



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 31 OF 2018

JOAKIM MOKAYA OMWERI.....APPELLANT

=VRS=

THE STATE.....RESPONDENT

[Being an Appeal from the Conviction and Sentence of Hon. B. M. Kimtai (SRM) Keroka Law Courts dated 17th July 2018 in Keroka Principal Magistrate's Court Criminal Case No. 715 of 2018]

JUDGEMENT

On 17th July 2018 the appellant was sentenced to two (2) years imprisonment after pleading guilty to a charge of cultivating narcotic drugs contrary to Section 3 (1) as read with Section 3 (2) of the Narcotic Drugs and Psychotropic Substances Act No. 4 of 1994.

The particulars of the charge were that on 16th July 2018 at Nyangori Sub-location in Masaba North Sub-county he was found having cultivated two (2) plants of bhang with an estimated street value of Kshs. 2,000/= which was not for medical use.

The appeal filed through M/s Ongegu & Associates, Advocates is premised on grounds: -

- “1. THAT the trial magistrate erred in law and fact in failing and/or neglecting to consider that the plea of guilt entered was unequivocal.**
- 2. THAT the learned trial Magistrate erred in law and fact by metting severe/illegal sentence in the circumstances and failed to consider appellant's mitigation.**
- 3. THAT the trial magistrate erred in law and fact to convict the appellant without report from the Government Chemist/analyst in respect to the plant.**
- 4. THAT the trial magistrate erred in law and fact in convicting the appellant as the burden of proof was shifted to the appellant. In respect to in metting severe sentence without considering mitigation of the appellant and the fact that he is a first offender.**
- 5. THAT the trial magistrate erred in law and fact by not according the appellants right to fair hearing contravening the provision of article 50 (1) and (2) of the constitution of Kenya.”**

The appellant has been on bond pending hearing and determination of this appeal.

When Counsel for the parties appeared before me on 30th October 2018 it was agreed that the appeal would be canvassed by way of written submissions. Counsel for the appellant had filed his submissions and Prosecution Counsel Mr. Ochieng undertook to file his within 7 days but did not do so.

I have considered the submissions by Counsel for the appellant and also perused the record of the lower court. Both the typed proceedings and the original record indicate that the substance of the charge and every element thereof were stated to the appellant in a language which he understood. It is however not clear whether that language was English, Kiswahili or Ekegusii as the three languages are stated on the record. The record is also silent on the language used by the appellant both at the stage where he responded to the charge and also at the stage he responded to the facts. The stages a court of law should follow when taking a plea were settled in **Adan Vs. Republic [1973] EA 445** and were restated in **Simon Gitau Kinene Vs. Republic [2016] eKLR** where it was stated: -

- “14. The law and practice related to the taking and recording of pleas of guilt was stated in the following iconic paragraph in**

the decision in *Adan V Republic* [1973] EA 445 at 446:

When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should then ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused’s reply must, of course, be recorded.”

The court must as much as possible comply with those steps so as to uphold the rights of the accused person. By recording the plea as much as is possible in the words of the accused the court ensures that the accused understands the substance and elements of the offence. The court must then have the facts read to him and if they disclose the offence charged the accused should then be invited to confirm or deny or even explain or add to those facts. It is apparent from the record that the trial magistrate did not observe those steps. I say so because even the facts narrated did not disclose the offence the appellant was charged with. Whereas the offence was that he had cultivated two plants of bhang which was not for medical use, the facts narrated in court were that two plants of bhang were spotted growing in his farm. The elements that he had cultivated the plants or that they were not for medical use although the latter is not an essential element of the charge were not put to him. Moreover, the appellant was charged under the wrong provision. Further he was charged under Section 3 (1) which relates to possession of narcotic drugs. The provision that proscribes cultivation of certain plants is **Section 6 of the Act** which states: -

“6. Penalty for cultivation of certain plants.

Any person who –

(a) Cultivates any prohibited plant; or

(b)

Shall be guilty of an offence and liable to a fine of two hundred and fifty thousand shillings or three times the market value or the prohibited plant whichever is the greater, or to imprisonment for a term not exceeding twenty years or to both such fine and imprisonment.”

It is my finding that this is not an error that is curable under **Section 382 of the Criminal Procedure Code**. The same clearly occasioned a failure of justice. Further, although the record states that two plants were exhibited in court, there is nothing to demonstrate that it was proven that they were in fact *cannabis sativa*.

Clearly the appellant’s plea of guilty was not unequivocal. He could not have pleaded guilty to a charge that was defective and where the facts stated to him did not disclose the offence charged. The conviction cannot therefore be sustained.

In regard to the sentence, my finding is that having been informed that the appellant was a first offender and the law having prescribed a fine or term of imprisonment and noting that only 2 plants were in issue the trial magistrate should have considered imposing a fine (*see the sentencing policy*).

The upshot is that the appeal is allowed and the conviction and sentence are set aside. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Signed, dated and delivered in Nyamira this 29th day of March 2019.

E. N. MAINA

JUDGE