



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CRIMINAL APPEAL NO. 92 OF 2010

ROSE AUMA OTAWAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case number 413 of 2008 of the Principal Magistrate's Court at Kisumu)

JUDGMENT

The appellant herein was charged in the Lower Court with the offence of being in possession of Narcotic Drugs contrary to Section 3 (2) (a) of the Narcotic Drugs and Psychotropic substance number 404 of 1994 reads number 41 of 1994 **“in that on the 24th day of September 2008 at Nyalenda Kilo in Kisumu District of Nyanza Province was found in possession of Narcotic Drug namely cannabis Sativa (Bhang) to wit 180 brooms worth a street value of Kshs. 180,000.00”**. On 16th October 1994 the charge was amended to read number 41 of 1994.

It is on record that the appellant was tried found guilty and convicted and before sentence the learned trial magistrate made the following observations **“Sentence. Accused said to be a first offender, offence grievous especially given the quantity of bhang found on her. She is thus a danger to the society most of which constitutes youth who may unfortunately be her customers”** She shall serve five (5) years in jail.

The appellant became aggrieved and appealed to this court citing six (6) grounds of appeal namely:-

- **The learned trial magistrate erred in law in failing to appreciate that the prosecution had miserably failed to prove the case and evidence presented was lacking on critical elements making it unsafe to convict and sentence the appellant.**
- **The learned magistrate erred in law by failing to critically analyse and re-evaluate the evidence adduced during the trial before the subordinate court especially the accuseds evidence and therefore misdirected himself in his conclusion**
- **The learned trial magistrate erred in law when he failed to find and hold that the contradictions in the evidence of prosecution witnesses was material; and the same raised reasonable doubt, the benefit of which should have accrued to the appellant**
- **The learned magistrate erred in law by convicting and sentencing the appellant based on a defective charge sheet which did not specify the charge and when none of the particulars of the charge were proved.**
- **The judgment of the learned trial magistrate was contrary to the provisions of the criminal procedure code.**
- **The sentence was excessively harsh under circumstances of this case.**

In his oral submissions to court, counsel for the appellant reiterated the content of the grounds of appeal and then stressed the following:-

- (i) The appellant was convicted on a defective charge as the Act under which she ought to have been charged is number 4 of 1994 and not 41 of 1994.
- (ii) The appellant was not charged with the penal Section 3(1) of the said Act and as such she should not have been convicted and sentence.
- (iii) The court is urged to be guided by the case law cited no plea was taken by the court after the charge had been amended contrary to the provision of section 214 of the Criminal Procedure Code.
- (iv) There was material and contradiction in the evidence which should have been addressed by the learned trial magistrate but which was not done.
- (v) Also contend that the evidence to support the conviction is weak and cannot support the conviction.

The state wishes to concede the appeal on the following grounds:-

- The charge is defective

- The appellant did not plead to the amended charge contrary to the mandatory requirements of Section 214 of the Criminal Procedure Code and as such the entire trial was a nullity.

The court has given due consideration of the afore set out concurrent arguments and in this court's opinion the following are own framed questions for determination in the disposal of this matter.

- (1) What is the mandate of this court?
- (2) What final orders are to be made herein on the disposal of this matter ?

In response to the first question it is trite law gathered from case law decided by the court of appeal that this court has judicial notice of to the effect that despite concurrent arguments put forth by the parties, an appellate court is entitled to re-evaluate the evidence on the record, consider it in the light of complaints raised against such evidence, consider the arguments for and against the said evidence and then arrive at its own conclusion on the matter before it.

This court has done so and in its opinion, the argument on behalf of the appellant has been presented on two fronts namely, the technical front and the merit front. The technical front arises because of the appellant's counsel's assertion and the concession by the state that the trial was a nullity. Whereas the merit front arises because of the appellants assertion that the evidence adduced being contradictory, the same could not sustain a conviction and the court is asked to allow the appeal on the two fronts.

This court has decided to deal with the technical front first because, if upheld there will be no need to interrogate the merits as these will be nothing to be interrogated as the trial would had been declared a nullity. The court has revisited the record and it has confirmed that indeed the charge read "**Act number 404 of 1994**". Then there are additional made to reads number 41 of 1994. It is discerned by this court that the charge was not substituted. Neither did the learned trial magistrate counter sign the amendment. It is also evident from the record that when the alleged amendment was effected the charge was not read been to the appellant in order to allow the appellant to admit or deny the said charge. Both sides agree this was irregular for and for this reason the trial was and still is a nullity. To fortify their stand, the attention of the court has been drawn to the provision of Section 214 of the Criminal Procedure Code as two court decision. The Section reads:- " Section 214 (1) where at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or form, the court may make such order for the alteration of the charge either by way aforementioned of the charge or by the substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case provided that:-

- (i) Where a charge is so altered the court shall there upon call upon the accused person to plead to the altered charge**
- (ii) Where a charge is altered under this sub-section, the accused may demand that the witness or any of them be recalled and give their accused afresh or be further cross examined by the evidence or his advocate and in the last mentioned event, the prosecution shall have a right to examine the witness on matters arising out of further cross-examination.**
- (iii) Variance between the charge and the evidence adduced in support of it with respect to the time at which the charged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact initiated within the time (if any) limited by the law for the institution thereof.**

(iv) Where an alteration of a charge is made under sub section (2) the court shall if it is of the opinion that the accused has been thereby misled or deceived adjourn the trial for such period as maybe reasonably necessary”

Further guidance is from the case of **Lawrence Wachira –VS Republic Nairobi CA** decided on the 8th day of July 2005 whose perusal reveals that it dealt with the merits of the case and not its technicalities.

There is also reliance on the extract of the substantive act showing that it is act No. 4 of 1994 and also the case of **Jon Caradon Wagner –VS- republic Nairobi HCCRA 404 of 2009** decided by Warsame judge on the 18th day of January 2010. At page 2 of the said judgment, the learned judge quoted with approval a decision of the court of appeal in the case of **Yongo –VS- Republic criminal appeal No. 17 of 1993** where the court of appeal held *inter-alia* that:-

(1)A charge is defective under section 214 (1) of the Criminal Procedure Code (Cap 75) where:-

(a) It does not accord with the evidence in committal proceedings because of inaccuracies/ or defective in the charge because it changes offences in the charge not disclosed in such evidence, or fails to charge an offence which the evidence in the committal proceedings discloses or

(b) It does not for such reason accord with the evidence given at the trial or

(c) It gives a misconception of the alleged offence in the particulars.

(2) Where the charge is defective either by misconception or it varies with the evidence at the trial, the court has the power to, order an amendment or alteration of the charge provided:-

(a) The court shall call upon the accused to plead to the altered charge and

(b) The court shall permit the accused if he so requests to re-examine and recall witnesses.

(3) It is a mandatory requirement that the court must not only comply with the above conditions but it shall record that it has so complied. The trial magistrate failed in not recording whether there had been compliance with the proviso to section 214 of the Criminal Procedure Code (Cap 75).

(4) The appellant should have been given the opportunity to further question the prosecution witnesses and it could not be said whether the failure to give him that opportunity occasioned no prejudice to him as such further questioning might have caused the trial magistrate to form a different view of the witnesses evidence”.

This court has given due construction of the provision of section 214 of the Criminal Procedure Code, as well as drawn inspiration from the extract of the holding of a court of appeal decision in the cited case of **Jon Caradon Wagner –VS- Republic (supra)** as well as the extract of the Act under which the

appellant was charged. The court appreciates the decision in **Wagner** case is a decision of a court of concurrent jurisdiction and therefore not binding on this court. However, since the learned judge was simply re-stating a holding case decided by the court of appeal on the subject as being the correct position, there is no need to deviate from that stand of the court of appeal, more so when the court of appeal was simply construing the provision of law as set out in section 214 of the Criminal Procedure Code.

This court has construed the same provision and finds that the requirement is mandatory. When applied to the facts before this court, it is clear that the appellant has a genuine complainant in that she was charged under a statute which was misdescribed and when the prosecution purported to rectify the error, the appellant was not called upon to plead. The court of appeal has ruled in the case of **Yongo –VS- Republic (supra)** that failure to comply is fatal to the proceedings. The state has rightly conceded the appeal.

The state has however asked for retrial. The court notes that the offence within which the appellant was charged in a serious one and considering that not a substantial part of the sentence imposed has been served, the court is of the opinion that this is a proper case for ordering a retrial save that a rider needs to be added to the effect that should the retrial result in a conviction, then the sentence served herein be taken into consideration when the new sentence is ultimately imposed.

Since the conviction has been faulted on a point of technicality, and a retrial ordered, there is no need for this court to interrogate the merits of the appeal as doing so might pre-empt the outcome of the anticipated re-trial.

For the reasons given in the assessment, the appeal is allowed in its entirety, conviction quashed and sentence set aside.

(3) A re-trial is ordered before another magistrate of competent jurisdiction other than the one whose conviction has been faulted.

(4) In the event of any conviction and sentence to a jail term, then the period of 9 months that appellant has served should be taken into account and reduced from the fresh sentence if any is imposed.

Dated, signed and delivered at Kisumu this 16th day of March 2011.

ROSELYN N. NAMBUYE

JUDGE

RNN/va