



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 72 AND 73 OF 2002

(From original conviction and sentence of the Senior Resident Magistrate's Court at Molo in criminal case No. 445 of 2002 – J.K. Ng'eno)

JOSHUA OMAMO OGELO.....1ST APPELLANT

KENNEDY WANDIGI OSIKA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants Joshua Omamo Ogelo and Kennedy Wandigi Osika were jointly charged with being in possession of cannabis sativa contrary to **Section 2(1) as read with Section 3(1) of the Narcotic drugs and Psychotropic Substances Control Act, (Act No. 4 of 1994)**. The particulars of the offence were that on the 25th of February 2002 at Salgaa Trading Centre, Nakuru District the Appellants were jointly found each in possession of ten kilograms of *cannabis sativa* in contravention of **Section 2(1) as read with Section 3(1) of the Narcotic drugs and Psychotropic Substances Control Act No. 4 of 1994**. When the Appellants were arraigned before Senior Resident Magistrate, Molo they pleaded guilty to the charge. The Appellants were duly convicted on their own plea of guilty and were each sentenced to serve a term of ten years imprisonment. The Appellants were aggrieved by the said conviction and sentence have appealed to this Court.

The grounds of Appeal put forward by the Appellants were more or less similar. The Appellants did not fault the decision of the trial magistrate in convicting them; rather the Appellants were aggrieved that they were sentenced to a harsh custodial sentence considering the fact that they were first offenders. The Appellants were further aggrieved that the trial magistrate did not consider their mitigation before sentencing them to the said term in prison.

At the hearing of this Appeal, the two separate appeals filed by the Appellants were ordered consolidated and were heard together as one. The 1st Appellant, Joshua Omamo Ogelo, pleaded with this Court to exercise its mercy on him. The 1st Appellant submitted that he had learnt his lesson while in prison. He further submitted that while in prison he had taught himself a trade and would not be tempted to again peddle narcotic drugs again. He submitted that while in prison he had become sick and was suffering from arthritis. The 1st Appellant urged this Court to reduce the term of imprisonment imposed after putting into consideration the mitigation of the 1st Appellant. The 2nd Appellant, Kennedy Wandigi Osika, pleaded with the Court to reduce the sentence imposed. He submitted that he was remorseful and had learnt his lesson. The 2nd Appellant pleaded with the Court to forgive him and sentence him to a lenient custodial sentence. The 2nd Defendant submitted that he was a first offender and if he were to be released he would engage in lawful employment. He submitted that he had learnt his lesson and would not engage in any illegal activity again. Mr Koech Learned State Counsel left the issue of the sentence to be imposed on the Court.

I have considered the submissions made by the Appellants. The Appellants have not challenged their conviction by the trial magistrate. Indeed they have reiterated their admission of guilt during the hearing of this Appeal. The Appellants submissions is basically a plea for mercy. No grounds have been put forward to convince this Court to interfere with the sentence imposed by the trial magistrate. The

Appellants were each found being in possession of ten kilograms of cannabis sativa (bhang) which is a narcotic drug as defined under **Section 2 of the Narcotic drugs and Psychotropic Substances (Control) Act, 1994**. The amount of *cannabis sativa* that were found in possession of the Appellants clearly show that the said narcotic drugs were for the purpose of sale and not for the consumption by the Appellants. The said Act provides a different punishment for an accused person who is convicted of trafficking narcotic drugs. The punishment for any person who is convicted of trafficking narcotic drugs is imprisonment for life. (See Section 4 of the said Act).

In the instant case the Appellants were obviously drug traffickers, but were charged under a section of the said Act which provided for a lesser sentence for a person is conviction for being in possession of a narcotic drug for his own consumption. The Appellant ought to have been charged convicted and sentenced under Section 4 of the said Act and not Section 3 (2) of the said Act. In the circumstances of this case the Appellants were indeed lucky that they were not charged and sentenced under the appropriate section of the law which provide for a punishment of life imprisonment. The Appellants should ride their luck. I will not interfere with sentences imposed by the trial magistrate. The Appellants were drug traffickers. The sentences imposed by the trial magistrate was very lenient. The Appeals filed by the Appellants lack merit. The same is dismissed. The convictions and the sentences of the trial magistrate is hereby confirmed. The Appellants shall serve the sentence of ten years imprisonment imposed.

It is so ordered.

**DATED at NAKURU this 24th day of November 2004.**

**L. KIMARU**

**AG. JUDGE**