded guilty to the charge and was convicted. He has filed five grounds of appeal which in summary are that the cannabis sativa was not his but a neighbours and he was tricked into pleading guilty by police. The other grounds are but mitigating factors like illness and family responsibilities. The appeal was opposed by the state who contend that the court should not interfere with the conviction and sentence.

Though the record before the trial magistrate does not show the language that the court used in reading the charge to appellant it is clear that he understood the charge that he faced, he admitted having planted the cannabis sativa and even after facts were read to him he confirmed that they were correct and he added that he planted them in his shamba to sell. The court is satisfied that he understood the charge. There is no evidence of police influence in the plea. If he had been convinced to plead guilty by the police, they were not in court. It is only the prosecutor who was present in court and appellant has not said it is the prosecutor who did so. The plea was unequivocal and the conviction was proper.

The court on its motion however notes that the prosecution in this case was one CPL Kyumbu who was not of the rank of acting inspector and above as required of prosecutors under provisions of section 85(2) CPC. He was not a qualified prosecutor and is in accordance with the finding of the Court of Appeal in the case of Thomas Ogamba Nyakundi versus Republic CR.A 217/03, the whole trial was a nullity and the conviction must be quashed and sentence of 4 years set aside.

The appellant has so far served just over one year. The court is of the view that there would be no need for a retrial as the sentence served is quite sufficient for the offence charged. Accordingly I quash the conviction and sentence and the appellant is accordingly set free unless otherwise lawfully held.

Dated, read and delivered at Machakos this.....day of.....,2004.

R. WENDOH

JUDGE