REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

HCCRA NO. 30 OF 2014

BELITA KIMANZI MWENDWA …..... APPELLANT

V E R S U S

REPUBLIC …..... RESPONDENT

(from the conviction and sentence in Mwingi SRM Criminal Case No.316 of 2014 – M. W. Murage Ag.SRM)

JUDGMENT

The appellant was charged in the subordinate court with being in possession of cannabis sativa contrary to section 3(1)(2)(a) of the Narcotic Drugs and Psychotropic Substances Control Act no. 4 of 1994. The particulars of the offence were that on 13th May 2014 at Yumbi Mwambui location in Mwingi Central District within Kitui County was found in possession of cannabis sativa to wit 500 gms with a street value of Shs 4,000/- which was not in any form of medical preparation.

She was recorded as having pleaded guilty to the charge. The facts were then summarized and she stated that the facts were correct. She was thus convicted. She was sentenced to serve 6 years imprisonment.

The appellant thereafter on 16th May 2014, filed the present appeal though his counsel C.K. Nzili & Co. The grounds of appeal are 4 and are as follow:-

1. The learned magistrate erred in entering a conviction on the appellant on a plea of guilty when the plea was not an unequivocal.
2. The learned magistrate erred in law and in facts in failing to warn the appellant on the implication of her own plea or if she understood the plea.
3. The learned magistrate erred in failing to establish scientifically if the substance was indeed bhang before conviction the appellant.
4. The learned. Magistrate erred in law and facts in failing to analyze and resolve the inconsistences in exhibit 1 which is material in drug related cases and in the substances of the case before her.
5. The learned. Magistrate erred in sentencing the appellant to an excessive sentence in the circumstances of the case.

Counsel for the appellant also filed 2 written submissions. He relied on section 281 of the Criminal Procedure Code with regard to the taking of a plea. He also relied on the case of ***Adan –vs- Republic (1973) E.A 445*** with regard to the steps to be followed by a court in recording a plea of guilty. Counsel also relied on a case of ***Njuki -vs- Republic (1990) KLR 305*** which emphasized the need for the court to caution an accused person when taking a plea of guilty. Counsel also relied on a case of ***Falehali Manji -vs- Republic (1964) EA 481*** on injustice that can be caused in ordering a retrial.

At the hearing of the Appeal, Mr. Nzili counsel for the appellant highlighted the submissions. Counsel submitted that the plea was equivocal as initially the charge was read in Kikamba language. However the next day, the facts were given and the record is silent of the language used in court. Counsel, stated that the language cannot be presumed to be the same as the language used the previous day. Counsel also submitted that no scientific report was tendered to confirm that the substance in question was cannabis sativa.

With regard to sentence, counsel submitted that the appellant was imprisoned for 6 years without an option of a fine. Counsel submitted that section 26 of Penal Code gives the court the option to hand down a sentence of a fine. He stated that his client had given strong mitigation and as such the court ought to have given a lesser sentence of a fine.

Mr. Mwangi the learned prosecuting counsel, opposed the appeal. The counsel submitted that the coram in court on both days was the same. It followed that the appellant understood the language used. Counsel emphasized that the exhibit was found in the house of the appellant and therefore it must have been cannabis sativa. In any event, in her submissions the appellant stated that she sold cannabis sativa. Counsel submitted that the sentence was lawful.

In response to prosecuting counsel's submissions Mr. Nzili submitted that the language used on the second day was not indicated and it could not be assumed. With regard to the sentence, counsel submitted that the prison sentence was not mandatory.

This is first appeal. As a first appellate court, I am duty bound to relook at the records afresh and satisfy myself as to its legality and whether there was any mistake. The appellant was recorded as having pleaded guilty. She has appealed to this court both against conviction and sentence.

I have perused the record. On the first day the charge was read to the appellant in Kikamba language,and she replied it was true. On the second day, the facts were given. The language of the court and the language used by the prosecutor were not indicated. After the facts were given the appellant was recorded as having stated that the facts were correct. In my view, if indeed the appellant did not understand the language used in summarizing the facts she would not have stated that the facts were correct. In addition she gave her mitigation which was recorded. In my view, looking at the entire record I am convinced that the appellant understood the language used.

Counsel has submitted that no scientific report was produced in court to prove that the substance in question was bhang or cannabis sativa. I agree that such a report was not produced. However the substance was taken or recovered from the house of the appellant. In her own mitigation she stated that she sold cannabis sativa in order to educate her children. It was not thus a new or stranger substance to her. As such in my view her own statements filled the gap of the prosecution case. I thus find that the fact that the prosecution did not produce a scientific report did not damage their case. I dismiss the appeal on conviction.

With regard to sentence, the appellant was sentenced to serve 6 years imprisonment without an option of a fine. Before sentencing, the appellant said that she had school going children and that her husband suffered from asthma. That was the reason why she sold cannabis sativa to educate the children. She did not show any remorsefulness nor indicate that she was going to stop the habit.

Sentencing is a discretion of the trial court. I find that an option was not an appropriate sentence. However, the prosecution did not indicate that the appellant had a previous conviction. As such in

my view the sentence of 6 years imprison for a person who pleaded guilty was harsh and in excessive. I will interfere with the sentence only to the extent of reducing the prison term. I will set aside the sentence and substitute it with a sentence of 2 years imprisonment from the date of which she was sentenced by the trial court.

To conclude, I dismiss the appeal on conviction and uphold the conviction of the trial court. I however allow the appeal on sentence and set aside the sentence imposed by the trial court and order that the appellant will serve 2 years imprisonment from the date of which she was sentenced by the trial court.

Dated and delivered at Garissa this 3rd day of June 2015.

GEORGE DULU

JUDGE