REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL REVISION NO. 129 OF 2016

ROSE WANJIKU KANYI……...…….APPLICANT

VERSUS

REPUBLIC…….……RESPONDENT

JUDGMENT

The applicant was charged in Mukurweini Principal Magistrates' Court Criminal Case No. 220 of 2015 with the offence of trafficking in narcotic drugs contrary to **section 4 (A)** of the **Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994**. The particulars were that on the 18th of day of June, 2015 at around 19:30 hours within Gathea village in Mukurweini sub County in Nyeri county, the applicant was found trafficking by storage 136 g of cannabis sativa which was not in its medicinal preparation form in contravention of the said Act.

In the alternative to this charge, the applicant was charged with the offence of possession of cannabis contrary to **section 3 (1)(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994** in that on the 18th day of June, 2015 at around 19:30 hours within Gathea village in Mukurweini sub County in Nyeri county, the applicant was found in possession of cannabis, to wit 136g which was not in its medicinal preparation form.

At the close of the prosecution case, the learned magistrate held that the prosecution had established a prima facie case against the applicant; it therefore put her on her defence in respect of the principal count. However, at the conclusion of the trial, the applicant was acquitted of the principal count but was convicted of the alternative charge. She was fined Kshs 200,000/= and in default to serve one year in prison.

By a letter dated 12th October, 2016 counsel for the applicant wrote to the deputy registrar asking for the intervention of this court because in the counsel's view, having been placed on defence in respect of the principal count, the applicant could not be convicted on the alternative count; the letter did not state clearly the sort of intervention counsel sought but going by his grievances he must be invoking the revisionary powers of this court under **section 364** of the **Criminal Procedure Code**; I will proceed on that presumption.

Counts alternative to the main charges are mainly preferred where the state or the prosecutor is not quite certain whether the available evidence or the conduct of the accused person can sustain or constitutes one offence rather than the other; in such event, the prosecutor or the state may prefer either of the possible offences as the principal count while the other possible offence, which ordinarily is a lesser offence, is treated as the alternative offence; as its description implies the offence is alternative to the principal charge or count.

If at the end of the trial the principal offence is proved beyond reasonable doubt the trial court will convict the accused person of that particular offence without any reference to the alternative count. But where the evidence is only sufficient to prove the alternative count then the court will convict the accused person on this alternative count.

Reference is made to the basis and form alternative counts take in section **137 (b)(i)** of the **Criminal Procedure Code, Cap 75**; that section provides as follows:

> *(b)(i) Provisions as to statutory offences. —*
>
> *Where an enactment constituting an offence states the offence to be the doing of or the omission to do any one of any different acts in the alternative, or the doing of or the omission to do any act in any one of any different capacities, or with any one of different intentions, or states any part of the offence in the alternative, the acts, omissions, capacities or intentions, or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence;*

In the trial against the applicant, the learned magistrate was of the opinion that the prosecution evidence was insufficient to prove the principal count of trafficking of narcotic drugs; but the same evidence was sufficient to prove, beyond reasonable doubt, the alternative offence of possession of cannabis contrary to **section 3(1)(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act No 4 of 1994**.

While convicting the applicant on the alternative count, the learned magistrate purported to invoke **section 179 (1)** of the **Criminal Procedure Code**. He need not have invoked this particular provision since it applies only when one is convicted of a minor offence for which he was not charged; it states as follows: -

> *CONVICTIONS FOR OFFENCES OTHER THAN THOSE CHARGED*
>
> *179. When offence proved is included in offence charged*
>
> *(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.*
>
> *(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.*

The applicant was charged with the minor offence as alternative to the principal offence and therefore the invocation of **section 179(1)** was superfluous; nevertheless, I cannot see how this misstep could have prejudiced the applicant's case. In the same vein, I cannot agree with the learned counsel for the applicant that the conviction of the appellant on a charge that was alternative to the principal charge was irregular or caused 'grave injustice' as suggested in his letter. Accordingly, I am of the humble opinion that the application for revision is misconceived and it is hereby dismissed.

I direct the deputy registrar to file a copy of this judgement in the original file in the Mukurweini Principal Magistrate's Court Criminal Case No. 220 of 2016 and thereafter remit it back to the magistrates' court for custody. It is so ordered.

Dated, signed and delivered in open court this 28th December,2016

Ngaah Jairus

JUDGE