



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 249 of 2004

JOHN NJOROGE MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[From original conviction and sentence in Criminal Case No. 2037 of 2004 of

Chief Magistrate's Court, at Nakuru – G. C. Mutembei - (SPM), Esq.]

JUDGMENT

The appellant, John Njoroge Maina was convicted on his own plea of guilty and sentenced to six (6) years imprisonment of the offence of being in possession of *Cannabis Sativa* contrary to section 3(1) as read with section 3(2) of the Narcotics drugs and Psychotropic substances control Act 1994. This was before the Chief Magistrate court Nakuru.

The particulars of the charge stated that on the 29th day of July, 2004 at 6.30 p.m. at Mangu Trading Centre in Nakuru District of the Rift Valley Province was found being in possession of thirty (30) rolls of *Cannabis Sativa* (***bhang***) which was under medical preparation. The appellant being dissatisfied with the conviction and sentence by the learned Chief Magistrate appealed to this court. Counsel for the appellant took issue with the way the plea was taken and recorded. Counsel argued that the plea was not recorded in the prescribed form as in the case of ***Aden -Vs- Republic 1973 EA 445***. According to the appellant the plea as recorded is vague and it would appear the appellant did not get an opportunity to understand the charge that he was facing. Counsel also challenged the facts that were read out which he argued did not disclose the offence as the particulars of the offence and the facts were not properly stated and contradict the offence as stated in the charge sheet. Moreover the language of the court was not specified and merely indicated the response of the appellant “*guilty*” is not the prescribed mode of taking a plea.

Another issue raised in this appeal was the fact that the learned Chief Magistrate erred in law by convicting the appellant in the absence of a certificate of an analyst as provided for in section 67 of the aforesaid Act. The said section states as follows:-

67 (1) “***The minister may, from time to time, by notice in the gazette designate any duly qualified analyst for the purposes of this Act.***

(2) ***In any prosecution or other proceedings under this Act a certificate signed or purported to be signed by an analyst designated under subsection (1), stating that he has analyzed or examined any substance and the result of his analysis or examination shall be admissible in evidence and shall be***

prima facie evidence of the statements contained in the certificate and of the authority of the person giving or making the same, without any proof of appointment or designation”.

Counsel for the appellant put forward the decision in the case of ***Alex Muna Njai -Vs- republic CA 148 of 2004 Nakuru*** where **Justice Musinga** held that in the case where an accused is charged with the offence of possession of a narcotic drug the prosecution is under an obligation to subject the substance alleged to appropriate analysis by a duly qualified and gazetted analyst.

On the part of the State this appeal was opposed by **Mr. Koech the learned Senior State Counsel**. According to **Mr. Koech** the plea, as recorded was unequivocal, there is nothing on record to indicate that the appellant did not understand either English or Kiswahili. The appellant pleaded guilty which is an indication that he clearly understood the ingredients of the charge. This is clearly seen from the mitigation by the appellant.

On the issue of the absence of the analyst certificate, this was not necessary because the facts were not disputed.

This appeal presents two issues for determination, firstly whether the plea was recorded in accordance with the laid down procedure and principles.

Secondly, whether the prosecution was supposed to produce and subject the alleged *cannabis sativa* to examination and production of an analyst certificate.

As regards the first issue I hereby highlight what transpired before the learned trial magistrate on 3rd September, 2004.

“ **3.9.2004**

Before: G. C. Mutembei – SPM

Court Prosecutor: SP Miyienda

Court Clerk: Kihara

Accused present

Charge read over and explained to accused in English/Swahili who replies – guilty.

COURT PROSECUTOR:

FACTS:

On 29.7.2004 at Mangu Estate, Police officers Cpl. Kirwa and P.C. Manyonga acting on information went to Mangu Trading Centre where they had information that accused was trafficking in bhang. They searched a bag which he had and recovered 30 rolls of cannabis sativa. They then arrested the accused and took him to Menengai Police Station where he was charged.

G. C. MUTEMBEI

SPM

Accused:

I admit facts as true and correct.

G. C. MUTEMBEI

SPM

Court:

Guilty on plea and convicted.

Court Prosecutor:

First offender.

G. C. MUTEEMBEI

SPM

Mitigation:

I sell the bhang to support myself.

G. C. MUTEEMBEI

SPM

Court:

Notes that accused is a trafficker in Cannabis Sativa. He does not appear remorseful.

G. C. MUTEEMBEI

SPM

Sentence:

Accused to serve 6 years imprisonment.

Right of Appeal 14 days.

G. C. MUTEEMBEI

SPM

Order:

Cannabis Sativa to be destroyed.

G. C. MUTEEMBEI

SPM ”

In the Celebrated case of Aden VR (Supra)

It was held

“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The Magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all the essential ingredients of the offence charged the

magistrate should record what the accused has said, as hereby as possible in his own words, and then formally enter a plea of guilty.....”

In the proceedings before the learned trial magistrate he did not record the language that was used to explain to the appellant the charge. Merely indicating English/Swahili is vague although it is possible the charge was read in both English and Swahili. What is more fundamental is that the reply by the appellant was not indicated in his own words, and more so the facts that were stated by the prosecution were not in support of the charge as the charge indicates the 30 rolls of *Cannabis Sativa* was recovered in a bag while the charge sheet indicates the 30 rolls of *Cannabis Sativa* was under medical preparation.

In view of the above I would allow the appeal. On the second ground that the analyst certificate was not produced, I am of the opinion that since in this prosecution the appellant had purportedly pleaded guilty, it was not necessary to avail the analyst certificate. My reading of the above section is that where the offence under the Act is denied, then an analyst certificate is mandatory.

In view of the above I allow the appeal, set aside the conviction and quash the sentence by the trial court. The appellant should be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Judgment read and signed on 2nd day of November, 2006

MARTHA KOOME

JUDGE