

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 151 OF 2012

(From the original Conviction and Sentence in the Criminal Case No. 17/2010 of the Principal Magistrate's Court at Kwale: A. O. Aminga – RM)

MWARUWA CHIDZAO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant herein **MWARUWA CHIDZAO** has filed this appeal against the decision of the learned Resident Magistrate sitting in Kwale Law Courts. The appellant had been arraigned in court on 7th January, 2010 and charged on a first count of **BEING IN POSSESSION OF NARCOTIC DRUGS CONTRARY TO SECTION 3(1) as read with 2(a) of THE NARCOTIC DRUGS AND PSCHOTROPIC SUBSTANCES ACT 1994**. In addition the appellant faced a second count of **TRAFFICKING IN NARCOTIC DRUGS CONTRARY TO SECTION 4(a) OF THE NARCOTIC DRUGS AND PSHCHOTROPIC SUBSTANCE ACT, 1994**. The prosecution case was that the appellant had hired a boda boda cyclist to ferry a sack to Tumba in Kwale. Acting upon a tip-off police intercepted the motor cycle along the Lunga Lunga road and arrested the appellant. The sack was found to contain 66 stones of plant material. Evidence from a Government analyst was that upon analysis the plant material was found to be cannabis sativa a prohibited drug. On 1st November, 2011 the learned trial magistrate convicted the appellant on both counts. After listening to his mitigation the court sentenced the appellant to a fine of Kshs. 100,000/= in default one (1) year imprisonment on the first count and a fine of Kshs. 1.0 million in default five (5) years imprisonment on the second count. Thereafter the appellant filed this appeal.

I have perused the appellant's written submissions and note that he makes it very clear that he does not wish to contest his convictions. He only seeks that this appeal court interferes with the sentences imposed. In his submissions appellant writes:

“Later I was served with the trial proceedings. I perused through it and came up with a view to NOW COME FORWARD WITH A MITIGATION APPEAL ONLY ON THE SENTENCE IMPOSED. My Lord I humbly and kindly beg the honourable court to consider my prayer and accord me this golden chance and [sic] rejoin my family.” [*my emphasis*]

From this it is clear that the appellant does not challenge his conviction. I have myself carefully and anxiously perused the record of the trial and I am satisfied that the convictions were merited in view of the evidence adduced and I am not therefore inclined to interfere with the same.

Although the appellant was accorded an opportunity to mitigate before the trial court, he has in his submissions argued that having seen the error of his ways he is now totally reformed and has determined to lead a good life and to avoid any unlawful and/or criminal activities. He adds that he has found religion whilst in prison and is now *'born again'*.

MR. DZUMO learned state counsel has conceded to the appeal only with respect to the sentence against the second count of trafficking which he urges this court to interfere with.

In my view the sentence on the first count being Kshs. 100,000/= in default one (1) year in prison was both lawful and appropriate and I will not interfere with this sentence.

With regard to the second count the value of the drugs was not given in the charge sheet. A careful perusal of the record does not show that any value was ascertained for the haul of 66 stones of bhang. No doubt this was a substantial amount. However, section 4(a) pegs the fine to the given value of the drug. Where no value has been ascertained by tangible evidence then section 28(c)(1) of the Penal Code will apply. No doubt under section 4(a) a fine may be imposed. Taking into account all relevant factors I set aside the sentence imposed by the trial court and instead substitute for count number 2 a fine of Kshs. 300,000/= in default four (4) years imprisonment. It is so ordered.

Dated and delivered in Mombasa this 4th day of February, 2014.

M. ODERO

JUDGE