No. 373/14

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 233 OF 2011

JOSEPH KASEE KATUNDYA ……....…….APPELLANT

VERSUS

REPUBLIC ……..……..RESPONDENT

(*Being an appeal from the original convicting and sentence in Kitui Principal Magistrate's Court Criminal Case No. 897 of 2010 by Hon. B.M. Kimemia , SRM on 23/11/2011)*

JUDGMENT

1. The appellant was charged with the offence of being in possession of **Narcotic Drugs** contrary to **Section 3(1) (2) (a)** of the **Narcotic** and **Psychotropic Substances Control Act No. 4** of **1994.** The particulars of the offence being that on the **29th November, 2010** at about **6.00pm** at **Mutune sub-location,** in **Kyangwithya East Location** of **Eastern Province,** he was found in possession of **Narcotic Drugs** namely; **cannabis sativa** to wit **one stone (500 grammes)** which was not in any form of medicinal preparation, street value **Kshs. 1000/=.**
2. He was tried, convicted and sentenced to serve **five (5) years** imprisonment. Being aggrieved by the conviction and sentence thereof, he now appeals on grounds that he was framed up since at the time he was alleged to have committed the offence he was serving sentence at the G.K. Prison and there was a grudge between him and the prosecution witnesses 1 and 2.
3. The facts of the case are that on the **29th November, 2010** PW1, **Timothy Mwangangi, Assistant Chief, Mutune Location** in conjunction with PW2, J**enni Nguu, Chief, Mutuni** went out on a raid. They encountered the appellant whom they arrested for being in possession of some dry plant material. They took him to the police station. He was re-arrested and charged.
4. In his defence the appellant denied having committed the offence. He stated that the charge was trumped up. He claimed that PW1 and PW2 were jealous of him because he was a nominated councillor.
5. The learned trial magistrate analyzed evidence adduced and disregarded the defence put up because in her opinion, it was a mere denial which failed to challenge the evidence on record.
6. This being the first appeal, I am duty bound to re-consider evidence adduced afresh and subject it to re-evaluation bearing in mind the fact that I neither saw nor heard witnesses who testified. **(*See Okeno versus Republic [1972] E.A. 32).***
7. It has been stated that the appellant was found in possession of **one stone (500 grammes)** of **narcotic drugs** namely '**cannabis'** that was not in any form of medicinal preparation.
8. PW1 was known to the appellant having arrested him previously. He stated that he asked him if he had the '***stuff***' and he offered him **Kshs. 200/=.** When he declined to accept the money he removed a stone of the substance from his jacket pocket. PW2 on the other hand was silent on the issue of money. She said the appellant looked suspicious and he removed the plant material.

9. PW3, **No. 89114, P.C. Ebenyo Mule** stated that he escorted the plant material to the Government Chemist and later received the report. He produced the report in evidence.
10. Prior to production of the report which was made by **G.N**. **Anyona** a **Government Analyst,** the officer did not lay any basis thereof. No application seeking leave of the court to have it produced was made by the prosecuting officer. It is not indicated under which provision of the law the Analyst's report was produced.
11. The appellant having been unrepresented, the court was duty bound to inform him of his rights under the law. The appellant should have been accorded an opportunity of cross-examining the expert if it was necessary. The procedure adopted by the trial court was irregular and prejudicial to the appellant.
12. Particulars of the offence indicate that he had **one stone** (**500 grammes)** of the plant material. According to the report produced, what was submitted to the **Government Chemist** was **one hundred thirty (130) grammes** of plant material. The discrepancy is not explained. The police officer, PW3 did not render any explanation as to how there was a disparity. This discrepancy was sufficient to put a doubt to the prosecution's case as to what the appellant was in possession of.
13. In the premises, the appeal succeeds. I do quash the conviction, set aside the sentence imposed and order that the appellant shall be released forthwith unless otherwise lawfully held.
14. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **9TH** day of **SEPTEMBER, 2014.**

L.N. MUTENDE

JUDGE