REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CRIMINAL APPEAL NO. 4 OF 2014

(Being an appeal from Criminal Case No. 655 of 2014 of the Senior Resident Magistrate's Court at Engineer)

SAMUEL MWANGI KIMANI…….APPELLANT

-VERSUS-

REPUBLIC……..RESPONDENT

J U D G M E N T

1. The Appellant pleaded guilty to a charge of Being in possession of Cannabis Sativa (bhang) Contrary to Section 3 (1) as read with 3 (2) of the Narcotic Drugs and Psychotropic substances Control Act when arraigned before the Senior Resident's Magistrate's Court, Engineer.

2. The particulars stated that on 7th July, 2014 at Mahiga, village Kipipiri, Nyandarua County, the Appellant had in his possession 200 Kilogrammes of bhangi with a street value of Kshs 1,500/=, which was not medicinal preparation. Upon admitting the facts as read out, the Appellant was convicted and sentenced to 10 years imprisonment.

3. He now appeals to this court primarily with regard to the sentence. His written submissions during the hearing consisted mainly of mitigatory factors.

4. The state through Mr. Kibelion opposed the appeal and defended the ten year sentence imposed by the lower court as legal and proper. That may be so as an offence under Section 3 (1) of the Narcotic Drugs and Psychotropic Substances Control Act carries a maximum sentence of twenty years imprisonment. That is not to say that the plea court should not consider all the circumstances including the amount of the drug in meting out a sentence.

5. However, in my view, this appeal does not turn on the legality or severity of the sentence, but rather on the glaring discrepancies between the charge and the facts given by the prosecution during the plea taking. The amount of drug indicated in the particulars of the charge was "Two hundred kilogrammes" but in the facts is stated as 200 grammes.

6. The original record indicates that 200 grammes of 'bhang' were produced before the court and marked as Exhibit B1. The facts read out by the prosecutor were at variance with the particulars of the charge. Secondly, there is no evidence that the alleged drug was subjected to analysis by the Government Analyst to confirm that it was a narcotic drug as prescribed in the First Schedule of the Act. No such report was tendered before the court.

7. The prosecution facts therefore did not fully support the charge laid before the court. The conviction

based on the Appellant's admission of the said facts cannot stand and is hereby quashed. The sentence of ten years imprisonment is set aside.

8. I have considered, the principles laid down in **Pius Olima & another –Vs- Republic [1993] eKLR** where the Court of Appeal stated**:**

> **"Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are:- Ahmed Sumar –Vs-Republic [1964] EA 481; Manji –Vs-Republic [1966] EA 343; Mujimba –Vs- Uganda, [1969] and Merali & Others –Vs- Republic, [1971] 221. The principles that emerge are that a retrial may be ordered where the original trial as was found by the High Court……is defective, if the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case."**

9. The Appellant has served almost one year of his sentence in respect of a relatively small amount of alleged drugs. The prosecution should not be allowed to fill the gaps in their case occasioned by the failure to have the alleged drugs analysed before the charges were preferred. That would be prejudicial to the Appellant. I am not persuaded that this is a proper case where an order for retrial can be made. I do therefore order that the Appellant shall be set at liberty unless otherwise lawfully held.

Delivered and signed at Naivasha, this **11th day of June, 2015.**

In the presence of:-

State Counsel : Mr. Kibelion

For the Accused : N/A - in person

C/C : Steven

Accused : Present

C. MEOLI

JUDGE