



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO 43 OF 2017

MZEE ATHMAN SUDI ..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the judgment and sentencing of Hon. Njeri Thuku Principal Magistrate in Lamu Criminal Case No.323 of 2016 delivered on 13/7/2016)*

JUDGMENT

1. The Appellant was charged with the offence of being in possession of narcotic drugs **Contrary to Section 3(i)** as read with **Sub Section (2) (a)** of the **Narcotic Drugs and Psychotropic Substance Control Act no. 4 of 1994**. The particulars of the offence as stated in the charge sheet were that on 6<sup>th</sup> day of July, 2016 at Langoni area near the market in Lamu West Sub-County within Lamu County was found in possession of 7 narcotic drugs to wit 5 grams of cannabis (bhang) of estimated value of Kshs. 20/= in contravention of the said act No. 4 of 1994.
2. The Appellant pleaded guilty to the charge and was convicted on his own guilty plea and sentenced to serve 10 years imprisonment on 13/7/2016. He has now appealed to this court on conviction and sentence.
3. In his amended grounds of appeal filed on 6/11/2018 appellant has faulted the conviction and sentence stating that the charge sheet was defective; that there was no government analyst's report to prove that the alleged drug was indeed cannabis (bhang); that the plea was equivocal; that the sentence was inhuman and harsh; and; that no certificate of valuation under **section 86 of the Narcotic Drugs and Psychotropic Substance Control Act** was produced.
4. Along with the amended grounds of appeal, the Appellant filed written submissions. His submissions briefly restate the grounds stated above. In support of the ground that the charge sheet was defective, the Appellant submitted that the wrong provision was stated and that the same was not curable **under section 382 of the Criminal Procedure Code** as he was unable to know the consequences of his plea. He further submitted that the case against him was not proved to the required standard as no expert was called and that there was violation of **Section 86 of the Act**. Further on the issue of plea, the Appellant submitted that his plea was equivocal while on sentence he submitted that the sentence was harsh and inhuman considering the value of the purported drug being only twenty shillings.
5. At the hearing of the appeal, the Appellant relied on his written submissions and prayed for leniency on the basis that he had a family to take care of.
6. Mr. Kasyoka learned counsel for the Respondent opposed the appeal in its entirety. In brief oral submissions he drew the court's attention to the fact that the Appellant was convicted on a guilty plea and that therefore no appeal can lie against his conviction. Further he submitted that the plea was not equivocal as submitted by the Appellant. On sentence, counsel conceded that the sentence was harsh in the circumstances.
7. The main issue in this appeal is whether or not the Appellant's plea was unequivocal. In **Adan -vs- Republic (1973)EA 445** the court of Appeal set out the steps to be followed in plea taking as follows:-

*“(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.*

*(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.*

*(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.*

*(iv) If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.*

*(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded."*

8. I have carefully considered the record. When the Appellant was presented before court he elected the Kiswahili language. The charge was read to him and he answered "it is true" when the facts were read and explained to him, he still answered "yes the fact are correct." Therefore the court entered a plea of guilty. From the record it is clear that the court followed the law and rightly convicted the Appellant on his guilty plea. I have come to the conclusion that he plea was unequivocal. There is nothing on the record to suggest otherwise.

9. Having come to the conclusion that the plea was unequivocal, it follows that it is not open to the Appellant to challenge his conviction. That being the case, I shall not therefore address the grounds of appeal challenging conviction and will limit this judgment to the consideration of the sentence.

10. As earlier stated, the Appellant was found in possession of a narcotic drug bhang of street value of kshs. 20/= **section 3(2) (a)** of the **Narcotic Drugs and Psychotropic Substances Control Act** provides a penalty of 10 years where possession is proved but for personal consumption. In sentencing the Appellant, the trial court observed that the sentence was punitive but had to be imposed because it was mandatory.

11. There is however ample authority to demonstrate that the sentence provided for under the **Narcotic Drugs and Psychotropic Substances Control Act** are not mandatory minimum sentences that must be imposed in all cases. In **Caroline Auma Majabu V. Republic Criminal Appeal no 65 of 2014** the court of Appeal sitting in Malindi had this to say in interpreting Section 4(a) of the **Narcotic Drugs and Psychotropic Substances Control Act**:-

*" Applying the above definition, the use of the word "liable" in section 4(a) of Narcotic Drugs and Psychotropic Substance Control Act merely gives a likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentence with the maximum limit being indicated. It should be noted that sentencing is an exercise of judicial discretion, and therefore provisions which provide for mandatory sentence compromise that discretion, and are the exception rather than the rule. thus, where applicable the mandatory sentence must be expressed in clear and unambiguous terms."*

See also **Daniel Kyalo Muema V Republic Criminal Appeal No 479 of 2007 (2009) eKLR.**

12. I am guided by the above binding authorities to find and hold that the trial court erred in interpreting Section 3 (2) (a) of the Act as providing a mandatory minimum sentence for the offence of possession, and for holding that although she appreciated that the sentence was manifestly unjust, her hands were tied.

13. It is my finding therefore that there was unproportionality in the sentence and that the mitigating circumstances called for a lesser sentence.

14. In the premises I reduce the 10 year imprisonment to the period already served which I consider sufficient.

The Appellant is set at liberty forthwith unless otherwise lawfully held.

**Judgment delivered dated and Signed at Garsen on 13<sup>th</sup> day of March, 2019.**

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**R.LAGAT KORIR**

**JUDGE**

**In the presence of**

The accused

S. Pacho Court Assistant`

Mr. Kasyoka For the Respondent