

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINL APPEAL NO. 33 OF 2014

SAMMY KATHIINA MATHUVA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court with being in possession of cannabis sativa (bhang) contrary to section 3 (1) (2) (a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars of offence were that on 13th May 2014at Yumbe Village Mwambui Location in Mwingi Central District within Kitui County was found being in possession of cannabis sativa (bhang) to wit 300 gramms with a street value of Kshs. 3,000/= which was not in any form of medical preparation. He was recorded as having pleaded guilty to the charge. He was convicted and sentenced to serve five (5) years imprisonment. He had now appealed to this court on sentence alone. He also filed written submissions.

At the hearing of the appeal the appellant relied on the written submissions and added that he was the first born in the family and was sole breadwinner of his family. He stated that he was looking for leniency.

The Learned Prosecuting Counsel Mr. Orwa opposed the appeal and supported both conviction and sentence. Counsel submitted that the grounds of appeal were more of mitigation rather than an appeal.

I have perused the record of the trial court. In my view, the plea of the appellant was unequivocal. The appellant was thus properly convicted of the offence.

His appeal is on sentence. In the subordinate court after the facts were summarized, the appellant in admitting the facts also stated that at first he sold the bhang but he had stopped. When he was asked to say something in mitigation, he said nothing. In effect he did not mitigate. He was then sentenced to serve five (5) years imprisonment.

In my view, the sentence was justified though the appellant was a first offender. He clearly stated that he used to sell the drug. That was a serious admission. He also elected to say nothing in mitigation which means he was not remorseful. In my view, the learned magistrate could not consider the mitigation which the appellant now seems to be raising on appeal. Such mitigation was not availed to the trial court. Therefore the learned magistrate cannot be faulted for the sentence of five (5) years imprisonment. It is not the function of the appeal court to deal with mitigation that had not been raised before the trial court, as the mitigation now raised on appeal is not new. The sentence is also lawful. I thus find no merits in the appeal.

To conclude, this appeal has no merits. I dismiss the same and uphold both conviction and sentence.

Dated and delivered at Garissa this 3rd March, 2015

GEORGE DULU

JUDGE

In the presence of:-

The appellant in person

Mr. Okemwa for the State

Martin Court Clerk