REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 147 OF 2019

DOUGLAS NGEI MALULUI ……..……..…....…… APPELLANT

VERSUS

REPUBLIC…….……..…..… RESPONDENT

(Being an Appeal from the original Conviction and Sentence of Hon. C. A. Mayamba (PM) in Kilungu Principal Magistrate's Court Criminal Case No. 926 of 2019 delivered on 28th October, 2019)

JUDGMENT

1. **Douglas Ngei Malului** the Appellant was charged with the offence of being in possession of CANNABIS SATIVA (BHANG) contrary to Section 2(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars were that on the 25th day of October 2019 at Kazunguni market in Watema Location in Makueni County was found being in possession of cannabis sativa (bhang) weighing 3 grammes on street value Kshs. 60/= which was not medically prepared.

2. He pleaded guilty to both the charge and the facts on 28th October 2019. The 3 grammes of cannabis sativa found in his possession were produced in court as PEXB1.

3. He was said to be a first offender. In mitigation he said he uses the cannabis for his personal consumption. The court sentenced him to one (1) year imprisonment.

4. He was aggrieved and filed this appeal through M/s Saidi Babu & Associates advocates. The grounds cited are as follows:-

***1. THAT** the learned magistrate erred in law and fact in convicting the Appellant on a plea that was equivocal.*

***2. THAT** the sentence was excessive considering all the circumstances of the case.*

***3. THAT** the learned magistrate erred in law while exercising his discretion in sentencing for applying the wrong principle applicable to a first offender.*

***4. THAT** the learned magistrate erred in law in convicting the accused on the unreliable evidence of the prosecution witnesses without evaluating it and making a finding on it.*

***5. THAT** the learned magistrate erred in law in not considering the reasonable doubts available in the case against the Appellant and erred in law in not giving the Appellant the benefit of those doubts.*

***6. THAT** the learned magistrate erred in law while exercising his discretion in sentencing by not allowing the probation office to review and give a report prior to sentencing.*

***7. THAT** the learned magistrate erred in law in convicting the accused without the prosecution having proved all the ingredients of the offence.*

5. When the appeal came for hearing today the Appellant's counsel was absent. The Appellant elected to proceed to argue his appeal. He made it clear that his appeal was against the sentence only. He asked the court to reduce the sentence or give him an alternative sentence, saying the one he was given was excessive.

6. The learned prosecution counsel Mr. Muriuki submitted that the plea was unequivocal and the sentence given was lenient since the law provides for a sentence of ten (10) years. He therefore opposed the appeal.

7. A quick perusal of grounds 4, 5, 7 shows that they are completely irrelevant to this case. The reason is that this case never proceeded to full hearing. Ground 6 is also irrelevant because the defence cannot dictate to the court the mode of sentence to apply. The court exercised discretion and passed the sentence.

8. In ground No. 1 it is alleged that the plea was equivocal. The plea was read out to the Appellant in a language he understands and he responded to it in Kiswahili. He admitted the charge and the facts (in the charge sheet) plus the 3 grammes of Cannabis Sativa (PEXB1). The language of interpretation is shown as English/Kiswahili. The record is clear and I am satisfied that the plea was properly taken and it's unequivocal.

9. The remaining grounds are No. 2 and 3 which touch on the sentence. In his submissions the Appellant asked the court to reduce the sentence for him and give an alternative sentence. The Respondent opposed this request saying the sentence of one (1) year was too lenient.

10. The penalty for possession of Cannabis Sativa for personal consumption is provided for under Section 3 (2) (a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. It provides;

> ***"3. Penalty for possession of narcotic drugs, etc.***
>
> ***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 satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years; and……..."***

11. The sentence of ten (10) years imprisonment is not a mandatory sentence. The words used are *"shall be liable."* The sentencing court shall therefore exercise discretion. Before passing sentence in such circumstances the court considers a number of factors. The record shows that the Appellant was a 1st offender, and the amount of the cannabis was 3 grammes valued at Kshs. 60/= only. This is not much substance.

12. The Appellant also admitted the charge on the first day he was arraigned in court. He then went ahead to explain how he was found in possession. There was no evidence to show that he trades in the stuff.

13. Considering all these circumstances and the fact that the Appellant was a 1st offender, I do agree with the Appellant that the sentence of one year imprisonment with no option of a fine was too harsh. He has been in prison since 28th October 2019 which is two (2) months and 11 days. He stayed away from his family over Christmas and the new year holidays. I do find that to be sufficient punishment for him.

14. The Appeal succeeds on sentence only. **I therefore set aside the sentence of one (1) year and substitute it with a sentence of the period already served. He shall be released forthwith unless lawfully held under a separate warrant.**

Orders accordingly.

Delivered, signed & dated this 8th day of January 2020, in open court at Makueni.

…….

H. I. Ong'udi

Judge