**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 70 of 2005**

**(From Original Conviction and Sentence in Criminal Case No.489 of 2005 of the Chief Magistrate's Court at Thika –U. P. Kidula – C. M.)**

**MERCY WANJIRU MBURU …….…….....……..……..APPELLANT**

**VERSUS**

**REPUBLIC……..…….....…….….RESPONDENT**

**JUDGMENT**

***MERCY WANJIRU MBURU***, the Appellant herein was charged with one count of being in possession of Narcotic Drugs contrary to Section 3 (1) as read with Section 3 (2) (a) of the Narcotic Drugs and Psychotropic Substances Control Act 1994. The particulars as given in the charge sheet were that on 23rd January, 2005 at Riandegwa Village in Maragua District within Central Province, the Appellant was found in possession of thirteen (13) rolls of Cannabis Sativa which was not in medicinal preparation form. The Appellant pleaded guilty to the charge. The facts as narrated to the trial Court and admitted by the Appellant were that on 23. 1. 2005 Police on patrol received a tip-off and proceeded to the Appellants house. They searched the house and found 13 rolls of bhang. The Appellant was then arrested and charged.

As the Appellant admitted the facts stated, the trial Court duly convicted her of the offence. The Appellant by way of mitigation stated that she had nowhere to live as she had been chased away by her brothers after their mother died. That she had 5 children and vowed never to commit similar offence in future. The Learned Magistrate considered the foregoing and opted to call for community service order report. When the report was availed, it was found to be most unfavorable of the appellant. Accordingly the Learned Magistrate had no choice in the matter but to impose a custodial sentence. Accordingly, the Appellant was sentenced to serve 4 years imprisonment. In addition she was also fined Kshs.30,000/= in default to serve a further 6 months imprisonment.

The Learned Magistrate in sentencing the Appellant stated:-

"*….**The report is most unfavorable regarding the accused ability to reform. It is said that the accused has deliberately set out to ruin the youth in the village and has no respect for the law. In view of the above, I have no alternative but to impose a stiff sentence that will keep the accused out of circulation both for her own safety and to stop her from carrying on her activities that are ruining the entire village. Accused is therefore sentenced to serve 4 years imprisonment. In addition accused will pay a fine of 30,000/= default serve 6 months imprisonment…"***

It is from the foregoing that the Appellant comes to this Court by way of Appeal. Her Appeal is against sentence only. In support thereof the appellant states that: she pleaded guilty to the offence, is a first offender, a sole breadwinner of 7 children, in poor health and finally that the sentence imposed is harsh and excessive.

Miss Nyamosi, Learned State Counsel opposed the Appeal. She submitted that the offence for which the Appellant was convicted carries a maximum jail term of 20 years. The Appellant was only sentenced to a term of 4 years after the Learned Magistrate considered the probation officer's report as well as the Appellant's mitigation. The sentence being lawful, the Appeal had no merit and ought to be dismissed

Learned State Counsel concluded her submissions.

The Appellant was convicted, on her own plea of guilty of being in possession of Narcotic Drugs contrary to Section 3 (1) of the Narcotic Drugs and Psychotropic Substances (Control) Act. She was therefore liable to be sentenced to 20 years imprisonment. The Learned Magistrate considered all the circumstances of the case in arriving at the sentence she imposed on the Appellant. I have on my part considered the circumstances under which the offence was committed as well as the mitigating circumstances proffered by the Appellant and it is my view that the sentence of 4 years imposed was neither harsh nor excessive in those circumstances. In imposing the sentence the Learned Magistrate did not take into account irrelevant considerations or failed to take into account relevant factors. Similarly, it would appear that the Learned Magistrate in arriving at the sentence did not exercise her discretion capriciously. See generally ***SAYEKO VS REPUBLIC (1989) KLR 306.***

However the only aspect of the sentence that perhaps requires intervention by this Court is that further sentence of a fine of Kshs.30.000/= in default to serve a further 6 months imprisonment. This sentence in my view has no legal basis. The Appellant was not charged under Section 4 (a) of the said Act which imposes an obligation on the trial Court upon conviction to impose both imprisonment as well as a fine. To that extend the latter sentence would appear to be unlawful. In the premises I will interfere with that aspect of the sentence to the extent that the same is hereby set aside and or vacated. The Appellant shall only therefore serve 4 years imprisonment. To that limited extend the Appeal on sentence succeeds.

Dated at Nairobi this 31st day of July, 2006.

…….

**MAKHANDIA**

**JUDGE**