

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT
MACHAKOS
APPELLATE SIDE
HIGH COURT CRIMINAL APPEAL 37 OF 2004

(From Original Conviction(s) and Sentence(s) in Criminal Case No 683 of 2003 of the Senior Resident Magistrate's Court at Kangundo N. N. Njagi (Esq.) on 3/11/03)

BONIFACE MWANZIA KITAVI ::: APPELLANT
VERSUS
REPUBLIC ::: RESPONDENT

J U D G E M E N T

Boniface Mwanzia Kitavi was convicted by Senior Resident Magistrate's Court Kangundo for the offence of possession of *bhang* Contrary to Section 3 (1) as read with Section 3 (2) (a) of the Narcotic Drugs and Psychotropic Substances Act No. 4 of 1994. He was sentenced to five years imprisonment. He was aggrieved and filed this appeal.

When the matter came up for hearing, Mr O'Mirera the learned state counsel conceded the appeal on grounds that the lower court proceedings were conducted by PC Mbonge who is an unqualified prosecutor. It is now trite law that prosecution by an unqualified prosecutor renders the proceedings a nullity see **ROY ELIREMA versus REPUBLIC Criminal Appeal 67/03** . The proceedings before the lower court are hereby declared a nullity, the conviction is quashed and sentence set aside.

The state urges the court to order a retrial. The appellant did not object to a retrial. The court will generally order a retrial if the trial in the lower court was illegal or defective. In ordering a retrial the court has to ensure that the trial will not prejudice the accused person.

Having scanned through the evidence on record, I do find that indeed in the event of a retrial the admissible evidence on record may result in a conviction. The exhibit was taken to the Government analyst and confirmed to be Cannabis Sativa. The appellant was arraigned in court on 29/8/03 and was sentenced to five years imprisonment on 3/11/03. So far he has served one year imprisonment leaving a balance of four years.

From the record, I have seen a report prepared by the Probation Officer who recommended a non custodial sentence since the appellant was found to be a first offender. I take note of the amount of Cannabis Sativa involved and in my view, the sentence was excessive in the circumstances and it would not be fair to hold the appellant any further by ordering a retrial which might take a long period. Accordingly, I decline to order a retrial and the appellant is set at liberty unless otherwise lawfully held.

Dated at Machakos this 15th day of December 2004

R.V. WENDOH

JUDGE