REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 06 OF 2019

NAOM PHOEBE NYAIGORA.....APPELLANT

=VRS=

THE REPUBLIC.....ACCUSED

{Being an appeal against the Judgement of Hon. B. M. Kimtai – SRM Keroka delivered on the 11th day of June 2018 in the original Keroka Principal Magistrate's Court Criminal Case No. 591 of 2018}

JUDGEMENT

The appellant was sentenced to five (5) years imprisonment upon pleading guilty to a charge of trafficking in narcotic drugs contrary to Section 4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act.

The particulars of the charge were that on 8th June 2018 at 1100hrs in Masimba shopping centre of Masaba South, Kisii County jointly with others not before court she trafficked in narcotic drugs by storing 2.1 kilogrammes of cannabis seeds in contravention of the said Act.

The gist of this appeal is that the plea of guilty was equivocal. Counsel acting for her in this appeal submitted that from the proceedings it is not clear which language was used at the trial as the same was not stated; that the facts stated by the prosecution made reference to seeds **"suspected"** to be cannabis therefore leaving doubt as to whether what was produced in court was cannabis seeds and further that in her mitigation the appellant raised new facts which would ordinarily constitute a defence and the plea should have been changed to not guilty and a trial held. Counsel also wondered how the court established that the substance in the appellant's house was cannabis without an analyst's report to that effect. Counsel stated that the prosecution did not comply with Sections 74 and 86 of the Act to determine the value of the alleged drug which would then have guided the court in determining the appropriate sentence. Counsel contended that the facts did not prove the elements of the offence let alone the charge beyond reasonable doubt and that the facts were at variance with the charge.

Miss Okok Learned Prosecution Counsel, conceded the appeal and urged this court to allow it in the interest of justice.

Having perused the record of the trial magistrate and considered the submissions by Counsel, I am satisfied that the plea of guilty in this case was not unequivocal. In narrating the facts to the court, prosecution Counsel stated: -

> **"On 8/6/2018 officers from Masaba DCI raided a building within Masaba market, they managed to meet the accused in one of the rooms, conducted a search in the said room and discovered a green bucket inside it there were seeds *suspected* to be cannabis, accused was interrogated and she said the seeds emanated from Isabania the green bucket is before court produced as exhibit 1 (a), contents thereof exhibit 1 (B)" (Sic).**

The facts indicate that the seeds were suspected to be cannabis sativa. **"Suspected"** and **"being"** cannabis sativa are distinct. The charge was that she was found trafficking cannabis sativa and she could have been convicted only upon proof that what she was found storing was cannabis sativa but not that it was suspected to be cannabis sativa. This could have been ascertained if the prosecution had complied with **Section 74 A** of the **Narcotic Drugs and Psychotropic Substances (Control) Act** which sets out the procedure upon seizure of narcotic drugs. That section is couched in mandatory terms and **Sub-section (5)** provides that it is only upon production of a sample together with the designated analyst's certificate that there is conclusive proof as to the nature of the substance. The trial magistrate clearly erred in convicting the appellant in the absence of an analyst's report. It is also desirous that when taking a plea, the court records the exact words used by the accused person and in as much as possible the court must strictly comply with the steps for recording plea set out in **Adan Vs. Republic [1973] EA 445**. Had the trial magistrate properly explained the ingredients of the charge and the facts narrated by the prosecutor to her the appellant would most likely have not admitted the charge. In the case of **Ndede Vs. Republic [1991] KLR 567** the court held: -

> **"1. There is a long line of authority to the effect that the bar to an appeal against a conviction based on a guilty plea is not absolute……."**

It is my finding therefore that as the facts stated to the appellant did not support the charge the conviction was not safe and this court is justified to interfere. Accordingly, the appeal is allowed and the conviction is quashed and the sentence set aside. This would have been a good case for retrial but as it is probable that the impugned substance was destroyed and that **Section 74 A** of the **Act** was not complied with, it would be futile to order a retrial. Accordingly, the appellant shall be set free unless otherwise lawfully held. It is so ordered.

Signed, dated and delivered at Nyamira this 25th day of July 2019.

E. N. MAINA

JUDGE