

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 406 of 2005

SIMON GATHUNGU NGANGAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 1247 of 2005 of the Senior Resident Magistrate's Court at Githunguri – Ms Lucy Mutai – SRM)

JUDGMENT

The appellant **SIMON GATHUNGU NGANGA** was charged before the subordinate court with the offence of being in possession of narcotic drugs contrary to Section 3(1)(2) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars of the offence were that –

“On the 24th day of July 2005 at Ikinu trading center in Kaimbu district within the Central Province, was found being in possession of 22 rolls of bhang which was not in medical preparation and in contravention of the said Act”.

He appeared in the subordinate court for plea on 27th July 2005. He was recorded by the learned trial magistrate as having pleaded guilty to the charge. He was therefore convicted and sentenced to serve three (3) years imprisonment. He has now appealed to this court claiming that he did not understand the language used in court, and therefore the plea was not unequivocal.

Learned State Counsel, Mrs. Gakobo, conceded to the appeal on one technical ground. That though the bhang was produced in court, there was no report from the Government Analyst to confirm that the substance produced was bhang. She also stated that she would not ask for a retrial as the exhibit was ordered by the learned trial magistrate to be destroyed.

I have perused the record of the subordinate court. Indeed, there was no report from the Government Analyst produced to confirm that the substance produced in court was bhang. I agree with learned State Counsel that it was a fatal mistake for the prosecution not to have produced a report from the Government Analyst to confirm that the substance produced in court was bhang.

There is another technical ground on which I will allow this appeal. The court record does not show the language used in the court and the language used by the appellant in the proceedings. This was clearly in contravention of the provisions of Section 77(2)(b) and (f) of the Constitution and Section 198(1) of the Criminal Procedure Code. The failure of the learned trial magistrate to indicate the language used in court and by the accused was a fatal omission and rendered the proceedings, and by extension, the plea a nullity – **SWAHIBU SIMIYU & ANOTHER – vs – REPUBLIC – Criminal Appeal No. 245 of 2005(Ksm) CA (unreported)**.

Learned State Counsel was also right in not pressing for a retrial, as the exhibit was ordered to be destroyed by the learned trial magistrate. I therefore have no basis for ordering a retrial.

Consequently, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered at Nairobi this 30th day of April, 2007.

George Dulu

Judge

In the presence of –

Appellant present in person

No appearance for State