REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

CRIMINAL APPEAL NO. 90 OF 2009

GEORGE GITONGA MWENDIA.....1ST APPELLANT

DANIEL NDURU NDUNG'U.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

When the Appellants first appeared before me for the hearing of this Appeal, I explained to them that the sentence imposed on them by the learned trial magistrate was unlawful and warned that in case their Appeal failed, this court would impose the sentence authorized by law.

They were both tried and convicted for trafficking in Narcotic Drugs C/S 4(a) of the NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCE CONTROL Act No. 4 of 1994 which provides as hereunder i.e.

"Any person who traffics in any narcotic drug or psychotropic substance or any substance represented or held out by him be a narcotic drug or psychotropic substance shall be guilty of an offence and liable-

a) In respect of any narcotic drug and psychotropic substance to a fine of 1million shillings or 3 times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and in addition, to imprisonment for life.

In interpreting and applying the above provision, the Court of Appeal in the recent case of KINGSLEY CHUKWU Versus R (2010) eklr ……held:-

"A person convicted for an offence under section 4(a) of the Act such as the Appellant before us shall be fined Kshs. One million, or three times the value of the drug (whichever is greater) AND in addition to imprisonment for life".

The Court of Appeal set aside the sentence imposed by the High Court and in its place ordered that the Appellant pays a fine of 28,800,000 AND in addition he serves a life imprisonment.

This decision coming from the highest court in the land binds this court and the subordinate courts and although the same is causing ripples both in the High Court and in the subordinate courts, it must be abided by for as long as it has not been overruled or otherwise set aside. I must say that I hold profound and tremendous respect and deference for the Appellate court but I find it extremely difficult to accept the above interpretation. My understanding and interpretation of the above section is that '**life Imprisonment'** as stipulatedhere is not mandatory and the court still has discretion to impose a shorter custodial sentence. I will not say more and as stated earlier I am bound by the said decision of the Court of Appeal.

I decided to bring this issue up for the benefit of the Appellants herein, and of those others who may be in a similar predicament but who may not be aware of this recent development.

Having said so, I now come to the Appeal before me. As stated earlier on, the sentence imposed was unlawful and if I were to dismiss the Appeal, I would substitute the same for the life imprisonment as pronounced by the Court of Appeal in the above decision.

I have gone through the proceedings before the trial court and in my view they constitute a comedy of errors. Originally, the Appellants were charged with being in possession of bhang C/S 3(1) (2) of the Narcotic Drugs and Psychotropic Substances Control Act. The matter proceeded to hearing and after the prosecution witnesses testified the prosecution made an application to amend the charge. The application was allowed and the charge was amended from that of 'possession' of one of 'trafficking'. The fresh charges were read over to the Appellants as mandated by law. The learned trial magistrate did not nonetheless inform the Appellants of their right to recall any of the witnesses who had already testified. It is the duty of the court to inform the accused person of his/her right to recall any witness once a charge has been amended or substituted. It should then be left to the accused to make the decision as to whether to demand for the recall of any of the witnesses or not. In this case, the learned trial magistrate failed to comply with the provisions of section 214 (1) ii. Given the nature of the sentence the accused persons faced in the event of conviction , it was important that the said right be explained to them in unequivocal terms. Failure to comply with that provision was in my view prejudicial to the Appellants.

Secondly, although this does not form a ground of Appeal herein, I have noted that the entire prosecution case was heard by one B.A. Ojoo Ag SRM. He even placed the accused persons onto their defence. When the matter came up of defence hearing however without any explanation whatsoever, the same was taken over by one J. N. Mwaniki – Resident Magistrate. He took the defence and proceeded to prepare and deliver the judgment. He did not comply with the provisions of section 200 (3) of the Criminal Procedure Code which provides as hereunder:-

"where a succeeding magistrate commences the hearing of proceedings and Part of the evidence has been recorded by his predecessor the accused person may demand that any witness may be resummoned and reheard and the succeeding magistrate SHALL inform the accused of that right"

Again, this provision must be complied with. It is mandatory. The Accused must be informed of that right. It shall then be left to him to make an informed decision as to whether to recall any of the witnesses

or to proceed with the hearing. The Court of Appeal while pronouncing itself on this issue in the case of NDEGWA –VR-(1985)KLR 534 succinctly stated;

"No rule of natural justice, no rule of statutory protection, no rule of evidence, and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal Administration".

Once again, I reiterate that the accused should and must be informed of these provisions. It should be left to him to decide on whether to waive them or not. In this case, the prosecution had already closed its case, the accused persons had made lengthy submissions on a "no case to answer". In my opinion they were prejudiced by the magistrate's non-compliance with this provision. Section 200(4) therefore comes into play. The same provides:-

"Where an accused person is convicted upon evidence that was not wholly recorded by the convicting/magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby set aside the conviction and may order a new trial……"

I have considered the viability of ordering a retrial or not. A retrial will in my considered view not be prejudicial to the appellants given the fact that they have not even served ½ of the lawful sentence they had been given. The enormity of the charge and the circumstances surrounding the matter do in my considered view militate for a retrial. The witnesses are police officers who should be readily available to go to court and testify.

For the foregoing reasons, I quash the conviction herein and set aside the sentence and invoke the provisions of section 200 (4) of the Criminal Procedure Code to order a retrial. I order that the Appellants herein be released from prison and they be escorted to Kerugoya Police Station where they will be tried afresh by a magistrate of competent jurisdiction other than Mr. Mwaniki or Mr. Ojoo, both of who presided over the initial trial.

W. KARANJA

JUDGE

Signed by the above but delivered and dated at Embu this 17th day of May 2011 by the undersigned.`

GEORGE DULU

JUDGE