



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**CRIMINAL APPEAL NO. 50 OF 2018**

**MS.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from Original Conviction and Sentence in Mwingi Senior Resident Magistrate's Court Criminal Case No. 53 of 2016 by Hon. G.Kirugumi (SRM) on 27/9/17)*

**J U D G M E N T**

1. The Appellant was charged with offence of Narcotic drugs & Psychotropic Substance Control Act NO. 4/1994 (NDPSC).
2. He was unable to take plea on **15/2/2016** as he was mentally sick. He was referred to Mathare Hospital for treatment under the Provisions of 162 Criminal Procedure Code.
3. A report dated **24/10/2016** was issued to court confirming him fit to plead. Thus he could proceed with defence under **Section 163 Criminal Procedure Code**.
4. The prosecution called 3 witnesses and closed its case. The Appellant gave sworn statement and after the court analyzed evidence, it convicted him and detained him at the pleasure of the President as it is stated to have Psychotic disorders and he is said to have raised defence of lenience which was not disapproved.
5. He was unhappy with above decision thus he lodged the instant appeal principally complaining that: Plea taking violated his rights under Article 25 (c ) Constitution plea taking was irregular.
6. Section 198 (1) Criminal Procedure Code was not complied with trial was a nullity. Parties were directed to canvass Appeal via submissions.
7. Appellants submitted placing him in detention at Presidents pleasure is unconstitutional and cited **Petition No. 160 /2019 Sammy Musembi vs. Republic** where **Odunga J** held same to be unconstitutional, thus same order no longer available.
8. On the issue of fair trial Article 25 (1) he says court ignored stating language used in court. Also plea taking was unfair as psychiatrist had already said he was not in position to take plea.
9. During the hearing of the Appeal the appellant admitted the substance was in his possession but he did not know how he got it and may be he was holding for somebody. He said he could not remember what happened.
10. In his defence he repeated the same narrative.
11. The PW1 and 2 Police officers narrated how they arrested Appellant at the Garissa stage –Mwingi town holding a paper and upon arresting him they discovered it was Cannabis Sativa.
12. The court has after perusing above material formed view that the issues were whether the trial was fair, whether the offence was proved and was detention order legal?
13. The offence of Narcotic trafficking under the provisions of Section 4 (a) has ingredients of impartation, exportation, manufacture, storing administering conveyance, delivery and distribution.

14. The 2 Police officers PW1 and 2 only saw him at stage with a paper which turned to contain Cannabis Sativa. Was trafficking in terms of the above ingredients proved?
15. The appellant said during defence that he did not remember what happened as he was sick mentally a fact upheld by the trial court.
16. During hearing of the Appeal he stated that he did not know how paper came into his possession. During the trial he had healed according to the Report of 24/10/2016.
17. The trafficking according to aforesaid provisions was not proved. The best the facts disclose is possession of same under Section 31 of the Act. This attracts a sentence of **maximum 10 years**.
18. The appellant has already **served 4 years** and also he is said to have been mentally sick when he committed the offence.
19. He has now healed. The court finds that this is an appropriate case for holding that the sentence served by him being in custody is adequate.

Thus it makes the following orders:

- (a) The conviction is set aside and substituted with conviction of offence of Possession of Narcotic drugs under Section 3(a) of the same Act.**
- (b) The order of detention at Presidents pleasure is set aside and substituted with the period already served.**
- (c) Thus the Appellant shall be released forthwith unless otherwise lawfully held.**

20. Orders accordingly.

**Dated, signed and delivered at Kitui this 18<sup>th</sup> day of October 2019**

**C. KARIUKI**

**JUDGE**