



## **REPUBLIC OF KENYA**

### **IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCRA NO. 35 OF 2020**

**MARGARET SYOMBUA KYALO.....APPELLANT**

**-VERSUS-**

**REPUBLIC..... RESPONDENT**

*(Being an appeal from the conviction and sentence of Hon. C.A Mayamba (PM) in the Principal Magistrate's court at Kilungu, Criminal case No.832 of 2019, delivered on 1<sup>st</sup> November 2019).*

### **JUDGMENT**

1. The Appellant was charged in the magistrates' court at Kilungu jointly with another with possession of cannabis (*bhang*) contrary to section 3(1) as read with section 3(2) (a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars of the offence were that on 20<sup>th</sup> September 2019 at Mavitini village Isovyva location in Makueni county was found in possession of cannabis (*bhang*) to wit 300gms valued at Kshs.15,000/= which was not medically prepared.

2. She denied the charge. After a full trial, she was convicted together with the co-accused and sentenced to serve 5 years imprisonment.

3. Dissatisfied with the sentence of the trial court, the Appellant has come to this court on appeal. It is not clear if the co-convict Alex Muema Wambua has appealed. The Appellant relied upon the following amended grounds of appeal on sentence –

***1) That she is deeply remorseful, repentant and regret her action.***

***2) That she is the remaining sole bread winner of her family bestowed with a heavy responsibility of taking care of her three school going children.***

***3) That she is unable to stand the prison condition due to terminal illness.***

***4) That she prays for non-custodial sentence/an option of a fine so as to save her innocent dependants who are suffering untold calamities due to her continued imprisonment.***

***5) That she is fully reformed through prison integrated correction services as well as prison fellowship programs.***

***6) That she has understood the value of patience and moral uprightness and (is) now an ambassador of Christ.***

4. The appeal proceeded by way of filing written submissions. Both the Appellant and the Director of Public Prosecutions filed their written submissions, which I have perused and considered. I note that in the written submissions of the Director of Public Prosecution they say that they have no objection the Appellant to being granted an option of a fine.

5. This is an appeal on sentence only. However, since the Appellant is a lay person, I have perused the evidence on record to satisfy myself that the evidence is adequate to sustain the conviction. In my view the evidence is sufficient to sustain the conviction.

6. With regard to the sentence, the Director of Public Prosecution does not oppose the grant of the option of a fine. I note that the law under which the Appellant was charged does not provide the option of a fine. In this regard the relevant part provides as follows –

***3(1) Subject to subsection (3), any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence.***

***(2) A person guilty of an offence under subsection (1) shall be liable.***

*(a) In respect of cannabis, where the person satisfied the court that the cannabis was solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years, and*

*(b) in respect of a narcotic drug or psychotropic substance, other than cannabis, where the person satisfies the court that the narcotic drug or psychotropic substance was intended solely for his own consumption, to imprisonment for twenty years and in every other case to a fine of not less than one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, or to imprisonment for life or to both such fine and imprisonment.*

7. The above being so however, section 26(3) of the Penal Code (Cap 63) allows the imposition of fines by courts in cases where a convicted person is liable to imprisonment. It provides as follows –

**26(3) A person liable to imprisonment for any offence may be sentenced to pay a fine in addition to or in substitution for imprisonment.**

Provided that –

***(i) Where the law concerned provides for a minimum sentence of imprisonment; a fine shall not be substituted for imprisonment.”***

8. Thus in all cases where the law imposes a prison sentence but does not provide a minimum or mandatory sentence, the court may impose a fine.

9. In my view, with the small quantity of cannabis found on the Appellant, and she being a first offender and the mitigation she gave that she was a single parent with 2 school going children, the trial court should also have considered the option of a fine.

10. Thus, though I appreciate that sentencing is a discretionary power of trial courts, I hold that the trial court should have given the Appellant the option of fine. The value of the cannabis being Kshs.15,000/= and the Appellant having been imprisoned since November 2019 in my view a fine of Kshs.15,000/= will be sufficient to send a message to her to stop the practice of using cannabis.

11. I thus allow the appeal against sentence, and order that the Appellant will pay a **fine of Kshs.15,000/= or in default will serve the 5 years** imprisonment pronounced by the trial magistrate.

**DATED, DELIVERED AND SIGNED THIS 10TH DAY OF MARCH 2021, IN OPEN COURT AT MAKUENI.**

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**GEORGE DULU**

**GEORGE.**