



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 45 OF 2011**

**JACKSON MWAIWA MALIKA.....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 2573 of 2009 by Hon. S. M. Mungai S P M on 11/10/10)*

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

1. Jackson Mwaiwa Malika, the appellant, was charged as follows:

**Count 1: Being in possession of Cannabis Sativa (Bhang) contrary to Section 3(1) as read with Section 2(b) of Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.**

Particulars of the offence being that on the 24<sup>th</sup> day of **September, 2009** at **Mlolongo Township in Machakos District** within **Eastern Province**, was found being in possession of **thirty one** rolls of **Cannabis Sativa (Bhang)** valued at **Kshs. 620/=** which were not in any form of medicinal preparation.

**Count 2: Being in possession of firearm or imitation of firearm without firearm certificate** contrary to **Section 34(1)** of the **Firearm Act Cap 114 Laws of Kenya**. The particulars of the offence being that on the 24<sup>th</sup> day of **September, 2009** at **Mlolongo Township in Machakos District** within **Eastern Province**, was found being in possession of an **Imitation Firearm** namely **Toy Pistol** without a **firearm certificate**.

2. He admitted **Count 1** where he was sentenced to serve **four (4) years imprisonment**. Having denied **Count 2**, the case in respect of the charge was set down for hearing. Facts as presented by the Prosecution were that police officers acting on information received went to the house of the accused which they searched and recovered some **31 rolls of dry plant material** and a **toy pistol**. They arrested the accused. He was charged with the offences.
3. When put on his defence the accused denied having been in possession of an imitation of a firearm as alleged. He stated that the police had a habit of collecting money from him as a fee to allow him continue selling **Cannabis (bhang)**. On the fateful date he had no money to give them. Therefore upon finding the **cannabis** and **toy pistol** they arrested him. He however did not understand if they were the police who had the imitation of a firearm.
4. The trial magistrate considered evidence adduced and found the Appellant guilty hence sentencing him to **Seven (7) years imprisonment** on the second count.

5. Being dissatisfied with the decision of the court the Appellant appealed against the conviction and sentence. However, at the hearing of the appeal he abandoned the appeal on conviction and only mitigated on sentence.
6. In mitigation he prayed for reduction of the sentence imposed and sought an order for the two (2) sentences to run concurrently. He asked the court to consider that his mother is mentally unsound.
7. In response thereto the State through State Counsel, **Mr. Shijenje** did not object to the sentence running concurrently. He also conceded to the Appellant's sentence being reduced and if considerate an order to be made for him to serve the remaining part of the sentence as a non-custodial one.
8. My duty as the first appellate court is to re-consider the findings of the trial court and come up with my own conclusion bearing in mind that I did not hear what transpired at trial. **(See Okeno V. Republic (1972) EA 32).**
9. Having been convicted in 2009, the Appellant has already served the sentence on the first count.
10. With regard to the second count having been sentenced on **11<sup>th</sup> October, 2010** the appellant has served **five (5) years imprisonment**. The Appellant was charged with an offence contrary to **Section 34(1)** of the **Firearms Act** that provides thus:

*“(1) If any person makes or attempts to make any use of a firearm or an imitation firearm with intent to commit any criminal offence he shall be guilty of an offence and liable to imprisonment for a term of not less than seven, but not exceeding fifteen years, and where any person commits any such offence he shall be liable to the penalty provided by this subsection in addition to any penalty to which he may be sentenced for that other offence.”*

11. The minimum sentence provided for the offence being **Seven (7) years** this court has no reason to interfere with the sentence imposed by the trial court. In the premises the appeal lacks merit. Therefore, it is dismissed.
12. It is so ordered.

**Dated, Signed and Delivered at Kitui this 2<sup>nd</sup> day of February, 2016.**

**L. N. MUTENDE**

**JUDGE**