REPUBLIC OF KENYA

IN THE HGH COURT OF KENYA AT KISII

Criminal Appeal 172 & 173 of 2011

MAURICE OKOTH OKORE ..……..……..……. 1ST APPELLANT

STEVEN ONYANGO NDEGE …….....……..……. 2ND APPELLANT

-VERSUS-

REPUBLIC ……....…..……. RESPONDENT

JUDGMENT

(Being an appeal from the conviction and sentence of the Senior Resident Magistrate's Court at Homa Bay, Hon. C. A. S Mutai in Criminal Case No. 658 of 2011 dated 25th August, 2011)

The appellants were accused of trafficking in narcotic drugs contrary to section 4 (a) of the **Narcotic Drugs and Psychotropic substances Act**, **1994**. There were 3 co-accused in the trial court wherein the 1st appellant was the 2nd accused while the 2nd appellant was the first accused. The 3rd accused was one **David Ouma Anea**. The 1st and 2nd appellants herein pleaded guilty to the charge and were convicted on their own guilty plea and sentenced to serve 15 months imprisonment. The 3rd accused pleaded not guilty. Both appellants filed their separate appeals but which have been consolidated under the present appeal no. 172 of 2011. The identical grounds of appeal are that:-

1. *The learned trial magistrate misdirected himself on several matters of law and fact.*

2. *The learned trial magistrate erred in law relating to Criminal Procedure and Practice in entering a plea of guilty and convicting the appellant for the offence charged when the plea entered by the appellant was not unequivocal as the language purported to be used by the Court to the appellant is not specified.*

3. *The learned magistrate erred in law in passing a custodial sentence without an option of fine which was harsh and oppressive.*

The appeal came before me for hearing on 27th March 2012. **Mr. G. S Okoth** for the appellants argued the appeal. On the 1st ground, he submitted that the fact of possession was not established by the trial court as the appellants were in a public service vehicle. On the 2nd ground he submitted that the appellants were denied fair trial rights as provided under Section 77 of the Constitution (now repealed). It was his submission that the appellants did not understand the language used by the court and that the record does not indicate that there was any translation.

Mr. Mutai learned counsel for the state opposed the appeal. He submitted that the appellant's plea was unequivocal and that they understood the Dholuo language into which the proceedings were translated. On the issue of possession, he submitted that the same could not be set aside from the facts which were admitted when the appellants stated that the facts were true.

This is a first appeal. As such I am under duty to re-evaluate the evidence and the record. Having critically examined the record as against the grounds of appeal and rival submissions by counsel, the critical issue for my determination is whether or not the plea of each appellant was unequivocal.

Briefly the facts of the case were as follows: the appellants along with the 3rd accused were travelling in motor vehicle registration number KBP 792F Probox on 2nd August 2-011 along Maguga Sindo road at around 5pm. The police were tipped that the said vehicle was carrying *'bhang'*. They laid an ambush near Kigolo Trading centre stopped the vehicle and conducted a search. They found about 200 grammes of *'bhang'* hidden between the seats whereupon they arrested the appellants.

It is to these facts as read by the prosecutor that the appellants admitted. The proceedings before court on 25th August 2011 were captured in the record as follows:- The charge was read to the accused. The interpretation is indicated as English/Kiswahili/Dholuo and Suba. The 1st accused (now 2nd appellant) answered *"It is true"*. The 2nd accused (now 1st appellant) answered *"It is true"*. The court indicated a plea of guilty in respect of the 1st and 2nd accused, and a plea of not guilty in respect of the 3rd accused who had answered *"It is not true"*.

Immediately thereafter the facts outlined above were read by the prosecutor to which the 1st accused (now 2nd appellant) responded *"facts are admitted"* and the 2nd accused (now 1st appellant) responded *"facts are true"*. The court then convicted the appellants on own plea of guilty. The 2nd appellant stated in mitigation that:- *"I am sorry. I did not intent to sell it. It was for my use"*. The 1st appellant mitigated thus:-*"I am sorry I fend for my siblings"*.

The above narration demonstrates that the court followed the correct procedure in taking plea. See **Adan –vs- Republic (1973 E. A 445**. Each appellant pleaded guilty and even went ahead to offer mitigation. They had an opportunity to deny the facts but they accepted. I therefore find that each appellant's plea was unequivocal and that the trial court did lawfully convict on such plea.

This being my view of the matter it follows that the appellant's having been convicted on their own plea of guilty lost the right to appeal against conviction. This is by dint of Section 348 of the **Criminal Procedure Code**.

On sentence, I find that the appellants have already served a substantial part of it. However, in view of the need to decongest our penal institutions and considering that the sentence was only 15 months, I order that they be set at liberty forthwith unless they are otherwise lawfully held.

Judgment dated, signed and **delivered** at **Kisii** this **27th** day of **September**, 2012.

R. LAGAT-KORIR
JUDGE

In the presence of:

Maurice Okoth Okore: 1st appellant (present/absent)

Steven Onyango Ndege: 2nd appellant (present/absent)

..... Counsel for respondent (present/absent|)

Edwin Mong’are court clerk

R. LAGAT-KORIR
JUDGE