



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO 44 OF 2016

SHEKUE HEMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the judgment and sentencing of Hon. Njeri Thuku Principal Magistrate in Lamu Criminal Case No. 334 of 2016 delivered on 19/10/2016)*

JUDGMENT

1. The Appellant Ali Shekue Hemed was charged with the offence of being in possession of narcotic drugs **Contrary to Section 3(i)** as read with **Section 3(2) (a)** of the **Narcotic Drugs and Psychotropic Substances Control Act no. 4 of 1994**. The particulars of the charge were that on 18<sup>th</sup> July 2016 at Langoni area near Tamarind Hotel in Lamu West Sub-County within Lamu County was found in possession of narcotic drugs to wit half big cut roll of Cannabis (bhang) of an estimated prevailing value of Kshs. 50/= in contravention of the said Act No. 4 of 1994.
2. The Appellant initially pleaded guilty to the charge but when the facts were read he disputed the size of the exhibit (bhang) saying he had a smaller roll. This necessitated change of plea to one of not guilty. At the conclusion of the trial, the Appellant was convicted and sentenced to 10 years imprisonment on 19/10/2016.
3. The present appeal is against sentence only. In the undated grounds of appeal filed on 1<sup>st</sup> November, 2018, the Appellant listed 7 grounds of appeal. He states in 2 of the 7 grounds that the sentence of 10 years is too harsh and that he begs the honourable court to reduce his sentence. The rest of what he terms grounds are statements of mitigating circumstances to the effect that he was the sole bread winner of his young family and was undergoing medical and health challenges.
4. The Appeal was opposed by the Respondent. In brief submissions at the hearing, Mr. Kasyoka learned counsel for the Respondent stated that the case against the Appellant was proved beyond reasonable doubt. On the issue of sentence learned counsel opted to leave that to the court.
5. I have already observed that the appeal was on sentence only. Indeed the Appellant stated in response to the Respondent counsel's submission that all he was praying for was for his sentence to be reduced. I shall therefore not dwell on the merits of the conviction but leave it undisturbed as it has not been challenged in any way.
6. As stated earlier the Appellant was sentenced to 10 years imprisonment the value of the narcotic was kshs. 50/= . I must hasten to add that the penalty prescribed under **section 3 (2)** does not take into account the value of the narcotic cannabis.
7. I have considered the Appellant's submissions on the sentence as well as the mitigation he offered in the trial court. I am of the view that the sentence was rather stiff. In saying so I am of the persuasion that the sentence prescribed under **section 3 (2) of the Act** is not a mandatory minimum sentence to be imposed in every case. Indeed I am fortified in this reasoning by the court of Appeal decision in **Caroline Auma v. Republic Criminal Appeal no 65. Of 2014 (2014) eKLR**. See also **Daniel Kyalo Muema v. Republic, Criminal Appeal no 479 of 2007 (2009) eKLR**.
8. In the end I consider that the period already served by the Appellant sufficient. I have taken into account that he has served two and half years excluding a three month pre-trial custody. He is released 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**

**The presence of**

S. Pacho Court Assistant

The Appellant

Mr. Kasyoka for the Respondent