



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.158 'A' OF 2014

JOHN MWAVISIAPPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal against sentence only of 5 years imprisonment passed on 16/10/2014 in Kakamega CMC Cr. Case No.3193 of 2014 by James Ongondo Ag P.M)

J U D G M E N T

Introduction

1. The appellant herein was convicted on his own plea of guilty to the charge of being in possession of cannabis sativa (bhang) contrary to Section 3(1) as read with subsection 2(a) of the Narcotic Drugs and Psychotropic Substances Act No.4 of 1994. The particulars of the offence were that on the 15th day of October 2014 at Mutsusu village, Shidodo sub location, Khayega location in Kakamega East District within Kakamega County he was found in possession of seventy seven rolls of bhang for sale of street value Kshs.770/= in contravention of the said Act. Upon conviction, the appellant was sentenced to 5 (five) years imprisonment.

The Appeal

2. The appellant being aggrieved by the sentence brought this appeal on the ground that the sentence was too harsh in the circumstances, especially considering the fact that he pleaded guilty and did not waste judicial time for the trial Court.
3. This is a first appeal, and on this appeal this Court is under a duty to reconsider and evaluate the case afresh with the view of reaching its own conclusions in the matter. In the instant appeal, the appellant is only appealing against sentence and wishes the Court to consider putting him on probation or some other non-custodial sentence.

The Law

4. Section 3(1) as read with Section 3(2) (a) provides that any person who is convicted under Section 3(1) shall be liable, “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”.
5. In deciding whether to interfere with the sentence imposed by the trial Court, this Court is guided by the principles set out in the case of **Diego –vs- Republic [1985] KLR 621** where it was held at holding number 5 that “an appellate Court should not interfere with the discretion by a trial Judge as to sentence except in such cases where it appears that in assessing the sentence the Judge acted

on some wrong principle or has imposed a sentence which is manifestly inadequate or manifestly excessive.”

Submissions

6. During the hearing of the appeal, the appellant relied on his written submissions in which he implored the Court to reduce the sentence of 5 years by placing him on probation so that he can go back to his family. In the alternative he urged the Court to impose a fine in lieu of the custodial sentence.
7. The State conceded the appeal on grounds that no report from the Government Chemist was produced before the trial Court to confirm that the 77 rolls of “bhang” were actually bhang. Mr. Omwengu who appeared for the State submitted that it is a requirement under the Act that any alleged substances be subjected to analysis and reports thereon produced in Court. Counsel could not say which Section of the law he was referring to but I believe that he had Section 74A of Act No.4 of 1994 in mind.
8. Under sub section 1 of the said Section where any narcotic drug or psychotropic substance has been seized and it is to be used in evidence. The same is supposed to be subjected to analysis and identification (see subsection 74A (2)) and return to the authorized officer together with the designated analysts certificates for production at the trial of the accused person.”

Analysis and Determination

9. In the instant case, the only exhibit produced by the Prosecution were the 77 rolls of bhang. There was no indication by the Police that that the 77 rolls were certified to be cannabis sativa or bhang. Nor was it even indicated whether the appellant intended to use the bhang for his own personal consumption or for some other purpose in order to bring the crime under Section 3(1) as read with Section 3(2) of the Act.

Conclusion

10. In the circumstances, I do agree with the State that this appeal ought to be allowed. Accordingly I allow the appellant’s appeal, quash the conviction and set aside the sentence of 5 years imprisonment. Unless otherwise lawfully held, the appellant shall be released from prison custody forthwith.
11. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 11th day of April 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Present in Person - For the Appellant

Mr. Omwenga (present) For Respondent

Mr. Lagat - Court Assistant