



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL NO. 70 OF 2015**

*(Appeal originating from the sentence by Hon. J.Aringo RM in Nyeri CR. CASE NO.792 of 2015)*

**ALFRED KINYUA KARIITHI.....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

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

The appellant was charged with the offence of trafficking of bhang contrary to section 4(a) of the Narcotic Drugs and psychotropic substances control act no.4 of 1994. The particulars were that on the 1<sup>st</sup> day of August 2015 at around 2100hours at muthinga market, Nyeri County in the republic of Kenya the appellant was found selling bhang approximately 2kg valued at kshs 1500 in his wooden kiosk in contravention to the said Act.

The appellant pleaded guilty to the charge and he was convicted and fined kshs one million in default 10 years imprisonment on 26<sup>th</sup> August 2015.the appellant appealed on sentence on the ground that it is harsh and excessive.

Ms. Mwaniki for the state submitted that the state is not contesting the appeal. She said that the respondent is conceding on the ground that the sentence is excessive considering that the value of the substance trafficked was kshs1500.she submitted that the court of appeal has agreed on the theory that section 4 (1) was meant to target drug barons not small offenders like the appellant. She referred to ***Mombasa criminal appeal no.65 of 2014(2014)eKLR*** an authority supplied to court by the appellant and submitted that the case was similar to this and the court of appeal substituted the charge with discharge under section 35 of the penal code on condition that the appellant does not commit another offence for the next one year. She urged court to impose appropriate sentence.

On perusal of the trial court record, I note that the appellant while pleading guilty said the bhang was for his own consumption; the trial magistrate convicted him on his own plea of guilty and in mitigation the appellant said that he started consuming bhang when he was young. It is evident that the appellant was pleading guilty to being in possession of bhang and not trafficking. Section 3 of the narcotic drugs and psychotropic substance control Act deal with possession. Section 3 (2) provide for imprisonment for 10 years if a person found in possession of cannabis prove that it was for own consumption and in any other case 20 years imprisonment.in the instant case the appellant was not given an opportunity to prove that the cannabis was for his own consumption despite the fact the he stated that when responding the charge read to him and in mitigation. There is however no doubt that he was pleading guilty to being in possession of cannabis and not trafficking.Idealy in such circumstances it would be proper to subject the appellant to a retrial as the plea appear equivocal but I however take note of the fact the he has served about 2 years imprisonment. The appellant is likely to suffer injustice if I take that route.

On the issue of sentence I have ***perused Mombasa criminal Appeal no.65 of 2014 Caroline Auma Majabu vs Republic (2014) e KLR*** and note that the court of appeal siting in Mombasa considered the amount of drugs the appellant was found in possession of and held that the gravity of sentence for drug trafficking was maximum sentence intended for drug barons and serious drug dealers with drugs worth

thousands of shilling if not millions and not small timers such as the appellant in that case who had few sachets of heroin. They indicated that the sentence imposed in such cases should be realistic and should aim at rehabilitating and not incarceration and completely destroying the offenders.

I take note of the fact that in the instant case the value of bhang was valued at kshs1500.I agree with court of appeal holding that courts should consider value of the substance and in cases like this where the value is low impose realistic sentence. From the foregoing I find that the sentence imposed herein was excessive. I note that the appellant was sentenced on 26th August 2015; he has served almost 2 years now.in the interest of justice I do reduce the sentence to sentence already served. The appellant to be released forthwith unless lawfully held.

**Dated, signed and delivered at Nyeri this 8th day of June 2017**

**RACHEL NGETICH**

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**HIGH COURT JUDGE**