REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO. 5 OF 2014

(From the original Conviction and Sentence in the Criminal Case No. 751/2013 of the Senior Principal Magistrate's Court at Voi: S. M. Wahome – SPM)

DANIEL MUTUA KILONZO……..……..……APPELLANT

VERSUS

REPUBLIC……..……..RESPONDENT

JUDGMENT

The appellant herein **DANIEL MUTUA KILONZO** has appealed against his sentence imposed upon conviction on a charge of **BEING IN POSSESSION OF NARCOTIC DRUGS CONTRARY TO SECTION 3(1) as read with SECTION 3(2)(9) OF the narcotic drugs AND PSHYCHOTROPIC SUBSTANCE ACT 1994.** The particulars of the charge which the appellant faced were as follows

"On the 2nd day of October, 2013 at Sofia Estate within Taita Taveta County was found being in possession of narcotic drugs namely cannabis sativa to wit 10 grams with a street value of 100/= (One Hundred Shillings) in contravention of the said act."

The appellant was arraigned before the magistrate's court in Voi on 3rd October, 2013 and the charges were read out to him. He pleaded *'guilty'* to the charge. There after the prosecutor read out the facts of the charge. The appellant maintained his plea of *'guilty'*. He was convicted on his own plea and after listening to the mitigation, the learned trial magistrate sentenced the appellant to serve a term of imprisonment of one (1) year.

The appeal was heard before the High Court sitting in Voi on 6th June, 2014. **MR. MWANYUMBA** Advocate acted for the appellant whilst **MR. GIOCHE** learned state counsel represented the state. In his submissions counsel for the appellant made it clear that the appeal was only against the sentence and not against the conviction of the appellant. The appellant did not challenge his conviction at all – indeed he could not do so as he pleaded guilty to the charge. He only seeks to appeal against the sentence which he terms as *'harsh and excessive'* in the circumstances.

The facts reveal that the appellant was found in possession of 10 grams of cannabis sativa. I have carefully perused the record of the proceedings before the trial court. At page 2 line 14 it reads

“The accused was arrested and a search was done and he was found in possession of cannabis sativa weighing 10 grams valued at Kshs. 100/=. He was arrested and charged with the offence before court. I wish to produce the cannabis sativa as an exhibit. It is exhibit 1.”

The court prosecutor proceeded to produce what he referred to as cannabis sativa. What proof was there that the item produced in the court was in actual fact cannabis sativa" The law requires that the prosecution must prove a charge beyond a reasonable doubt. The fact that an accused person has entered a plea of *‘Guilty’* does not absolve the prosecution from the legal obligation to prove all elements of the offence. No report from a Government analyst was produced before the trial court to prove that the exhibit had been analyzed and found to be cannabis sativa. I repeat the prosecutor has an obligation to prove **all elements** of the offence beyond a reasonable doubt.

In this case the offence had two crucial elements which required proof

- Possession of the plant material
- Proof that the plant material recovered on the appellant was in actual fact ‘Cannabis Sativa’

They have failed to prove one element in this case. The prosecutor was not an analyst and had no capacity to declare the plant material *‘cannabis sativa’*. In the circumstances one crucial element of the charge remained unproven. Therefore notwithstanding the plea of guilty by the appellant, the trial court ought not to have entered a conviction. The prosecution had not availed proof of all elements of this offence. I therefore quash the conviction against the appellant and I set aside the sentence imposed upon him. The appellant is to be set at liberty unless he is otherwise lawfully held.

Dated and signed this 25th day of June, 2014.

MAUREEN A. ODERO

JUDGE

Read and delivered in Voi High Court this 3rd day of July, 2014.

MARTIN M. MUYA

JUDGE