

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 85 of 2004

NDEGWA KOMU.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Being judgment against the sentence and conviction by G. K. Mwaura Principal Magistrate, in the Senior Principal Magistrate's Criminal Case No. 161 of 2004, at Murang'a)

JUDGEMENT

The Appellant herein was charged of being in possession of *cannabis sativa* contrary to Section 3(1) (2) of the Narcotic Drugs and Psychotropic Substance Act No. 4 of 1994. The Appellant was convicted on his own plea of guilt. Thereafter the facts were read out to him and it is recorded that he stated the facts were true, correct and he admitted them. The Appellant was convicted on his own plea and because the facts indicated that he was in possession of 20 rolls of bhang with an intention of selling them to other people, he was sentenced to four(4) years.

The Appellant in his petition before court has appealed against conviction and sentence. Going through the proceedings I, on checking the original record of the trial court, found that the trial court recorded that the accused was present and without any indication in the record that the charge was read out to the accused it was recorded that he admitted to possessing 20 rolls of bhang. The court failed to read out the charge to the Appellant as required by the law. For the avoidance of doubt the trial court should have followed the following procedure in taking the plea: **Andan v Republic [1973]E.A.** In that case it was held as follows:

- (i) *the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;*
- (ii) *the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;*
- (iii) *the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;*
- (iv) *if the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered;*

(v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.

The trial magistrate did not follow that procedure and accordingly the conviction of the Appellant cannot stand. The court therefore does hereby quash the conviction against the appellant and further does hereby set aside the sentence against the Appellant. The Appellant since being convicted in January 2004 he has been in prison. He has therefore served three years out of the four years of sentence. He has stated in his appeal that he is 60 years old. I am therefore of the view that it could not be right to order a retrial against the Appellant in this matter. I do hereby order that the Appellant unless otherwise lawfully held should be released from jail.

Dated and delivered this 23rd March 2007

MARY KASANGO

JUDGE