REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO.150 OF 2017

NGUMBAO MJORI .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant, NGUMBAO NJORI, has appealed against the conviction and sentence imposed on him vide. Criminal case No 20119 of 2017 at the Municipal court in Mombasa on 28th August, 2017.

2. The Appellant jointly with others were charged with the offence of being found in a place to which persons resort for the purposes of Drug use contrary to section 5 (1) of the Narcotic Drugs and Psychotropic substances Control Act, No 4 of 1994.

The facts are that;

> ***"On the 27th day of April, 2017 at about 2230 HRS at Tudor –Mworoto area in Mombasa District within Mombasa County, the appellant without lawful and reasonable excuse was jointly with others in a place to which person rent for the purpose of smoking cannabis in contravention of the said Act.***

3. The appellant upon being arraigned in court for pre-taking, on 28th August , 2017 pleaded guilty whereby he was convicted and sentenced to serve on (1) year imprisonment.

4. This aggrieved the appellant that he filed this appeal on the following grounds (verbatim).

> (a). THAT the learned magistrate erred in law and fact by failing to adequately and properly take and record an unequivocal plea of guilt thus resulting in an unsafe conviction.
>
> (b). THAT the learned magistrate erred in law and fact by imposing a sentence which was manifestly excessive and without any option of a fine.
>
> (c). THAT the learned trial magistrate erred in law and fact in failing to follow due process in the trial as to accord the appellant a fair trial and thus violating the rights of the appellant as provided under Article 25, 47 and 50 of the Constitution of Kenya to the extent that the whole process amounted to miscarriage of justice as facts were not read out to him and he was not granted any chance to mitigate and the appellant did not fully understand the language used.

5. The background of the proceedings is that on 28.8.2017, the appellant jointly with others were arraigned before court charged with the above mentioned offence . The charge was read over and explained to them and some pleaded not guilty while the appellant and three (3) others pleaded guilty to the offence. The prosecution indicated to court that the facts of the case were "as per charge sheet" and the trial magistrate proceeded to enter a plea of guilt for the appellant and the other 3 accused persons. She then convicted and sentenced them to serve one (1) year imprisonment.

6. The Appellant's counsel submitted that the plea of guilt which was entered by the trial court was equivocal as the appellant was denied the chance to interrogate the facts of the case which were not read for him.

7. He also submitted that the sentence passed against the appellant was harsh and excessive since the trial magistrate failed to consider the option of fine but proceeded to sentence him to a jail term.

8. He further submitted that the accused person was never accorded a chance to submit, hence this was not put into consideration when the

sentence was passed against him.

9. Further, the counsel submitted that the language used during plea taking was not recorded hence it is not known whether the same was taken in a language the appellant understands.

10. The counsel concluded by submitting that the appellant was denied fair trial as provided for by the Constitution under Article 25, 47, and Article 50.

He also cited several authorities to support his grounds of appeal.

11. The state, through M/s Ocholla conceded to the appeal by admitting that the plea was equivocal. That the language used by the court was not indicated and neither were the facts of the offence read out to the accused. They added that they would not insist on a re-trial since the appellant was about to complete his sentence.

12. I have read through the proceedings in line with the submissions by both counsel.

It is instructive to note that the procedure of taking plea is provided for under section 207 of the Criminal Procedure Code as follows;

> ***1.The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.***
>
> ***2.If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary: Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.***

13. The procedure was properly outlined and set out in the case of ADAN VRS R (1973) 446 as follows;

> ***" 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 word, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state 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 guilt, 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".***

14. This was after courts realized that the provision in the criminal procedure code posed a danger of accused person being convicted on an equivocal plea since it was not very clear. It merely provides that;

> ***" .....his admission shall be recorded merely as possible in the words used by him and the court shall convict him and pass sentence".***

Having found that the appellant in this case was convicted and sentenced on an equivocal plea, I proceed to quash the conviction and set aside the sentence that was meted upon him.

The appellant is hereby set free, unless lawfully held.

Orders accordingly.

Judgment read, signed and dated this 20th day of March, 2018.

LADY JUSTICE D. O.CHEPKWONY

In the presence

M/s Ocholla counsel for the state

Mr Jumbale, counsel for the appellant

C/clerk- Beja