REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

NYERI HIGH COURT CRIMINAL APPEAL NO. 65 OF 2012

ISRAEL ALLRAN SELASIE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment and sentence from original Karatina

SRM'S Criminal 208/2012 delivered on 26/3/2012

by L Mutui Senior Principal Magistrate)

JUDGMENT

The appellant **Israel Allcran Selasie** was on 12/3/2012 charged in the magistrate's court at Karatina with the offence of being in possession of Narcotic Drug Contrary to section **3 (1)** as read with section **3(2)(a)** of the Narcotic drugs and psychotropic substances (**control Act No.4 of 1994**.

The particulars of the charge are that on the 8th day of March, 2012 at about 3.30pm at Karatina Township within Nyeri County he was found being in possession of three (3) stones of cannabis sativa valued at Kshs.1500 at street value which was not in medical preparation.

The charge was read to the appellant on date of plea and he pleaded guilty to the charge and was sentenced to serve ten (10) years imprisonment.

The appellant was dissatisfied with the conviction and sentenced and filed this appeal in which he attracts the decision of the trial magistrate on two grounds (a) that the trial magistrate did not caution him on the consequences of pleading guilty and (b) that the sentence of 10 Ten (10) years imprisonment was harsh and punitive taking into account that he was a first offender. The appellant relied on the written submissions in which h reiterated the grounds of appeal.

Mr. Njue learned prosecuting counsel for the Respondent opposed the appeal. The counsel submitted that the trial magistrate was not under any obligation to warn the appellant if the dangers of pleading guilty. The trial magistrate was required to ensure that the appellant understood the charge and that the plea of guilty was unequivocal. Counsel further submits that the appellant did not offer amy mitigation when asked to; and that the sentence of ten (10) years was lawful and should not be disturbed.

This is a first appeal and the duties of the first appellate court were well stated in **Okeno – VS – Republic 1972 EA** where it was held that.

> "An appellant in the first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellant's own decision on the evidence. The court must itself weigh the conflicting evidence and draw its own conclusion" it is not a function of the court o merely scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusions. It must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's finding should be supported. In doing so it should make allowance for the fact that trial court had the advantage of hearing and seeing the witnesses".

Cloth eyed with the duties of the first appellate court as stated in Okelo – vs – Republic …….this court examined the record of proceedings on 12/3/2012 and after the charge was read to the accused, and he pleaded guilty the prosecutor in narrating facts stated.

Prosecutor: facts are that on 8/3/2012 officers were on patrol within Karatina market when they saw accused carrying a paper bag. He looked suspicious (sic) he was arrested, searched and found to possess three (3) stones of cannabis which was not in medical preparation and worth shs.1500. Accused was subsequently charged by the Karatina Police station with this offence. The three stones of cannabis is before court exhibit "1".

The question that comes out from the brief facts is was the plant material discussed by the prosecution to be cannabis proved to be so?

The prosecution in order to establish an offence under this section must prove that there was a plant material which they suspected to be cannabis and arrested the accused. They must also prove that the plant material was actually cannabis sativa and therefore a narcotic drug and psychotropic substance. It is therefore imperative that when an accused person is purported to plead guilty, the prosecution must give all the particulars that disclose the commission of an offence. In offences under the Act, the prosecution must provide evidence by way of analyst report to confirm that the material is a substance inteplated under the Act. In the absence of such report the court will be relying on its own knowledge which role it is ill prepared and lacks skills. The non-production of analyst report made the court facts incomplete to which the appellant was said to plead guilty. I find that that was a total omission by the prosecution and therefore the facts do not support the charge.

I therefore allow the appeal, set aside the sentence of 10 years imprisonment and order that the appellant be set at liberty unless otherwise lawfully detained.

Dated at Nyeri this 15th day of December, 2015

S RIECHI

JUDGE

31/3/2016

Before – HON S RIECHI JUDGE

Catherine – Court clerk

Appellant – present

Njue for state – present

Court – the judgment is read and delivered in open court in presence of appellant and Mr. Njue for state this 31st day of March, 2016.

S RIECHI

JUDGE