



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CRIMINAL APPEAL NO. 9 OF 2015.

MOHAMMED OTUNDU ::::::::::::::::::::::::::::::::::::::: APPELLANT.

VERSUS

REPUBLIC ::::::::::::::::::::::::::::::::::::::: RESPONDENT.

(An appeal from the conviction and sentence of Hon. J. Ong'ondo – P.M. in Kakamega Chief Magistrate's Court Criminal Case No. 739 of 2014 delivered on 21st March, 2014.)

J U D G M E N T.

1. The appellant, Moses Otundu was charged in count 1 with the offence of being in possession of Narcotic drugs contrary to section 3 (1) and 3 (2) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars of the charge were that on 20th day of March, 2014, at about 1930 hours at Masingo village, in Kakamega Central District, within Kakamega county was found in possession of a Narcotic Drug namely cannabis sativa (bhanga) to wit 100 rolls with a street value of Ksh. 2000/= in contravention of the said Act.

2. In Count 2, the appellant was charged with the offence of resisting police officers in due execution of police officers duties contrary to section 103 (a) of the National Police Service Act of 2011. The particulars were that on the 20th March, 2014, at about 1930 hours at Masingo village resisted a police officers (1) CPL SEREM (2) PC WAWERU (sic) in the due execution of police officers duties (sic).

3. The appellant pleaded guilty to both counts and was convicted on his own plea of guilt and sentenced to serve five (5) years imprisonment in respect to count 1, and to pay a fine of Ksh. 20,000/= and in default serve 6 months imprisonment in respect to count 2.

4. The appellant being dissatisfied with the sentence imposed on him, appealed against the said sentence. He raised the following grounds of appeal:-

- i. *That the sentence meted was harsh in the circumstances (sic);*
- ii. *That he was very much remorseful for having committed this offences (sic) and pray for leniency (sic);*
- iii. *That the trial court did not consider that he was a first offender; and*
- iv. *That the trial court did not consider his mitigation.*

5. At the hearing of the appeal, the appellant relied on his written submissions and highlighted that his main concern was the harshness of the sentence of five (5) years and six (6) months imprisonment imposed on him. He informed the court that he has reformed and prayed that his appeal be allowed.

6. Mr. Ng'etich, learned Prosecution Counsel supported the sentence imposed on the two counts. He pointed out to the court that the appellant was a repeat offender. In his view, the sentence of five (5) years and six (6) months imprisonment was not excessive.

Determination of the appeal

7. The appellant was convicted and sentenced on his own plea of guilt on the two counts he was charged with. The plea was clear and unequivocal. The provisions of section 3 (2) (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act provides as follows:-

“A person guilty of an offence under section (1) shall be liable –

(a) In respect of cannabis where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years.”

It is apparent that the appellant was sentenced to a lesser sentence than that provided in law.

8. Section 74 A of the Narcotic Drugs and Psychotropic Substances Control Act gives the procedure for dealing with narcotic drugs upon seizure. It stipulates as follows:-

“Where any narcotic drug or psychotropic substance has been seized and is to be used in evidence, the Commissioner of Police and the Director of Medical Services or a police or a medical officer respectively authorized in writing by either of them for the purposes of this Act (herein referred to as “the authorised officers”) shall, in the presence of where practicable:

(a) the person intended to be charged in relation to the drugs (in this section referred to as “the accused person”);

(b) a designated analyst;

(c) the advocate (if any) representing the accused person; and

(d) the analyst, if any, appointed by the accused person (in this section referred to as “the other analyst”), weigh the whole amount seized, and thereafter the designated analyst shall take and weigh one or more samples of such narcotic drug or psychotropic substance and take away such sample or samples for the purpose of analysing and identifying the same.

2. After analysis and identification of the sample or samples taken under subsection (1), the same shall be returned to the authorized officers together with the designated analysts’ certificates for production at the trial of the accused person. (emphasis added)

9. The facts in the trial court did not disclose that the substance that was recovered from the appellant was taken to the Government Chemist for analysis. The prosecutor produced in court exhibit 1 which he indicated was cannabis. There was no Government Chemist's report that was produced in court by the prosecutor to prove that the substance recovered from the appellant was analysed and established to be cannabis.

10. It is the finding of this court that failure by the prosecution to take the crucial step of having analysis of the substance recovered from the appellant undertaken in a case of this nature was prejudicial to the appellant. Notwithstanding the fact the appellant stated that the facts were true when read out to him, the onus was on the prosecution to ensure that the Government Chemist's report was produced.

11. In the case of **Tima Kopi versus Republic, [2005] eKLR**, a court of concurrent jurisdiction held that the prosecution must prove that the appellant was found in possession of a narcotic drug, namely, cannabis sativa.

12. In the instant case, due to the said failure on the part of the prosecution, I quash the appellant's conviction on count I and set aside the sentence.

13. I uphold the conviction and sentence in respect to count 2.

14. The appellant has been in custody since 21st March, 2014. He has therefore served 6 months imprisonment in respect to Count II.

15. The upshot of the foregoing is that the appellant shall be set at liberty unless otherwise lawfully held.

It is so ordered.

DELIVERED, DATED and SIGNED in open court at **KAKAMEGA** on this **10TH** day of **MARCH**, 2016.

NJOKI MWANGI.

JUDGE.

In the presence of:-

..... **for the Appellant**

..... **for the Respondent**

..... **Court Assistant**