



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NUMBER 43 OF 2017**

**BETWEEN**

**MARY WANGECHI THAIRU.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal against sentence passed by Hon. H. Adika, SRM ON 18<sup>TH</sup> July 2018 in Nyeri CMC Cr.case no. 610 of 2017)***

**CORAM: LADY JUSTICE RUTH N. SITATI**

**JUDGMENT**

**Introduction**

1. The appellant pleaded guilty to the charge of ***being in possession of narcotic drugs contrary to section 3(1) as read with section 3(2) of the Psychotropic Substances Act number 4 of 1994.*** It had been alleged that on the 26<sup>th</sup> day of June 2017 at 3.00pm [at] Kiawara Village, Kieni West Sub-County within the Republic of Kenya, she was found in possession of 65(sixty five) rolls of cannabis sativa (bhang) [with an] estimated street value of kshs.1,300/- which was not in the form of medical preparation.

**The Appeal**

2. Being aggrieved by the 10 year term of imprisonment, the appellant filed her petition of appeal against sentence only on the following homemade grounds:-

- 1. That the learned trial magistrate erred in both law and fact while sentencing me on a plea of guilty without addressing my health status.**
- 2. That I pleaded guilty with the charges since I am a layman in law and I was not represented by counsel and that the sentence is harsh and excessive considering I am a first offender.**
- 3. That the learned trial magistrate erred in law while sentencing me without giving me anytime to reconcile my mind which was against the nature of law contrary to section 50(2) of the Constitution.**
- 4. That, I kindly urge this Honourable Court to reduce my sentence at its own convenient term deemed fit.**
- 5. That the learned trial magistrate erred in both law and fact while sentencing me on a plea of guilty without considering my mitigation factor.**
- 6. That I am a single mother with 5 children being the sole bread winner and when I am in prison there is no one to cater for their needs.**
- 7. That, other further grounds will be adduced at the hearing of this appeal and I wish to be present in person**

3. On the 19<sup>th</sup> April 2018, the appellant filed amended grounds of appeal which were argued together with the original 7 grounds of appeal as

above indicated. The amended grounds of appeal were as follows:-

- 1. The learned trial magistrate erred in law and facts by convicting and sentencing me on the first day of plea taking without considering that the offence as charged was serious and I needed time to seek advice before taking a second plea.**
- 2. The learned trial magistrate erred in law and facts by giving me a sentence on the high side and failed to consider the mitigating factors hence denied me a fair trial since the sentencing policy guidelines require mitigating factors to be duly considered before passing a sentence.**
- 3. The learned trial magistrate erred by sentencing me without considering that I was not represented by a counsel and I was only a layman in law.**

4. Though the appellant pleaded guilty, she seems to be appealing against both conviction and sentence. In this regard, and this being a first appeal, this court is under a duty to consider whether the plea of guilty entered herein was unequivocal. If the court finds that the plea was unequivocal, there will be no justification for interfering with the same. Secondly, the court is under a duty to consider whether the sentence imposed upon the appellant was too harsh in the circumstances as to warrant an interference with the trial court's discretion of sentencing. Unless and until the above two issues are resolved by this court, there would be no basis for either upholding or setting aside the trial court's finding. *See Okeno versus Republic [1972] EA 32.*

#### Submissions

5. The appellant filed her written submissions and relied on the same. The appellant contended that she was entitled to a second opportunity to plead to the charge. She alleges that the policemen are the ones who convinced her to plead guilty. Secondly, the appellant contends that the sentence imposed upon her was harsh and excessive because the learned trial magistrate failed to consider her mitigating circumstances, in addition to her being a first offender. It is the appellant's further contention that by imposing the sentence of 10 years imprisonment, the learned trial magistrate did not give the appellant a fair trial.

6. The appeal was opposed on grounds that in her mitigation the appellant confirmed to the court that she was a user of narcotics. Prosecution counsel, Mrs. Beatrice Owuor also submitted that before sentencing the appellant, the trial court took the trouble to call for and obtain a pre-sentence report which was found to be unfavourable to the appellant. In her view, the sentence was not excessive, although she asked this court to exercise its discretion in determining whether or not, the appellant can be given the option of a fine.

#### Appellant's reply

7. In her reply, the appellant submitted that even if she was given the option of a fine there was no possibility of her raising the money to pay. She urged the court to find that the period she has spent in person is sufficient punishment for her.

#### Analysis and Determination

8. The first issue for determination is whether the plea taken by the appellant was unequivocal. In this regard, a case in point is *Adan versus Republic [1973]EA 445*. That case was followed in *Baya versus Republic [1984] KLR 657* where the court restated the procedure for recording a plea of guilty as follows:-

- a. The charge and all its ingredients must be explained to the accused in vernacular or some other language that he understands.*
- b. The accused's own words in reply should be correctly translated into English and carefully recorded.*
- c. If the accused admits the charge, then the facts pertaining to the charge shall be read out to the accused, still in vernacular or in some other language that he understands.*
- d. The accused shall then be asked to confirm to the court whether or not he admits the facts as given and in this regard, his full answer shall be recorded by the court.*
- e. Where the facts as given are admitted, the court shall proceed to confirm the plea of guilty and to convict the accused.*
- f. Where the accused's response to the facts suggests a change of plea, the same shall be recorded and a plea of not guilty entered.*

9. In *Njuki versus Republic [1990] KLR 334*, the court held that a plea recorded in words such as "I admit", "I plead guilty", "It is true", "I am guilty", "accept" and such like words cannot amount to or be considered unequivocal pleas. The court went further to hold that before convicting on a plea of guilty it is highly desirable not only that every constituent of the charge should be explained to the accused, but that they should be required to admit or deny such constituent and what he says should be recorded in a form which will satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally.

10. In the instant case, the language of interpretation is shown as English/Kiswahili. The court then went on to record:

***"The substance of the charge and every element thereof has been stated by the court to the accused person in the language that he/she understands, when being asked whether he/she admits or denies the truth of the charge replies:-"*** – and the accused went

on to say, **“It is true.”** The record also shows that after the appellant pleaded to the charge, the court did not record the plea of guilty before calling upon the prosecution to give the facts.

11. The prosecution then proceeded to give the facts of the case, including production of the exhibits. The accused then replied to the facts as follows: **“The facts are true.”** Again there is no entry confirming plea of guilty and conviction. The court then went on to ask for the appellant’s previous criminal records where the prosecutor asked the court to treat the appellant as a first offender.

12. In my considered view, the plea in this case was not unequivocal, one because the language in which the plea was taken was not clearly indicated whether it was English or Kiswahili. It was important for the trial court to clearly record the language of the plea as being either English or Kiswahili instead of simply recording **“.....in the language which he/she understands.”** That kind of wording is vague, and this court would be entitled to conclude that the plea was not taken in a language which the appellant understood. In any event, the trial court skipped two crucial steps in the plea taking process of recording **“plea of guilty entered”** after the charge was read to the appellant and also convicting the appellant upon taking of the facts before asking for the appellant’s previous records. The conclusion I have reached is that the appellant’s plea was not unequivocal.

13. The second major issue raised by the appellant is on sentence. She contends that the sentence is excessive in the circumstances and further that the trial court failed to consider her mitigation and further that she was not given a second chance to tender her plea. The appellant relies on **sections 216 and 329 of the Criminal Procedure Code**, both of which require a trial court, before passing sentence or making an order against an accused person under the relevant sections to receive such evidence as the court deems fit in order to inform itself as to the proper sentence or order to be passed or made.

14. The importance of such an enquiry was emphasized by the Supreme Court in **Francis Karioko Muruatetu & another –vs- Republic [2017] eKLR** in which the Supreme Court held, *inter alia*, that,

**“It is evident that the trial process does not stop at convicting the accused. There is no doubt in our minds that sentencing is a crucial component of a trial. It is during sentencing that the court hears submissions that impact on sentencing. This necessarily means that the principle of fair trial must be accorded to the sentencing stage as well.”**

15. In the instant case, the trial court correctly heard the appellant in mitigation where the appellant stated **“I only did this once. I will not repeat the same. I use the narcotics. I will not repeat.”** It is also on record that the learned trial court called for a community service officer’s report from the probation officer, which report he considered together with the mitigation. I have myself read through the community service officer’s report and find the same was adverse to the appellant. It was upon consideration of the mitigation, which was in essence an admission of the offence, and the community service officer’s report that the learned trial court exercised its discretion in sentencing the appellant to 10 years imprisonment. In light of the above, I find no merit in the appellant’s complaint that the trial court did not consider her mitigation in sentencing her. I also find and hold that since sentencing is a matter of discretion of the trial court, I would have no reason to interfere with such discretion if all other parameters were in place.

### **Conclusion**

16. Having reached the conclusion in this case that the plea was not unequivocal, I allow the appeal, quash the conviction and set aside the sentence of 10 years imprisonment. The next question is whether I should set the appellant free as pleaded by her or whether I should order a retrial.

17. Taking all the circumstances of this case into account, I am of the view that this is a proper case for retrial. The appellant first appeared in court on 26<sup>th</sup> June, 2017 and on the same day, plea was taken. She was sentenced on 18<sup>th</sup> July, 2017. The period the appellant has spent in prison is not too long compared to the total term of 10 years imprisonment.

18. In the premises, I make the following final orders:-

**a. The appeal herein be and is hereby allowed, conviction quashed and sentence set aside.**

**b. The case is remitted to the Chief Magistrate’s Court for fresh plea and for directions as to fresh hearing before a magistrate other than Hon. H. Adika, SRM who took the initial plea.**

**c. The appellant shall be remanded in custody pending her appearance before the trial court for fresh plea.**

It is so ordered.

Judgment written and signed at Kapenguria.

**RUTH N. SITATI**

**JUDGE**

Judgment delivered, dated and countersigned in open court at Nyeri on 20<sup>th</sup> day of December, 2018

**HON. A. MSHILA**

**JUDGE.**

**In the Presence of**

Gicheha for the state

Accused present in person

Kinyua – Court Assistant