



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 22 OF 2016

JOHN MUKENDI NJIRU.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the Hon.C.Mburu (RM) delivered

on 14/03/2016 in Criminal Case No.1166 of 2015 Nyeri)

JUDGMENT

FACTS

1. The appellant, **John Mukendi Njiru** was charged with the offence of possession in narcotic drugs contrary to **Section 3(2)(A)** of the **Narcotic Drugs and Psychotropic Substances Control Act**.
2. The particulars of the charge are that on the 26/11/2015 at Kimathi Area within Nyeri County the appellant was found in a room in possession of fifteen (15) grams of bhang valued at Kshs.60/- which was not in medical preparation form.
3. The appellant was subsequently charged at the Chief Magistrates Court at Nyeri and was convicted on his own plea of guilty and sentenced to serve a term of ten (10) years imprisonment.
4. Being aggrieved by the sentence, the appellant filed a Petition of Appeal on the 29th March, 2016; and listed three (3) grounds of appeal which are summarized hereunder;
 - (i) That his plea of guilty was equivocal;
 - (ii) That the sentence imposed was excessively harsh considering the circumstances of the case;
 - (iii) The trial court failed to take into consideration his mitigation; that he was a first offender;
5. At the hearing hereof Ms Jebet appeared for the State and the appellant appeared in person; both Prosecuting Counsel for the State and the appellant made oral presentations; hereunder is a brief summary of the parties submissions;

APPELLANTS SUBMISSIONS

6. The appellant prayed that the sentence be reduced due to the fact that the trial court did not take into consideration that he was a first offender; that his wish was to go back to his family; that he had served one year of the sentence and during this stint he had learnt masonry and carpentry skills; that he had also learnt how to make soap;
7. He prayed that his appeal on sentence be allowed;

RESPONDENTS SUBMISSIONS

8. In response Counsel submitted that the appellant pleaded guilty to the charge of possession of drugs; and that the sentence imposed by the

trial court of ten (10) was legal and was as provided by law;

9. Though Prosecuting Counsel for the State opposed the appeal, but courteously left the matter in the courts hands for it to make a decision.

ANALYSIS

10. The appellants appeal is against the plea taken and the sentence imposed; the record reflects that he took his first plea on the 15/12/2015 and after the charge was read to him in a language he understood; the trial court proceeded to enter a plea of '**Not Guilty**'; at the next appearance which was on the 14/03/2016 the record shows that the appellant asked to have the charges read out to him again and that he changed his plea to that of '**Guilty**';

11. This court has perused the particulars as read out to the appellant by the prosecution and the facts are as quoted hereunder;

“...that on 26/11/2015 at around 1.30pm at Kimathi area within Nyeri County AP’s for Kimathi camp got a tipoff from members of the public that John is suspected to be *selling* bhang in his rented house. They recovered 15 grams in a polythene bag. I wish to produce the same as Exhibit 1, the same was valued at Kshs.60/-. He was arrested and escorted to police station and charged with the offence.....” (emphasis mine)

12. The fact is that the charge of being in possession of bhang was explained to the appellant and that he pleaded to it; whereas the facts as read out to him were irregular as the particulars did not contain the elements of the offence of being in possession of bhang; but were otherwise supportive of the offence of trafficking; which therefore raises an element of uncertainty as to the matters complained of; the result thereof would be that the appellant did not validly plead guilty to the offence of being in possession of the narcotic.

13. It is this courts considered view that even though the appellant admitted the truth of the particulars of the charge, but his admission did not constitute an admission of the key ingredient of the offence created by Section 3(2)(A) and that the trial court ought not to have entered a plea of guilty.

14. This court finds that there was uncertainty as to the matters complained of; and it was incumbent upon the trial court to take note of the irregularity and record an order that the charge be drawn in terms of the complaint as there was uncertainty as to the matters complained of; this court finds that the quantity and value of the narcotic were so negligible and the facts are more supportive of possession as opposed to being put up for sale as stated in the particulars; this court is satisfied that the appellant was prejudiced by the defective charge; and accordingly the conviction cannot be allowed to stand;

FINDINGS AND DETERMINATION

15. The appeal is allowed and the conviction is hereby quashed and the sentence imposed is hereby set aside;

16. The appellant be set at liberty unless otherwise lawfully held.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 27th day of July, 2017.

HON.A. MSHILA

JUDGE.