REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 19 of 2005

ONESMUS KAMBI RAI …….. APPELLANT

- Versus -

REPUBLIC ……..…… RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 677 of 2004 of the Senior Resident Magistrate's Court at Voi - K Muneeni, Senior Resident Magistrate)

Coram: Before Hon. Justice L. Njagi

Ms. Mwaniki for State

Adagi h/b for Obara

Court clerk - Abuya

J U D G M E N T

The appellant, Onesmus Kambi Rai, was charged in the Senior Resident Magistrate's Court, Voi, with being in possession of Narcotic drugs contrary to section 3(1) as read with section 2(a) of Narcotic Drugs and Psychotropic Substances Control Act No.4 of 1994. He was convicted ostensibly on his own plea of guilty and sentenced to serve 20 years in jail. He now appeals to this court both against the conviction and sentence.

At the hearing of the appeal, Mr. Obara appeared for the appellant while Mr. Onserio appeared for the Republic. Mr. Obara submitted that after the only prosecution witness had adduced evidence, the appellant said, "I admit the offence." Since the appellant had been called upon to cross examine the prosecution witness, that statement would appear to have been the appellant's perception of cross examination, and therefore the statement which he made appears to have been the cross examination. The court then proceeded to convict him on his own plea of guilty and pass sentence while the only plea on record was that of not guilty. Furthermore, the learned trial magistrate relied on exhibits which had not been referred to by the sole prosecution witness who testified. Counsel for the appellant then asked the court to quash the conviction, set aside the sentence and set the appellant free.

Mr. Onserio for the Republic conceded the appeal on the ground that the trial court convicted the appellant
when the latter said that he admitted the offence, instead of first taking a fresh plea. Secondly, the Government chemist should have been called to produce his report, but this was not done. Mr. Onserio then applied for a retrial on the ground that the matter was serious; the appellant was found in possession; and the witnesses are ready to come back and testify.

In reply, Mr. Obara submitted that taking the appellant back for retrial would be double jeopardy. He had already served about three years, and that therefore the appeal should be allowed unconditionally.

I agree with both counsel for the appellant and the State Counsel that failure of the court to call upon the appellant to plead to the charge after he admitted his guilt in mid-trial rendered the trial a nullity since

the plea on record was still that of "not guilty". The best practice is always to take the plea afresh every time an accused person changes his mind while the trial is in progress. In sum, I find that the trial was a nullity and that the conviction and sentence cannot be allowed to stand.

Mr. Onserio applied for the appellant to be retried, an application which Mr. Obara resisted, citing the period during which the appellant has been incarcerated, and submitting that a retrial would expose the appellant to double jeopardy. I have agonized over this issue. In the case of MUIRURI v. REPUBLIC [2003] KLR 552, at p.556 the Court of Appeal addressed the principles governing an order for retrial as follows –

"Generally, whether a retrial should be ordered or not must depend on the particular facts and circumstances of each case. It will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to illegalities or defects in the original trial (see *Zededkiah Ojuondor Manyala v. Republic* (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the court's."

Applying these guidelines to the present case, I find that the failure to take a fresh plea when the appellant admitted the offence in mid trial was a mistake on the part of the court. The admission of the Government Chemist's report upon production by the court prosecutor was partly the fault of the prosecutor, and partly that of the court. To a larger extent, therefore, I find that the court was responsible for the defects in the original trial. I also find that the offence is a serious one, carrying a mandatory sentence of 20 years, out of which the appellant has served two years and nine months. The amount of cannabis sativa (bhang) said to have been in the possession of the appellant and its value both suggest that he was trafficking in it for commercial gain. In these circumstances, and taking all these factors into account, I think that the interests of justice require that a retrial be ordered.

I accordingly allow the appeal, quash the appellant's conviction in the lower court, and set aside the sentence. However, I also order that the appellant be retried by a different magistrate.

Dated and delivered at Mombasa this 23rd day of October, 2007.

L. NJAGI

JUDGE