REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

HIGH COURT CRIMINAL APPEAL CASE NUMBER 20 OF 2020

TITUS MUTHUI MULI.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

Being an Appeal from the Conviction and Sentence in Criminal Case Number 41 of 2020

Principal Magistrate's Court at Migwani.

J U D G E M E N T

1. **Titus Muthui Muli**, the Appellant herein, was charged vide **Migwani Principal Magistrate's Court Criminal Case Number 41 of 2020** with the offence of trafficking in Narcotic Drugs contrary to ***Section 4 (a) of the Narcotic and Psychotropic Substance Control Act No. 4 of 1994***.

2. The particulars of the offence as per the charge sheet presented to the trial court shows that, the Applicant was on 15th July, 2020 at around 6:20 am, at Nguutani within Kitui County aboard ***Motor Vehicle Registration Number KCM 020A***, was found trafficking Narcotic Drugs to wit Cannabis Sativa (bhang) approximately 8 Kgs with a street value of Kshs. 80,000 in contravention of the law.

3. The Applicant pleaded guilty to the charge and he was convicted on his own plea of guilty and sentenced to pay a fine of Kshs. 1 million or serve 20 years' imprisonment in default.

4. The record of proceedings from the lower court and this court shows that the Appellant's attempt to have his conviction and sentence set aside on legality vide **Criminal Revision Number 186 of 2020** failed, after this court vide its ruling dated 13th October, 2020 dismissed the application for lacking in merit.

5. It is apparent from the record of this appeal, that the Appellant had also made this appeal while separately pursuing the cited application for revision.

6. The Appellant was convicted at the trial court vide **Migwani Principal Magistrate's Court Criminal Case Number 41 of 2020** as observed above on his own plea of guilty and sentenced to pay a fine of Kshs. one million (Kshs. 1,000,000) or 20 years' imprisonment.

7. The Appellant felt aggrieved by both conviction and sentence and preferred this appeal raising the following grounds namely:

(i) The Learned Magistrate's erred in fact and law by failing to follow proper procedures of taking plea.

(ii) The Learned Magistrate erred in fact and law by failing to have the facts read to the Applicant in language he can understand.

(iii) The Learned trial magistrate erred in fact and law by convicting the Applicant on a substance not proved as cannabis sativa (bhang).

(iv) The sentence meted on the Appellant is harsh and excessive in the circumstances.

(v) The Learned trial magistrate erred in fact and law when he demonstrated open was in accepting the facts read to the Appellant without production of certificate from Government Chemistry.

(vi) The Learned Trial Magistrate misdirected himself in both fact and law when he failed to make a finding that the prosecution evidence was not in conformity with the law of antinarcotics Act.

(vii) The Learned Trial Magistrate misdirected himself in law and fact when he convicted the Appellant without proper evidence.

(viii) That the decision of the learned Magistrate was against the weight of the evidence.

8. The Appellant in his written submissions, made through Learned Counsel, *Mulinga Mbaluka and Company Advocates*, submits that, he was not supplied with the charge sheet, statements and other documents to be relied up by the prosecution and that, he was rushed to court without any explanation at all be given to him about the seriousness of the charge facing him.

9. He also complains that he was not given an opportunity to engage a Lawyer and that when the charge and facts were read over to him, he did not comprehend the danger of pleading guilty to a serious charge facing him. He avers that, he pleaded guilty, unaware of the consequences of admitting the charge.

10. He contends that, the prosecution failed to produce a certificate from government chemist to prove that the substance found on him, was cannabis sativa and that the omission was fatal as there was no scientific proof that what he pleaded to, was in respect to cannabis sativa and contends that ***Section 74 A (1) of Narcotic and Psychotropic Substance Act*** required the sample of the substance found in his possession to be subjected to forensic analysis.

11. He also contends that, the substance was not weighed and valued as provided under **Section 86(1) of the Act**. He submits that the trial court should have called for a report from the Government Chemist.

12. He submits that, though **Section 348 of Criminal Procedure Code** bars an Appeal on conviction entered upon an own plea of guilty, he is challenging the legality of the sentence.

13. He avers that, the facts were read over to him without precautionary statement explaining to him the consequences of pleading guilty. He says, he was not given an opportunity to engage an advocate, adding that the facts of the charge were read to him in Kiswahili when he is a Kamba and that he was not asked whether he was familiar with Kiswahili. He says that as a result, he did not understand the proceedings well.

14. He submits that, the trial Magistrate erred by considering extraneous factors and by concluding that the Appellant was caught in possession of bhang when there was no scientific proof. He contends that, his right to a fair trial under ***Article 50 (2) of Constitution of Kenya*** was violated as he was not granted an access to an advocate to advise him on proper pleato make. He avers that he has suffered injustice and asks this court to overturn his conviction and sentence. He relies on the decision of ***Henry O. Edwin versus Republic (2015) eKLR***.

15. The Respondent through the Office of the Director of Public Prosecution has opposed this appeal. The Respondent contends that, the language used by the trial court was Kiswahili and when the charges were read over to the Appellant, he pleaded;

‘‘*ni ukweli’’* which showed he understood the language well.

16. The state further submits that, when the facts were read over to him on 27th July, 2020 he stated clearly that he understood the facts as read and were true. The Respondents contends that, the plea was unequivocal and that in his mitigation, the Appellant claimed that he was dealing with the drug for his livelihood. It submits that, the same confirmed that the dry leaves were cannabis sativa.

17. The State further justifies the stiff penalty imposed on the Appellant by the trial court stating that the drug seized was

8Kg whose value was high. It submits that, because the Appellant intended to sell the same, much damage to the society could have been caused, had he been not caught. The State urges this court to take that aggravating factor into account as the Appellant was out to make a profit at the expense of vulnerable Kenyan Public particularly the youth and that one of the mandate of this court is to protect the Public.

18. This court has considered this appeal and the response from the State. The Appellant was charged with the offence of trafficking in narcotic drugs contrary to ***Section 4(a) of the Narcotic and Psychotropic Substance (Control) Act Number 4 of 1994*** (hereinafter to referred to as the Act for ease of references). This Court has looked at the charge sheet and notes that though none of the parties in this appeal pointed it out, there is some minor anomaly in the sense that the charge cites **Section 4(a)** as the Section creating the offence instead of **Section 4**. **Section 4 (a) of the Act,** provides for the sanction or penalty for one found guilty of trafficking in any narcotic drug or psychotropic substance. The charge ought to have cited the Section creating the offence **(either Section 3 or 4** whichever was appropriate) together with the **Section (4(a))** that provide the sanction.

The omission however, was insignificant in my view, and the Appellant suffered no prejudice as a result of the omission. I find the omission in the charge sheet curable under **Section 382 of the Criminal Procedure Code.**

19. The provisions of **Section 4 of the Act** provides as follows:

‘‘Any person who traffics in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug and psychotropic substance shall be guilty of an offence……..’’

20. This court has perused through the brief record of proceedings and it is apparently clear that, the Appellant indeed pleaded guilty to the offence on 16th July, 2020 when the plea was taken. The court record shows the interpretation done was from English to Kiswahili. The Accused expressly stated he understood Kiswahili well. He pleaded guilty to the charge when it was read over to him by stating, *''ni ukweli''*. The facts were not read to him immediately, because the record shows that the prosecution asked for time to get the facts which request, was granted. The facts were read to him on 23rd July, 2020 which was 7 days after the plea was taken. The contention by the Appellant that he was subjected to a rushed process certainly does not hold any water. This is because on 23rd July, 2020 perhaps out of abundance of caution due to the nature of the charge, the trial court read the charge afresh again to the Appellant in Kiswahili and he repeated his plea of guilty the second time. *''Ni ukweli''*, he repeated succinctly upon which the facts were read over to him in Kiswahili and this is what he stated in response:

> ***''I have understood the facts. They are correct. I was found trafficking the dry plant material which is cannabis commonly known as bhang.''***

21. The above admission in my considered view contrary to the Appellant's contention was unequivocal and the trial court found it as such.

22. This court finds that, the Appellant's contention that the plea was not unequivocal on account of language used or not being afforded a chance to engage an advocate, is both incompetent and lacks in merit and I say this for the following reasons;

> *(i) The ground is incompetent because for one, this court in its ruling on revision dated 13th October, 2020 rendered itself on the same issue and found that, the plea taken was unequivocal. This court cannot be called upon again to adjudicate over the same issue once again because that issue is res judicata.*
>
> *(ii) Secondly, under Section 348 of the Criminal Procedure Code, the law is clear. It provides;*
>
> *''No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the extent or legality of the sentence.''*

The above provisions shows that after a person pleads guilty to a charge or offence, there is no room for appeal, unless he claims that the plea was not unequivocal or that the sentence meted out is illegal. This court has already rendered itself on that score and there is no need to go back to it.

> (iii) *The ground also lacks in merit because, the Appellant has appeared before this court both in this appeal and revision and the language of communication used by the Appellant has always been Kiswahili which means that the Appellant is either being economical with the truth or he is just trying to look for an escape route. In either way, this court is not persuaded that the language used during trial was not familiar to the Appellant. He understood the language well just like he has exhibited through out in the proceedings in this appeal.*

(iv) This court also finds that the Appellant had sufficient

> *time to change his plea if at all it was true that he had been rushed which is on 15th July, 2020 as per the information on the charge sheet and presented to the trial court the following day on 16th July, 2020 in conformity with the 24-hour Constitutional Rule. However, after the plea was taken he had 7 days within which to ponder about what he had done, the consequences and the chance to change his plea.*

23. I further find that, his claims that he did not get a chance to acquire legal services to be flimsy. He never asked for legal services when he was first presented to court for plea and neither did he ask the trial court to allow him more time to engage an advocate of his choice. He had 7 days within which to engage an advocate if he wanted one. The Appellant is of course finding himself in a corner and could be looking for any window to escape the tight grip of the law but the contention that he was denied a chance to engage legal services holds no water.

24. In the same vein, I find the Appellant's contention that he was not cautioned about the consequences of pleading guilty to be flimsy as well because the trial court upon reading out clearly the nature of the charge, and the facts was not under any other obligation to further caution the Appellant about the consequences of pleading guilty. It is only in capital offences where the sanctions are stiffer that the trial court is under an obligation to warn the Accused about consequences of pleading guilty. Though the offence of dealing with narcotic is also serious no doubt, I do not think that a plea of guilty can be overturned on the grounds that there was no caution extended to the Accused. It is true that, trial court should be alive to the Constitutional requirement under ***Article 50 of the Constitution of Kenya*** and ensure that in serious charges, accused persons are duly cautioned with a view to ensuring that he/she is informed of the charge with sufficient detail including the likely consequences of a plea of guilty to enable the Accused make informed decision when answering to the charge.

25. This court finds that the Appellant was quite candid when he was given a chance to mitigate. He stated that he was trafficking the cannabis to enable him eke out a living to help his children and mother. He added that, his attempt to gain freedom by paying Kshs. 5,000 to the police was in vain and asked the trial court assist him recover the Kshs. 5,000 paid out to the police.

26. This Court rendered itself on the regularity of the proceedings in the trial court when I delivered a ruling on revision because the Appellant had challenged the legality and regularity of the proceedings in the lower court. This court therefore cannot be recalled to render on an issue that has already been determined. If the Appellant was dissatisfied, with the finding of this court he should have appealed.

27. On sentence, this court finds that the Appellant was count on a charge that by law carries a heavy penalty. ***Section 4 a*** provides: -

> ***''In respect of any narcotic or psychotropic substance to a line of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is greater and in addition to imprisonment for life.''***

The trial court made the following observations before meting out the 20-year imprisonment in default of Kshs. 1 million fine,

> ***''……. I have looked at the exhibits, of dry plant material which the Accused admits is cannabis. It is huge under circumstances. The same no doubt would have ruined others if it got into destination and circulation to the public……''***

It is apparently clear that the sentence noted out though harsh was legal because, the law provides up to life imprisonment for that sort of offence, there is no doubt that parliament enacted the Act with a view to stamping out the menace brought about by the misuse of the narcotic drugs and psychotropic substances. Cannabis sativa (bhang) is comprised in the 3rd schedule of the Act as part of what is defined as psychotropic substances.

The trial court was therefore, within its discretions to mete out the sentence it passed against the Appellant. I am however, persuaded that, the 20-year term is a little bit harsh, and it only on the that ground, that I am persuaded to allow this appeal given that, the Appellant readily pleaded guilty to the charge and saved on judicial time that could have been spent in trial.

In the premises, this court hereby upholds the conviction but set aside the **20 years'** imprisonment in its place, the Appellant is hereby sentenced to serve **10 years'** imprisonment.

DATED, SIGNED AND DELIVERED AT KITUI THIS 22ND DAY OF JUNE, 2021.

HON. JUSTICE R. K. LIMO

JUDGE