



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NANYUKI**  
**CRIMINAL APPEAL NO. 59 OF 2016**

**PAUL MWANGI .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence by Hon. C.N. NDEGWA PRINCIPAL  
MAGISTRATE dated 17th November, 2014 in Maralal Principal Magistrate's Court Criminal Case  
No. 826 of 2014)*

**JUDGMENT**

1. **PAUL MWANGI** was charged before the Principal Magistrate's Court Maralal with the **offence of trafficking twenty nine rolls of Narcotic drug contrary to Section 4 (a) of the Narcotic Drugs And Psychotropic Substance Control Act Cap 245**. He pleaded guilty and was sentenced to ten years imprisonment.

2. He filed his appeal against sentence and on the ground, which the trial Magistrate erred in convicting him based on particulars that were not clear. Learned Counsel for the appellant Ms. Nancy Njoroge submitted that the trial court erred in convicting and sentencing appellant because the prosecution failed to able by the provisions of **Section 74A of Cap 245**. Counsel argued that the police should have taken a sample of the drug to a government analyst and the analyst's report should have been before court before the appellant was convicted. She stated the trials court's proceedings reveal that the appellant was convicted on his own plea of guilty in the absence of that analyst report. That, she stated was fatal in law. Counsel relied on **High Court Nakuru Criminal Case No. 115 of 2007 WAWERU KIBUTU WANJIKU – V- REPUBLIC** where the learned Judge stated:-

***“In the absence of an analyst's certificate as required under Section 74A of the Act I must agree with the learned state counsel that the conviction herein was unsafe and cannot be upheld.”***

3. Learned Senior Principal prosecuting Counsel Mr. Tanui although conceding that the prosecution had failed to produce the analyst certificate confirming the rolls found on the person of the appellant were narcotic drug, however submitted the appellant had pleaded guilty of the charge. He therefore submitted that the appeal should be dismissed.

4. **Section 74A** provides the procedure to be followed upon the seizure of narcotic drug. In the first instance the police and a medical officer ought to weigh the amount of drug seized and there after the analyst should take sample for the purpose of analyzing. That exercise where possible should be done in the presence of the person intended to be charge and his advocate, if any.

5. In case the person is charged Section 74 (5) ought to be followed. Section 74(5) provides:

***“The production in court by either one of the authorised officers at the trial of an accused person of the sample or samples together with the designated analysts’ certificates and the magistrate’s certificate of destruction shall be conclusive proof as to the nature and quantity of the narcotic drug or psychotropic substance concerned and of the fact of its destruction in accordance with the provisions of this section. “***

6. I have perused the trial court’s proceedings which reveal that the charge on being read to the appellant the appellant responded “**ni kweli**” (it is true). The facts were then read to the court by the prosecutor to which the appellant responded. “*The facts are correct.*” The trial court then entered a plea of guilty. That entry of guilty contravened Section 74 (5) of Cap 245 because in absence of an analyst’s certificate confirming the twenty nine rolls were narcotic the plea was not unequivocal it was equivocal. Black law dictionary Eighth Edition defines unequivocal as “unambiguous, clear, free from uncertainty. It defines equivocal as “doubtful character, questionable ambiguous.” Appellant plea was equivocal because he pleaded guilty to an offence that was not conclusively proved by an analyst certificate. In this regard I refer to the case **Kato V Republic [1971] E.A542 (CAD)** where the Court of Appeal said:-

***“the procedure relating to the calling upon the accused person to plead is governed by section 203 of the Criminal Procedure Code. In our view, if it can be clearly shown that an accused person has admitted all the ingredients which constitute the offence charged, it is then proper enter a plea of guilty. The words “it is true” when used by an accused person may not amount to a plea of guilty, for example, in a case where there may be a defence of self-defence or provocation...”***

In this case appellant’s plea did not amount to a plea of guilty because of the absence of the analyst certificate. The case **P. FOSTER (HAULAGE) Ltd V ROBERTS [1978] 2 ALL Er 751** the court stated:

***“A court cannot accept an equivocal plea of guilt; it ..... must either obtain an unequivocal plea or enter a plea of not guilt.”***

7. In view of the above finding the trials courts conviction is hereby quashed and the sentence is hereby set aside. **The appellant shall be set free unless he is otherwise lawfully held.**

**Dated and Delivered at Nanyuki this 23<sup>rd</sup> November, 2016.**

**MARY KASANGO**

**JUDGE**

**Coram**

**Before Justice Mary Kasango**

**Court Assistant .....**

**For State .....**

**For Appellant .....**

**Appellant .....**

**COURT**

**Judgment delivered in open court**

**MARY KASANGO**

**JUDGE**