



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**HCCRA NO. 24 OF 2020**

**SILA LUKA NTHUEI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. E. Onzere (RM))*

*in Kilungu Principal Magistrate's Court Criminal Case No. 236 of 2015*

*delivered on 15<sup>th</sup> January, 2018).*

**JUDGMENT**

1. **Sila Luka Nthuei** the “Appellant” herein was charged with the offence of trafficking of narcotic drugs (*bhang*) contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars were that on the 8<sup>th</sup> day of May, 2015 at Kilia village, Kalongo sub-location, Kikoko location in Kilungu sub-county within Makueni county the Appellant was found having stored for purposes of sale, cannabis sativa (*bhang*) to wit 3400 grams worth Kshs.170,000/=

2. He faced a second count of resisting arrest contrary to section 253 (b) of the Penal Code. The particulars being that the Appellant on the 8<sup>th</sup> day of May 2015 at Kilia village, Kalongo sub-location, Kikoko location in Kilungu sub-county within Makueni county resisted arrest by the assistant chief of Kalongo location, Regina Mutunga and team while armed with a knife, who at the time of the said resistance was acting in the due execution of her duty.

3. He was first arraigned in court on 8<sup>th</sup> May 2015 when plea was taken. He admitted **count I** and denied **count II**. The facts in respect to **count I** were read to him and he admitted them. He was finally convicted and sentenced to a fine of Kshs.200,000/= and an addition of fifteen (15) years imprisonment. The offence in **count II** was later on (18<sup>th</sup> June 2015) withdrawn by the prosecution.

4. This appeal relates to **count I** and is against both conviction and sentence. The Appellant first filed six (6) grounds of appeal which were later on (19/6/2020) reduced to three (3) by way of amended grounds which are as follows: -

a) **That**, the learned trial Magistrate erred in matters of law and fact by entering a guilty plea whereas the mitigation statement, qualified the purported conviction on an equivocal plea.

b) **That**, the learned trial Magistrate erred in matters of law and fact by failing to warn him that the present case attracts a life sentence before convicting him to life.

c) **That**, the learned trial Magistrate erred in matters of law and fact by failing to subject the Appellant to the medical examination to ascertain whether he was mentally stable before entering a guilty plea.

5. The Appellant in his written submissions states that the plea was equivocal because the trial court never warned him of the seriousness of the offence and the long jail term. Infact he says he did not know what he was charged with as the language used was not Kikamba.

6. He finally submits that he ought to have been taken for mental assessment before the plea was taken. To him the failure to do so nullifies the plea of guilty.

7. Learned counsel for the State Mr. James Kihara has in his written submissions argued that the plea was unequivocal in line with the

principle set in the case of **Adan vs- Rep (1973) E.A 445 at 446**. He contends that the record is clear and confirms that the plea was unequivocal.

8. Counsel supports the sentence meted out against the Appellant. He relies on the Court of Appeal decision in **Moses Banda Daniel –vs- Rep (2016) eKLR** where the court stated that section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 does not impose a mandatory sentence. It's his contention that the learned trial Magistrate exercised his discretion in imposing out the sentence that he did.

#### **Analysis and determination**

9. This is a first appeal and this court has a duty to re-analyse and re-consider the evidence and arrive at its own conclusion and inferences. See **Okeno –vs- Rep (1972) E.A** where the Court of Appeal set out the duties of a first appellate court as follows:

*“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957)*

*EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vs Sunday Post [1958] E.A 424.”*

10. Similarly, in **Kiilu & Anor –vs- Rep (2005) I KLR 174** the Court of Appeal stated thus;

*“1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.*

*2. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”*

11. I have considered the evidence on record, grounds of appeal and the submissions by both parties. I find two main issues to be falling for determination. These are:

- i. Whether the plea was unequivocal.
- ii. Whether the sentence was harsh and excessive.

#### **Issue no. (i) Whether the plea was unequivocal.**

12. In the case of **Adan –vs- Rep (supra)** the court set out the steps to be followed by a court when taking plea. The following are the steps:

- a) **The trial Magistrate or Judge should read and explain to the accused the charge and all the ingredients in the accused’s language or in a language he/she understands.**
- b) **He should then record the accused’s own words and if they are an admission, plea of guilty should be recorded.**
- c) **The prosecution may then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.**
- d) **If the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a charge of plea entered but if there is no charge of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused’s reply.**

13. A perusal of the record herein confirms that there was a court clerk in court. Interpretation of the charge was in Kiswahili and the Appellant responded in Kiswahili saying “*Ni ukweli*”. The facts were thereafter presented to the court by the prosecution. The Appellant was given a chance to respond to the facts which he did and confirmed having been in possession of the cannabis. The issue was not whether he had harvested it or whether he had bought it but whether he had been in possession of the same.

14. The Appellant submits that he did not understand what was going on because he was never told what sentence the offence carried. There is no requirement for the court to tell the accused the sentence an offence carries before he/she pleads to a charge. It is however prudent for the court to warn an accused who pleads guilty to a serious offence of the consequences of such a plea. Failure to do so in itself does not vitiate an otherwise properly taken plea.

15. The Appellant also faults the trial court for not having him taken for mental assessment before plea was taken. There is no such

requirement for this kind of offence unless an accused exhibits a strange behavior. The Appellant has not in any way shown that he was suffering from a mental disorder. There is further nothing on record to show that the court noted any behavior that would have warranted such action being taken.

16. My finding is that the trial court followed the proper steps in **Issue no. (ii) Whether the sentence was harsh and excessive.**

17. The Appellant does not complain about any excesses in the sentence passed against him. His complaint is that the court did not warn him about the sentence the offence carried. I have already dealt with it above. However, having confirmed the conviction, I must also satisfy myself as to the legality or otherwise of the sentence.

18. Section 4(a) of the Narcotic Drugs and Psychotropic Substances provides this:

“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 or psychotropic substance shall be guilty of an offence and liable—

***4(a) in respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life; or”***

19. As was held by the Court of Appeal in the case of **Moses Banda Daniel** (*supra*) the sentence of life imprisonment under section 4(a) of the Act is not a mandatory sentence. The same had been the position as held by the same court in **Kalibi Kalume Katsui –vs- R Mombasa Criminal Appeal No. 90 of 2014.**

20. In the instant case, the trial court imposed a fine of Kshs.200,000/= and an addition of fifteen (15) years imprisonment. He did not give the default sentence for the fine of Kshs.200,000/= which was an error. Secondly the fifteen (15) years’ imprisonment is not justified considering the quality and value of the cannabis.

21. I therefore dismiss the appeal on conviction. I allow the appeal on sentence by setting aside the fifteen (15) years imprisonment and the fine of Kshs.200,000/= and in their place substitute respectively six (6) years imprisonment and a fine of Kshs.200,000/= in default twelve (12) months imprisonment from the date of conviction.

Orders accordingly.

**Delivered, signed & dated this 25<sup>th</sup> day of June 2020, in open court at Makueni.**

**H. I. Ong’udi**

**Judge**