



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CRIMINAL APPEAL NO.132 OF 2003**

**(From original conviction and sentence of the Chief Magistrate's Court at Kisii in
Criminal Case No.121 of 2000 – W. K. TUYOIT ESQ., C.M)**

SAMUEL ALOICE KIMANI APPELLANT

VERSUS

REPUBLICRESPONDENT.

JUDGMENT

The appellant was convicted by Chief Magistrate Kisii for the offence of being in possession of Narcotic Drug (bhang) c/s. 6(1) as read with s.2 (a) of the Psychotropic Substance Control Act.

The particulars were that on 6/1/2000 along Kisii/Keroka road he was found in possession of 1,260 stones bhang worth shs.2.5 million. The appellant pleaded guilty. He was fined shs.2.5 million or 10 years imprisonment.

In his supplementary record of appeal there are six grounds listed. The first two grounds attacks the entering of guilty. It is stated that the plea was not voluntary and the appellant did not know the relevant factors and ingredients of the charge as they were not explained to him prior to the plea. The plea was not unequivocal.

Grounds state that the sentence was manifestly excessive. Ground 4 also attacks the sentence and so in grounds 5 and 6.

It was submitted by Mr. Kaburi that the magistrate failed to consider whether the appellant understood the charge before entering the plea of guilty. The appellant did not participate in the proceedings and the proceedings does not show whether the charge was read and explained to the appellant in a language he understood. He said appellant is a Kikuyu who is illiterate. It is not shown in the proceedings if there was any translation.

Further it is not shown what appellant said in mitigation.

Mr. Kemo the state counsel supported the conviction but said sentence was harsh.

There is no denying that the appellant pleaded guilty to the offence. The only issue is whether the plea was unequivocal or not. Was the charge read and explained to him in a language he understood. Did he understand the charge before he pleaded? True corum does not show the language being used in court. The language used should be recorded all the times. However even if the language was recorded it is clear that the charge was read and explained to the appellant person and he understood it before entering the plea. After the charge and particulars were read it is recorded that he replied;-

“It is true I had the bhang”

He did not just say the offence is true but he went on to say he had the bhang. This shows he was live to what he was charged of and that is why he wants to state that he had the bhang. How would he have known the charge was that of being in possession of bhang if he did not understand the charge? I find that he properly understood the charge read to him in whatever language.

After the plea the prosecutor gave the facts. The facts were quite detailed. Again appellant is recorded to have said:

“I agree with all the facts. I was in possession of 1260 stones” This again is very candid. The appellant must have understood the facts and even the amount of bhang he was said to have been found in possession with.

Thus though the magistrate erred in failing to record properly the language used I am satisfied that appellant did understand the charge. He cannot be illiterate as the counsel said. He was found driving which means he is a driver if nothing else. The plea was unequivocal.

As to the issue of sentence the recording is not clear what appellant said in mitigation. It is only recorded.

“Mitigation: Accused asks for forgiveness.”

It is as if the magistrate was reporting what the appellant wanted. The correct procedure was to read what appellant said in his own words, and not what the magistrate thought appellant wanted. This was not proper but it does not affect the plea as taken. I believe it only affected the sentence.

It was submitted that the sentence of a fine of shs.2.5 million or 10 years was harsh and excessive. The state counsel agreed with that submission. Indeed the offence was quite serious as the magistrate noted and a deterrent sentence warranted.

However the appellant was a first offender. He prayed for forgiveness in mitigation. I do concur that the sentence was a bit on the higher side. Though the value of bhang was said to be shs.2.5 million there was really no indication how the actual value arrived at. I will therefore uphold the conviction but allow the appeal on sentence by setting aside the sentence of from of shs.2.5 million and substitute it with one of a fine of shs.1 million (one million shillings) in default to serve five (5) years imprisonment. It is so ordered.

Dated and delivered at Kisii this 22nd October 2002.

KABURU BAUNI

JUDGE

22/10/03 Mr. Kemo for State. Mr. Kaburi for Accused.

KABURU BAUNI

JUDGE.