

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 75 OF 2015

MACKSON ZOSI DECHE APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the Original Conviction and Sentence in the Criminal Case No. 81 of 2012 of the Chief Magistrate's Court at Malindi – C.W. Gitari, CM)

JUDGEMENT

The appellant was charged with the offence of trafficking in Narcotic Drugs contrary to section 4 (a) of the Narcotic drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars of the offence are that the appellant, on the 6th February, 2012 at around 11.20 am at Marine Park in Malindi District within Kilifi County jointly with another person before the court, were found trafficking in narcotic drugs to wit 22 small rolls of cannabis with a street value of Kshs.220/= by conveying in contravention of the said Act.

The appellant pleaded guilty to the charge. The trial court sentenced the appellant to twelve (12) years imprisonment and an additional fine of Kshs.500,000/=. The appellant's co-accused pleaded not guilty to the offence. His case was fully heard and he was acquitted under section 210 of the Criminal Procedure Code.

The appellant's grounds of appeal are that the plea was not unequivocal, that he was not informed of the consequences of his guilty plea and that he was lured by the police to plead guilty so that he could be set free. The appellant filed written submissions in support of his case. The submissions basically deal with the issue of the sentence. It is submitted that the sentence is harsh and not in line with the circumstances of the case. The appellant is a first offender and was found in possession of 22 small rolls of cannabis sativa worth Kshs.220/=. The appellant relies on the case of **REPUBLIC V THOMSA GILBERT CHOLMODELLEY Nairobi Criminal case No. 55 of 2006**. The appellant informed the court that he has now reformed and prays for leniency.

Mr. Monda, prosecuting counsel, opposed the appeal on conviction. Counsel submitted that the plea was properly taken. Counsel concedes the appeal on the issue of sentence. Counsel contend that both the fine and the sentence are improper. The 12 year imprisonment is excessive.

The record of the trial court shows that the appellant was arrested on 6th February, 2012. He was arraigned before the court the following day on 7th February, 2012. The charge was read over to the accused and he pleaded guilty. His co-accused pleaded not guilty. The prosecution was not ready with the facts that day as the drugs had not been analysed. The case was fixed for mention on 21st February, 2012, a period of about two weeks. On 21st February, 2012 the appellant reiterated that he was still maintaining his guilty plea. The facts were read over and the appellant pleaded guilty to the facts. The facts simply put are that the appellant was arrested by Kenya Wildlife Services officers on 6th February, 2012 at about 11.20 am along the beach in Malindi. They searched him and recovered the drugs. The drugs were sent to the Government analyst and found to be cannabis sativa.

Given the record of the trial court, I do find that the conviction is proper. The plea was unequivocal. The appellant had ample time to reflect on his plea. He was not lured by the police. He had two weeks to reconsider his plea. The appeal on conviction lacks merit and is hereby disallowed.

The state concedes that the sentence is excessive. I do agree with the position taken by the state. The appellant is a first offender. The drugs had a street value of Kshs.220/=. A fine of Kshs.500,000/= and an additional twelve years (12) imprisonment sentence is quite excessive. The sentence leaves no room for reforming the appellant. It is quite retributive and unfair in the circumstances.

The appellant was arrested on 6th February, 2012. He has now served over four (4) years in prison. I do find that to be enough punishment. The twelve years (12) imprisonment and fine of Kshs.500,000/= imposed by the trial court is hereby set aside. The sentence is replaced with the period already served. The appellant shall be set at liberty unless otherwise lawfully held.

Dated and delivered in Malindi this 15th day of September, 2016.

S.J. CHITEMBWE

JUDGE