REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 84 OF 2014

MIKE STEVEN OCHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 1068 of 2014

in the Principal Magistrate's Court in Nyando)

J U D G M E N T

1). The appellant was charged with the offence of being in possession of Narcotic Drugs contrary to section 3(1) as read with section 3(2)(a) of the Narcotic Drugs and Psychotropic Substance(Control) Act. It was alleged that on the 1st day of September, 2014 at Katito Trading Centre in Nyakach District within Kisumu County, he was found in possession of Narcotic Drugs namely Bhang to wit 50 rolls of street value Kshs. 2000/=.

He was convicted on an own plea of guilty and was sentenced to 5 years imprisonment. Being dissatisfied with the decision of the subordinate court, he appealed to this court on two grounds namely that:

> **i. The learned Senior Resident Magistrate erred in law and fact in failing to consider that the prosecution failed to tender proof from the Government Analyst that the exhibit substance was indeed or qualified to be a narcotic drug.**
>
> **ii. That the five year sentence imposed by the learned Senior Resident Magistrate is manifestly harsh and excessive.**

2). In his submission, Mr Onyino counsel for the appellant stated that the substance brought before court was subjected to analysis by the Government analyst and it was therefore not possible to ascertain whether substance that the appellant was arrested with was actually bhang or another substance. He argued that the burden of proof was on the prosecution to ascertain the substance was actually bhang. He prayed that the appeal be allowed.

3). Learned state counsel opposed the appeal stating that section 348 of the Criminal Procedure Code was clear that an appeal could not lie from a subordinate court from an own plea of guilt except on the legality of sentence. He however admitted that the substance had not been taken for analysis as was required under the law. Section 74A of the Narcotic Drugs and psychotropic substances (control) Act gives the procedure of dealing with narcotic drugs upon seizure. it stipulates as follows:

Where any narcotic drug or psychotropic substance has been seized and is to be used in evidence, the Commissioner of Police and the Director of Medical Services or a police or a medical officer respectively authorized in writing by either of them for the purposes of this Act (herein referred to as "the authorised officers") shall, in the presence of where practicable:

(a) the person intended to be charged in relation to the drugs (in this section referred to as "the accused person");

(b) a designated analyst;

(c) the advocate (if any) representing the accused person; and

(d) the analyst, if any, appointed by the accused person (in this section referred to as "the other analyst"), <u>weigh the whole amount seized, and thereafter the designated analyst shall take and weigh one or more samples of such narcotic drug or psychotropic substance and take away such sample or samples for the purpose of analysing and identifying the same.</u>

2. <u>After analysis and identification of the sample or samples taken under subsection (1), the same shall be returned to the authorized officers together with the designated analysts' certificates for production at the trial of the accused person.</u> (emphasis added)

4). It would appear therefore that a duty fell upon the prosecution to produce an analyst' certificate identifying the substance that the accused was arrested in possession as bhang. From the statement of facts read out to the accused person in court, the prosecution only stated the street value of the substance that was in court but did not produce a certificate identifying it as bhang. That was a lapse on the part of the prosecution.

5). However section 348 of the Criminal Procedure code is clear. the same provides that "**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."** Clearly, when an accused person admits to have committed an offence then he knows that he really committed it. He may not know the impact of pleading guilty or the magnitude of the offence but he certainly knows that he committed it. As such, if the accused admitted to have been in possession of bhang, then he knew that it was bhang he was in possession of. That said, I would find that the first ground of this appeal must fail. The prosecution should however endeavour to meet the requirements of section 74A of the Narcotic Drugs and psychotropic Substances (control) Act in future to avoid such lapses.

6). The second ground is that the sentence meted out was excessive and harsh. Section 3(2)(a) provides as follows:

A person guilty of an offence under subsection (1) shall be liable:

(a) 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;

7). The above is the law. The appellant was sentenced to 5 years which was below the above cited provisions. Under section 354 (3) (a) of the Criminal Procedure Code, this court is enabled to increase or reduce the sentence. Whereas this is the law there was no application or warning by the state that the sentence should be enhanced. The appellant was therefore not warned on the consequences and likelihood of having the sentence enhance.

8). In a similar situation the Court of Appeal in JJW -VS- Republic Criminal Appeal No. 11 of 2011 had this to say:

"It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant that if his appeal does not succeed on conviction, the sentence may be enhance or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal".

9). Consequently and in light of the above observations I shall disallow the appeal and as much as I would have enhance the appeal, hold that the appellant shall serve the period meted out against him.

Dated, signed and delivered at Kisumu this 27th day of November, 2014.

H.K. CHEMITEI

JUDGE