



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 36 OF 2015**

**BERNARD MUTHUI ..... APPELLANT**

**V E R S U S**

**REPUBLIC..... PROSECUTOR**

*(From original conviction and sentence in Criminal Case No. 93 of 2015 of the Principal Magistrate's Court at Mwingi- N. W. Murage – Ag.SRM).*

**JUDGMENT**

The appellant was charged in the subordinate court with possession of cannabis contrary to Section 3(1)2(b) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars of the offence were that on 14th February 2015 at Mathuki Shopping Centre Mwingi East in Kitui County was found in possession of 150gms of Cannabis of street value of Kshs 1500/- which was not in the form of medical preparation.

When he was brought before court on 16th February 2015, he was recorded as having pleaded guilty. However report from the Government Chemist had not by then been received by the prosecution. The matter was thus put for mention on 2nd March 2015.

When the matter came up on 2nd of March 2015, the appellant still maintained his plea of guilty. The facts of the case were then summarised by the prosecutor, and the report from the Government Chemist produced, which confirmed that indeed the substance found in possession of the appellant was cannabis. After the facts were given the appellant admitted the same and he was convicted.

With regard to sentence, the appellant was treated as a first offender. In his mitigation, he stated that he usually smoked the substance as a drug and that he was going to use it with a friend. He was sentenced to serve 5 years imprisonment.

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal. He filed seven grounds of appeal challenging both convictions and sentence. At the hearing of the appeal however, he submitted that he had admitted the offence, and stated that he was merely a smoker and not a seller of the drug. He asked for a lenient sentence, and said that he had stayed in prison for long and learnt a lesson.

Learned prosecuting counsel Mr. Orwa, submitted that this court should reconsider all the facts on record and come to its own conclusions. Counsel submitted that the grounds of appeal appeared to be a mitigation rather than an appeal. Counsel emphasized that the appellant had, during submissions admitted committing the offence.

I have perused and considered the entire record as required of me in a first appeal – see the case of ***Okeno vs Republic (1972) EA 32***.

It is clear to me that the appellant admitted committing the offence.

Looking at the charge sheet, the appellant was charged under Section 3(1) as well as (2)(b) of the Narcotic Drugs and Psychotropic Substances Control Act. Since the facts disclosed that he was merely in possession of the substances for his own use, he should have been charged and convicted under Section 3(1) and (2)(a), instead of subsection (2)(b). Subsection (2)(b) related to possession of the Narcotic Substance for purposes other than his own use, and the sentence therein is more severe.

The sentence for an offence under Subsection (2)(a) is a maximum of Ten (10) years imprisonment, and the appellant should have been convicted under this section.

Though the charge sheet was defective in the description of the section under which the appellant was charged, in my view that defect was not fatal to the conviction, as indeed the appellant understood the charge he was facing. Secondly, there is in existence an offence which covers the circumstances and facts of his possession of the narcotic substance. I find that the appellant was not prejudiced by the reference to the wrong subsection of the law. In my view the defect is curable Under Section 382 of the Criminal Procedure Code (cap.75).

In my view the conviction was proper. The plea of guilty was unambiguous.

The sentence however for a first offender who did not waste the court's time in my view was harsh and excessive. The appellant has made submissions on appeal with regard to the sentence. I agree with him that the sentence imposed in the circumstances of the case was excessive, as the quantity of the substance was small and it was for his own use not for sale.

The offence is however serious. Many youngsters are becoming addicted and wasted due to use of drugs. I will reduce the sentence to (2) Two years imprisonment, from the date on which he was sentenced by the trial court.

To conclude, I uphold the conviction. I however set aside the sentence and order that the appellant will serve a sentence of (2) Two years imprisonment from the date on which he was sentenced by the trial court.

**Dated and delivered at Garissa 3rd of March 2016.**

**GEORGE DULU**

**JUDGE**