REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 59 OF 2016

CLAUD MWANYUMBA NGALO..... APPELLANT

VERSUS

REPUBLIC……..…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 415 of 2015 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon G. M. Gitonga (RM) on 16th September 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Claud Mwanyamba Ngalo was charged on two (2) Counts. Count I was in respect of cultivating of prohibited plant contrary to Section 6(a) of the Narcotic Drugs and Psychotropic Substance (Control) Act Cap 245 (Laws of Kenya). Count II was in respect of being in possession of narcotic drugs contrary to Section 3(2) of the aforesaid Narcotic Drugs and Psychotropic Substance (Control) Act. He pleaded guilty to both Counts.

2. In respect of Count I, Hon G. M. Gitonga, Resident Magistrate sentenced himto Kshs 100,000/= and in default to serve two (2) years imprisonment. As regards Count II, the Learned Trial Magistrate fined him Kshs 20,000/= and in default to serve six (6) months imprisonment.

3. The particulars of the offence were as follows:-

COUNT I

"On the 20th day of August 2015 at around 6.00am at Javuli Village, Mwanda Location within Taita Taveta County was found having cultivated a prohibited plant namely canabis (sic) **sativa to wit 78 plants in contravention of the said Act."**

COUNT II

"On the 20th day of August 2015 at around 6.00am at Javuli Village, Mwanda Location within Taita Taveta County was found being in possession of narcotic drug to wit 2 grammes of canabis (sic) **sativa."**

4. Being dissatisfied with the said judgment, on 14thNovember 2016, the Appellant filed a Notice of Motion application seeking leave to file his appeal out of time which application was allowed and the

Petition of Appeal deemed as having been duly filed and served. He relied on four (4) Grounds of Appeal.

LEGAL ANALYSIS

5. On 5th April 2017, the Appellant filed Amended Grounds of Appeal. Having considered the initial and Amended Grounds of Appeal and noted that the issues that had really been placed before it for determination were:-

> **a. Whether or not the Appellant was denied a fair trial by not being assigned legal representation;**
>
> **b. Whether or not the Prosecution had proved its case beyond reasonable doubt;**
>
> **c. Whether or not the Learned Trial Magistrate meted upon the Appellant sentence that was harsh in the circumstances of the case herein.**

6. Evidently, the Appellant's admission of the two (2) Counts that had been preferred against him was reflective of his guilt. His submissions regarding the veracity or otherwise of the analysis by the Government Chemist could not be considered by this courtas no evidence was adduced in court, having pleaded guilty to the two (2) Counts.Indeed, Section 74A of the Narcotic Drugs and Psychotropic Substance Control Act was rendered moot by his pleading guilty to the two (2) Counts herein.

7. He was fully aware that he had been charged for cultivating *cannabis sativa* and being in possession of *cannabis sativa,* a narcotic drug as the same was clearly set out in the Charge which two (2) offences were contrary to the Narcotics Drugs and Psychotropic Substance (Control) Act .

8. On pleading guilty, the facts that were read to him were also clear that he was found in possession of bhang. There was no ambiguity in the manner he pleaded to the charge and in the manner the facts were read to him as the Charge and facts were read to him in a language that he understood.

9. This was in line with the holding in the case of **Kariuki vs Republic[1954] KLR 809**that Wendoh J referred to in the case of **Fredrick Musyoka Nyange vs Republic[2012]eKLR**wherein it was held as follows:-

> **""2. The manner in which a plea of guilty should be recorded is:**
>
> > **(a) the trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands;**
> >
> > **(b) he should then record the accused's own words and if they are an admission, a plea of guilty should be recorded;**
> >
> > **(c)the prosecution may then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;**
> >
> > **(d) if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused's reply – Adan v Republic [1973] EA 445""**

10.This process was meticulously followed by the Learned Trial Magistrate. The Appellant could not now turn and purport that the substance he was found with and cultivating was not *cannabis sativa*and cast aspersions on the Report of the Government Chemist. This court's hands were therefore tied to the extent of establishing whether or not the sentence that was meted upon the Appellant by the Learned Trial Magistrate was legal and proper.

11. Indeed, Section 348 of the Criminal Procedure Code Cap 75 (Laws of Kenya) stipulates as follows:-

> **"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."**

12. Having said so, this court found it prudent to address the question of whether or not the Appellant's right to fair trial had been infringed upon. The Appellant argued that he ought to have been assigned legal representation since he was a lay man in matters of law. On its part, the State argued that the right to legal representation enshrined in Article 50 (2) (h) of the Constitution was not an absolute right and that the practise was to assign counsel to persons who had been charged with treason or murder.

13. The limitation of the right to be assigned legal representation by the State was addressed by the Court of Appeal in the case of **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic [2015] eKLR** when it stated as follows:-

> **"It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This Court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result' and to include *all situations where an accused person is charged with an offence whose penalty is death.* This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arise in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.**
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> **Again, this Court differently constituted in the case of Moses Gitonga Kimani v Republic, Meru Criminal Appeal No. 69 of 2013, recognized that the Constitution has placed an obligation on Parliament to enact legislation which would ensure realization of an accused person's right to a fair trial under Article 50 of the Constitution within four years of the promulgation of the Constitution. In that regard the court stated as follows:**
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> ***"It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense. While appreciating that the framers of the Constitution intended the right to legal representation to be achieved progressively we implore Parliament to enact the requisite legislation."***
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> **Article 261 of the Constitution provides *inter alia*:-**
>
> ***(i) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.***
>
> ***(ii) Despite clause (1), the National Assembly may, by resolution supported by the votes of at least two-thirds of all members of the National Assembly, extend the period prescribed in respect of any particular matter under clause (1), by a period not exceeding one year***
>
> **It is therefore apparent that the provisions of Article 261 and the Fifth Schedule to the Constitution, that would give effect to the provisions of Article 50, including Article 50(2)(h), are to be implemented within a period of between 4 and 5 years. We must however lament the obvious lack of the appropriate legislation almost five years after the promulgation of the**

Constitution to provide guidelines on legal representation at State's expense. We believe time is now ripe and nigh for the enactment of such legislation. That right cannot be aspirational and merely speculative. It is a right that has crystalized and which the State must strive to achieve. We say so while alive to the fact that right to fair trial is one of the rights that cannot be limited under Article 25 of the Constitution."

14. Whilst this court agreed with the Appellant that there was discrimination relating to the provision of legal representation, it was took cognisance of the aforesaid decision by the Court of Appeal and only hoped that the right to assign legal representation to **all**(emphasis court) accused persons will be realised progressively but sooner than later. In light of the aforesaid limitations on assignment of legal counsel, this court was not persuaded to find that the Appellant's rights to fair trial had been infringed as he had contended and his Amended Ground of Appeal No (2) was not merited and the same is hereby dismissed.

15. Turning to the substantive issue of the sentence, an appellate court must restrain itself from interfering with the discretion of a trial court unless of course it can be shown that the sentence of such a court was illegal or unlawful. This was a position that has been re-stated in several cases- See **Kenneth Kimani Kamunyu Vs Republic [2006] eKLRwhere the Court of Appeal**reiterated this principle and stated that an appellate Court can only interfere with the sentence if it is illegal or unlawful.

16. Section 6(a) of the Narcotic Drugs and Psychotropic Substance (Control) Act provides that:-

"Any person who—

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

17. As the Appellant herein pleaded guilty to the charge of cultivating a narcotic drug to wit seventy (78) plants, the Learned Trial Magistrate acted correctly when he fined him Kshs 100,000/= or in default to two (2) years imprisonment. Indeed, the Learned Trial Magistrate was lenient as he did not impose upon him both a fine and imprisonment.

18. Section 3(2) of the Narcotic Drugs and Psychotropic Substance (Control) Act stipulates that:-

"A person guilty of an offence under subsection (1) shall be liable— in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years;"

19. In the case of **William Mwanyumba Mwasaru vs Republic [2017] eKLR**, this very court imposed upon the applicant therein a fine of Kshs 60,000/= and in default twelve (12) months imprisonment for cultivating thirty one (31) plants of seedlings of cannabis sativa valued at Kshs 1,000/= in contraventionof theNarcotic Drugs and Psychotropic Substance (Control) Act.

20. In the case of **Zech Lennart Deutsh v Republic [2016] eKLR,**this very court also imposed a fine of Kshs 20,000/= or in default to serve four (4) months imprisonment where the applicant therein had been found in possession of a smoked roll of bhang.

21. It was therefore clear that the Learned Trial Magistrate exercised his discretion judiciously when he fined the Appellant Kshs 20,000/= and in default to serve six (6) month's imprisonment and there was no error when he proceeded as such. Indeed, there was no impropriety or illegality as regards the extent of the sentence that the Learned Trial Magistrate meted upon the Appellant herein.

22. However, this court noted that the Learned Trial Magistrate did not indicate how the sentences were to run, a fact that the State pointed out in its Written Submissions.It was apparent from the facts that were

read to the Appellant in court that the two (2) offences the Appellant was charged with occurred on the same date and around the same time.

23. In the case **Peter Mbugua Kabui Vs Republic[2016] eKLR**that was relied upon by the State, the Court of Appeal addressed its mind to the question of concurrent and consecutive sentences when it stated as follows:-

> **"In the case of Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97, the then Court of Appeal for Eastern Africa in a judgment read by Sir Joseph Sheridan stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice. As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment."**

24. In the said case, the Court of Appeal found that the appellant therein had committed different offences on different dates and as a result, Achode J who heard the appeal was correct in upholding the Trial Court's holding that the sentence the Appellant was to serve was to run consecutively.

25. On his part, in the case of **George Mwangi Chege & 2 others v Republic [2004] eKLR** , Khamoni J (as he then was) rendered himself as follows:-

> **"….where more than one sentence of imprisonment are imposed without specifying whether the sentences will run consecutively or concurrently, Section 333(2) of the Criminal Procedure Code will apply so that every one of those sentences is-**
>
> **"deemed to commence from, and to include the whole**
>
> **of the day of, the date on which it was pronounced"**
>
> **with the result that:-**
>
> **(a) If the sentences are in one trial and are pronounced on the same date, they definitely run concurrently.**
>
> **(b) If the sentences are in different trials and are pronounced on the same date, they also run concurrently.**
>
> **(c) If the sentences are in one trial but are pronounced on different dates, the sentences will run concurrently only to the extent of the balance of the formerly pronounced sentence is yet to be served so that if at that time the latter pronounced sentence is longer than the remainder of the formerly pronounced sentence, then the latter pronounced sentence, following the end of the formerly pronounced sentence, will be served consecutive to the formerly pronounced sentence.In other words, the prison sentences will run concurrently onlyto the extent of the duration of service of the two sentences coinciding.**
>
> **(d) If the sentences are in different trials and are pronounced on different dates, the prison sentences will run concurrently only to the extent of the duration of service of the two sentences coinciding. Otherwise the sentences will run consecutively."**

26. This principle was also expounded in the cases of**Ng'ang'a vs Republic (1981) KLR 530** and **Ondiek vs Republic (1981) KLR 430**where the common thread was that concurrent sentences should be awarded for offences committed in one criminal transaction unless exceptional circumstances prevail.

27. In view of the fact that the Appellant pleaded guilty to the charges at the beginning of the trial thus saving the Trial Court judicial time, he was a first offender and said he was remorseful and the fact that there were no exceptional circumstances in the case herein, it was this court's view that a concurrent sentence would have been most appropriate in the circumstances of the case herein, a position that the State conceded to in its Written Submissions.

28. Notably, the Appellant was convicted on 16th September 2015. His two (2) years imprisonment in respect for Count I ended on 16th September 2017. As the six (6) months imprisonment for Count II was to run concurrently with the two (2) years imprisonment, he has already fully served his sentence in respect of Count II.

DISPOSITION

29. For the foregoing reasons, the upshot of this court's Judgment therefore was that the Appellant's Appeal that was lodged on 14th November 2016relating to the conviction was not merited. The court hereby declines to quash the conviction and instead hereby upholds the same as it was lawful and fitting.

30. However, as the Learned Trial Magistrate erred in law and fact in failing to indicate how the sentence he had imposed upon the Appellant and he has since served slightly more than two (2) years from the date he was convicted, this court hereby directs and orders that the Appellant be released forthwith unless he be held for any other lawful cause.

31. It is so ordered.

DATED and **DELIVERED** at **VOI** this**19th** day of **October** 2017

J. KAMAU

JUDGE

In the presence of:-

Claud Mwanyumba Ngalo-Appellant

Miss Anyumba for Respondent

Josephat Mavu– Court Clerk