REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 9/2016

SIMON GITAU KINENE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Appellant herein has, through his advocates, has appealed against both conviction and sentence of the Gatundu Principal Magistrate's Court Criminal Case No. 12 of 2016.

2. The brief history of the case is that the Appellant was arraigned before the Learned Trial Magistrate on 06/01/2016 charged with a single count of trafficking in narcotic drugs (bhang) contrary to section 4(a) as read together with sub-section 2(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars of the offence were that on the 5th day of January, 2016, at Gacharage village in Gatundu South Sub-county within Kiambu County, the Appellant was found trafficking in narcotic drugs (bhang) to wit eight (8) stones with a street value of Kshs. 4,000 which was not its medicinal preparation.

3. During his first arraignment, the Appellant is recorded to have pleaded guilty. Since the equivocality of the plea is in question, I will reproduce, below, what appears in the Court record:

> 6.1.2016
>
> Before Hon. W. Ngumi – SRM
>
> Court Prosecutor – Marete/Matwa
>
> Inter-
>
> Accused – Present
>
> The substance of the charge and every element thereof has been stated by the court to the accused person in the language he/she understands, who being asked whether he admits or denies the truth of the charge replies:
>
> Accused – It is true

Facts

On 5/1/16 at around 11.20pm, police officers from Gatundu Police Station whole on patrol received a tip off that the accused is a bhang peddler while at Gacharage trading centre. They went to the house of the accused and conducted a search and recovered 8 stones with a street value of 4,000/- Kshs. The same is before court. We wish to produce it before court as an exhibit. They also recovered the razzler wrapping papers 5 packets. They arrested him and escorted him to the police station where he was booked and investigations commenced. Later he was charged. I wish to produce 8 stones of bhang and the razzler wrappings as exhibits in this case.

Accused: - I admit the offence.

W. Ngumi

SRM

Court: Plea of guilty entered. Convicted on own plea of guilty.

W. Ngumi

SRM

State Counsel: - Treat him as a first offender.

Mitigation

I have a child joining Standard 1. I was selling for his upkeep. He does not have anyone to look after him.

4. Based on this record, the Appellant now appeals against both conviction and sentence. After getting leave of the Court to file the appeal out of time, the Appellants advocates filed eight grounds of appeal. During the hearing of the appeal, Mr. Weche appearing for the Appellant, consolidated the grounds to three as follows:

a. In the first instance, Mr. Weche attacked the conviction on the ground that the Court did not satisfy itself that the Accused Person was not mentally ill before convicting.

b. Secondly, Mr. Weche attacked the procedure used to obtain a guilty plea arguing that it resulted in an equivocal guilty plea.

c. Thirdly, Mr. Weche attacked the sentence imposed on the Appellant, arguing that the Learned Trial Magistrate proceeded on a misconception of the law and hence ended up imposing an unduly harsh sentence.

5. Mr. Kinyanjui argued the appeal for the State. He opposed the appeal on conviction but conceded that the Learned Trial Magistrate proceeded on the wrong principles in the sentence. He would be amenable to the reduction of the sentence imposed in the case.

6. I have analysed the issues presented in the appeal under three headings below.

B. WAS THE CONVICTION UNSAFE BECAUSE THE TRIAL COURT DID NOT CALL FOR A MENTAL ASSESSMENT REPORT?

7. First, Mr. Weche argued that it was wrong for the Trial Court to have proceeded with the trial without first calling for a mental assessment report of the Appellant. Had the Trial Court done that, Mr. Weche insisted, it would have discovered that the Appellant was mentally ill and therefore unfit to stand trial.

The Grounds of Appeal in Grounds 6, 7, and 8 allude to this fact. Mr. Weche's argument is brief: the guilty plea is not safe given the circumstances. The Grounds of Appeal allege that the father of the Accused tried to bring to the Court's attention the fact that the Appellant was mentally ill but the Trial Court refused to give him audience.

8. I should begin by pointing out that the Trial Court record does not have any indication that there was an attempt to bring to its attention the suspicion that the Appellant was mentally ill. It also does not have any indication that the Appellant behaved in any way that would have alerted the Trial Court that the Appellant was anything than mentally sound. Indeed, his mitigation would seem to suggest an ability to logically communicate in a way which would not raise any concern in the mind of the Trial Court as to his mental status.

9. I have raised the issue of the Trial Court record because Section 11 of the Penal Code and Section 162 (1) and (2) of the Criminal Procedure Code are important here. Section 11 provides as follows:

> Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.

10. On the other hand, section 162 reads as follows:

> 162. (1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.
>
> (2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case.

11. The law is that every accused person is presumed to be of sound mind under section 11 of the Penal Code. The burden is on the Accused Person to rebut this presumption. However, the Court is obligated under section 162 to take action – for example by ordering a mental assessment – where it comes to the attention of the Court that the Accused Person may be of unsound mind.

12. In this case, the Trial Court cannot be faulted for proceeding as it did in the circumstances. There was simply no material brought to the attention of the Trial Court to suggest that the Appellant was of unsound mind to warrant further inquiry by the Court. In the circumstances, I find this ground of appeal unavailing to the Appellant.

C. WAS THE PLEA OF GUILTY EQUIVOCAL?

13. Mr. Weche also attacked the procedure used by the Trial Court to record the guilty plea. He thought that the procedure was deficient and failed to meet the high threshold stipulated in section 207 of the Criminal Procedure Code and outlined in the famous case of ***Adan v Republic (1973) EA 445*** **at 446.**

14. The law and practice related to the taking and recording of pleas of guilt was stated in the following iconic paragraph in the decision in ***Adan v Republic(1973) EA 445*** **at 446:**

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 words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of 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 guilty, 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, off course, be recorded.

15. The first point for analysis is an important point of departure namely the trite law stated by the Court in ***Ombena v Republic****1981 KLR 450* to the effect that whether a guilty plea is unequivocal or not depends on the circumstances of the case. Differently put, an appellate or a revising court must take the totality of circumstances into account in determining the equivocality or otherwise of a guilty plea.

16. With this totality of circumstances test in mind, the following observations are appropriate from the proceedings in the Magistrates' court.

17. First, although the Court record indicates that the charge and every element thereof was stated by the court to the accused person in the language he understands, it is critical that the court does not state which language was used to explain. Second, while Adan Case stipulates the salutary practice that the Court records the words of the Accused Person verbatim, this did not happen here. Instead, the Learned Magistrate recorded the response in English: "It is not true."

18. Mr. Kinyanjui is right that the fact that the Accused engaged in mitigation might be an indication that he understood what was going on but I do not think that a guilty plea should be left to any deductions or conjecture. It should be clear, unambiguous and unequivocal. It should be even more so when the Accused faces a serious charge capable of attracting custodial sentence.

19. Finally, courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. I have previously held that where an Accused Person is unrepresented, the duty of the Court to ensure the plea of guilty is unequivocal is heightened. In ***Paulo Malimi Mbusi v R Kiambu Crim. App. No. 8 of 2016 (unreported)*** this is what I said and I find it relevant here:

In those cases [where there is an unrepresented Accused charged with a serious offence], care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence.….To put it plainly, then, one may add that where an unrepresented Accused Person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the Accused Person understands the consequences of such a plea is heightened. Here, the Court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the Court was about to convict and sentence the Accused Person for, it behooved the Court to warn the Accused Person of the consequences of a guilty plea.

20. These sentiments apply with equal force to the present case. I therefore hold that it would be unsafe to uphold the guilty plea in the circumstances.

D. WAS THE SENTENCE TOO SEVERE AS A RESULT OF MISCONCEPTION OF THE LAW?

21. For his third set of arguments, Mr. Weche urged the Court to overturn the sentence on the ground that the Learned Trial Magistrate misconceived the provisions of section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 by importing mandatory language into the sentence prescribed by the section. He relied on the Court of Appeal decision in ***Moses Banda Daniel v R*** **[2016] eKLR**. In that case, the Court of Appeal sitting in Mombasa expressly held that section 4(a) does not impose mandatory sentence.

22. Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act provides that:

> Any person who trafficks in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence and liable—
>
> a. in respect of any narcotic drug or psychotropic substance to a fine of one million shillings or

three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life.

23. Given the clear wording of the statute and the express interpretation given by the Court of Appeal in ***Moses Banda Daniel v R*** **[2016] eKLR** which is binding on this Court, it was wise for Mr. Kinyanjui to concede this aspect of the Appeal. While given my finding that the conviction on a guilty plea was not safe in the circumstances automatically quashes the sentence as well, for future guidance is important to remind trial courts that the provisions of section 4(a) of the Act merely give the Trial Court discretion in sentencing and do not impose any minimum sentences. Trial Courts might be well advised to bear in mind the provisions of 26(2) of the Penal Code. That section reads:

> Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term.

24. This section makes is clear that unless the law prescribing the sentence expressly provides otherwise, a court can sentence an Accused Person to a shorter period than that prescribed in the law prescribing the sentence. In other words, the Trial Court is clothed with the discretion to impose a sentence of imprisonment which is shorter than that prescribed except where mandatory minimum sentences are expressly prescribed. The ***Sentencing Policy Guidelines, p. 18, para. 7.2*** is in accord.

ORDERS AND DISPOSITION

25. In the end, therefore, the orders and directions of the Court are as follows:

a. The guilty plea entered in Gatundu Law Courts Criminal Case No. 1

b. 2 of 2016 is hereby set aside. In its place a plea of not guilty shall be recorded in the case.

c. The sentenced imposed on the Appellant is hereby consequently set aside.

d. The Appellant shall be released from Prison forthwith and shall, instead, be placed on remand pending his presentation before the Magistrates' Court for a retrial.

e. The Appellant shall be presented before the Principal Magistrate, Gatundu Law Courts on Thursday, 27th October, 2016 for directions. The case shall be allocated to a magistrate other than the Learned Honourable W. Ngumi who initially heard the case.

The Deputy Registrar is directed to send back the Trial Court file in Criminal Case No. 12 of 2016 and a copy of this file and ruling to the Principal Magistrate's Court, Gatundu for compliance.

Dated and delivered at Kiambu this 25th day of October, 2016.

.....

JOEL NGUGI

JUDGE