



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA. NO. 250 OF 2017

DOMINIC MUTUA SAMMYAPPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

INTRODUCTION

1. The Appellant was charged with offence of being in possession of Narcotic Drugs contrary to Section 3 (1) as read with Section 3 (2) of the Psychotropic Substance Control Act No. 4 of 1994.
2. Particulars being that on the 5th September, 2017 at Ngukuni Village, Makindu Location within Makueni County, DOMINIC MUTUA SAMMY was found in possession of narcotic drugs (cannabis) to wit 500 grams not prepared under medical preparation form.
3. He pleaded guilty. The facts were read to him namely:-

“Prosecutor: On 05/09/2017, at 5.00 p.m. while acting on a tip off, police officers went to the accused’s Ngukuni Village. They went to the accused’s house and on searching his house they recovered 500 grammes of cannabis. The accused was arrested and taken to Makindu police station. I have the 500 grammes of cannabis.

Court: 500 grammes cannabis P. Exhibit 1.

Accused: It is true.”

4. He confirmed the same fact as “*it is true.*” In mitigation he said “*I ask court to forgive me. I do hard labour so I smoke bhang.*”
5. After considering mitigation the Appellant was sentenced to serve 5 years imprisonment.
6. Being aggrieved by the above verdict, the Appellant lodged instant appeal and set out 5 Grounds of Appeal namely:-
 - 1) **THAT** the Learned Magistrate erred in both law and fact when he convicted the Appellant on a defective charge.
 - 2) **THAT** the Learned Magistrate erred in both law and fact when he went ahead and convicted the Appellant on a non-existent law.
 - 3) **THAT** the Learned Magistrate erred in both law and fact when he went ahead and convicted the Appellant without following the procedure of establishing whether the alleged narcotic before him was cannabis or not as provided by the law and regulations thereof.
 - 4) **THAT** the Learned Magistrate erred in both law and fact when he went ahead and meted a custodial sentence without considering the option of a fine as provided by the law.
 - 5) **THAT** the sentence is harsh and excessive in the circumstances of the case.
7. During hearing the Appellant put 6 grounds of mitigation namely:-

- 1) **THAT** he pleaded guilty to the charges.
- 2) **THAT** he is not in any dispute with the conviction and sentence but only pray to the Hon. Court to review the same under the powers conferred to it in article 165 (7) of the Constitution of Kenya 2010.
- 3) **THAT** after a deep soul searching, he is remorseful, repentant and regret his act hence prays for leniency.
- 4) **THAT** he is just but a first offender who have never been caught in the wrong side of the law there before and promise to eschew from any criminal activity in future if given another opportunity.
- 5) **THAT** he pray to the Hon. Court to find that the sentence as was imposed by the trial court was harsh and excessive hence prays for the same to be substituted to the non-custodial sentence under the community service order (CSO) or rather reduce the same.
- 6) **THAT** he implores the Hon. Court to issue any order it may deem fit and he promises to comply.

8. The prosecution via Ms. Gitau State Counsel opposed appeal and submitted that the Appellant is impugning sentence Under Section 3 of Act under which he was charged the penalty of 10 years. There is no widow for fine. He got only 5 years.

9. The particulars of charge accused faced were clear of offence he allegedly committed. When the Appellant pleaded guilty he said he smokes cannabis because of his hard labour.

10. The Appellant pleaded guilty and where one pleads guilty, there is no need to establish the substance scientifically.

11. In cases where an accused pleads guilty to the charge, Section 348 CPC vests jurisdiction to the High court where appeal is only on legality of sentence.

12. This not the case in the instant matter. The appellant seeks reduction of sentence because he says, ***“after a deep soul searching, he is remorseful, repentant and regret his act hence prays for leniency.”***

13. In sum the courts finds no merit in appeal and makes the following orders;

- The appeal is dismissed, conviction upheld and sentence confirmed.

SIGNED, DATED AND DELIVERED THIS 4TH DAY OF FEBRUARY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE