

(From Original Conviction and Sentence in Criminal Case No. 1511 of 2010 of the Chief Magistrate's Court at Mombasa: R. Mutoka – C.M.)

FAITH TOTO MWANGI.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

JUDGEMENT

The Appellant **FAITH TOTO MWANGI** has filed his appeal against the sentence imposed upon her by the learned Chief Magistrate sitting at Mombasa Law Courts. The Appellant was first arraigned in court on 17th May 2010 facing a charge of **BEING IN POSSESSION OF NARCOTIC DRUGS CONTRARY TO SECTION 3(1) OF THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCE CONTROL ACT 1994**. The Appellant entered a plea of **'Guilty'** to the charge. Indeed the Appellant was very categorical in her plea of Guilty and left no doubt as her actual words were:

"I maintain that I was in possession of the 20 rolls of bhang"

The Court Prosecutor **SUPERINTENDENT MATE** read the facts out as required by law. The Appellant maintained her plea of guilty saying:

"The facts as set out are correct"

The trial magistrate then convicted the Appellant on her own plea of guilty in line with Section 207(2) of the Criminal Procedure Code. I am satisfied that the Appellant entered a clear and unequivocal plea of guilty to this charge of Possession of Narcotic Drugs. Indeed a look at the Appellant's written submissions confirms that she has not challenged her conviction. Her appeal is only against her sentence which she terms 'harsh and excessive'. The learned State Counsel left this matter of sentence entirely to the court's discretion. The Appellant was allowed an opportunity to mitigate and in fact did so. A Probation Report was called for. I have perused that probation Report and I note that it was not in favour of the release of the Appellant in probation. Section 3 2(a) of the Narcotics act provides for the penalty upon conviction with the offence of Possession under Section 3(1) of the Act. This section provides as follows:

"(2) A person guilty of an offence under subsection (1) shall be liable (a) in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years ..."

This provision applies to the Appellant since the substance found in her possession was Cannabis. The trial magistrate sentenced the Appellant as follows:

"she is sentenced to serve 10 years imprisonment. She will also pay a fine of Kshs.10,000/- in default to serve 10 months imprisonment. Present sentences to run consecutively. Right of Appeal 14 days to the high Court explained"

I note that the trial magistrate appears to have imposed two distinct sentences. One was ten (10) years imprisonment and the other was a fine of 10,000/- with a default period of ten (10) months. The court directed that sentences be served consecutively. This makes a total prison term of about eleven (11) years. The law in Section 3(2)(a) makes no provision for two distinct sentences. It is only the offence of trafficking that by section 4 the Narcotics Act provides for two distinct sentences. Thus this sentence as imposed on the Appellant was unlawful. Taking into account the amount of Cannabis recovered on the Appellant I set aside the sentence as imposed by the trial court and substitute instead a term of five (5)

years imprisonment to run from the date of conviction in the lower court.

It is so ordered.

Dated and Delivered in Mombasa this 16th day of July 2012.

M. ODERO
JUDGE

In the presence of:

Mr. Onserio for State

Appellant in person