**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**
**Criminal Appeal 62 of 2004**
**(Arising from Original Kimilili R.M. Cr. Case No. 644 of 2004)**

**TABALIA MARUTI…….APPELLANT**

**VS**

**REPUBLIC……RESPONDENT**

**J U D G M E N T**

Tabalia Maruti, the appellant herein appeared before the District Magistrate sitting at Kimilili and pleaded guilty to a charge of being in possession of Narcotic Drug Contrary to Section 3 (1) of the Narcotic and Psychotropic Substances (Control) Act 4 of 1994 as Read with sub-section 3 (2) of the same Act. The learned District Magistrate then sentenced the appellant to pay a fine of Ksh. 20,000/= and in default to serve one (1) year imprisonment. Being aggrieved with the said decision the appellant has now appealed to this court to interfere with the whole decision.

On appeal, the appellant's counsel listed in his petition the following grounds:

*(i) That the trial magistrate erred when he convicted the appellant on an equivocal plea on account of the appellant's intoxication and or insanity.*

*(ii) That the trial magistrate passed a sentence which he did not have jurisdiction to do so.*

*(iii) That the sentence passed was harsh and excessive.*

*(iv) That the trial magistrate erred when he convicted the appellant of being in possession of bhang which was not produced in court.*

Mr. Kraido advocate, argued the appeal on behalf of the appellant. On the first ground, Mr.Kraido deviated from the contents of that ground. The petition clearly states that the plea was equivocal on the basis that the appellant was either insane or intoxicated at the time of taking the plea. However Mr. Kraido did not pursue that line of argument but opted to argue a new ground which was to the effect that the plea was equivocal because the Kiswahili word "nimekubali" was not the same as 'ni ukweli'. The principal state counsel opposed this ground and averred that the plea was unequivocal because the appellant understood the language of the court.

I wish to state that I will for the moment consider the merits of this ground despite the fact that the appellant's counsel did not seek leave to argue an additional ground of appeal which was not pleaded. The record shows that the charge was read over and explained to the appellant in Kiswahili language which the appellant no doubt understood very well. That fact is noted by the trial magistrate. The appellant's counsel has pointed out that there is a big difference between the word 'nimekubali' and 'ni ukweli'. In my mind I think the appellant's counsel is hair splitting to say the least. It is a question of

language semantics. The main concern of a court of law at that stage is whether or not the accused understood the charge and the ingredients of the offence facing him. I have keenly reconsidered this issue and I have come to the conclusion that the appellant understood the language of the court hence the plea cannot be said to be equivocal.

The second ground argued on appeal is to the effect that the subject matter of the charge i.e cannabis sativa, was not produced in the trial court hence according to the appellant, the charge was not supported by the facts.

Mr. Onderi, the learned principal state counsel was of the contrary view that the substance was produced. He justified his argument on the ground that the trial court issued an order for forfeiture and the destruction of the bhang.

I have considered these rivaling submissions. I have further perused the record of appeal. It is evident from the record that the court prosecutor read the facts but did not produce the substance found in possession of the appellant. The prosecutor did not also produce the government analyst report which in essence would have established whether or not the substance retrieved from the appellant was bhang (cannabis Sativa). I am not prepared to infer at this stage that the substance was surrendered to the trial court on the basis of the fact that the trial court made an order for forfeiture and destruction of the said substance. Even if I were to infer that the substance was produced in court, still there was no evidence to show that the substance was sent for analysis by the government Analyst. It was incumbent upon the prosecution to prove that whatever substance was recovered from the appellant was indeed a prohibited drug or substance under the provisions of the Narcotic Drugs and Psychotropic Substances (Control) Act.

In my view the prosecution failed to prove its case beyond reasonable doubt. In a nutshell, there was no proof that the substances recovered from the appellant were prohibited under the law. In other words, the facts read to the court did not support the charge. Consequently it cannot be said that the plea was equivocal.

The third ground argued on appeal was in respect of the fact that the trial court imposed a fine which was beyond its jurisdiction. This ground was conceded by the learned principal state counsel who urged me to order for a retrial in the matter. I have examined the provisions of Section 7 (3) of the criminal procedure code and it is clear that the trial court had jurisdiction to only impose a maximum fine of upto Ksh.10,000/=. The trial Magistrate imposed a fine of Ksh. 20, 000/=. It is obvious the fine imposed was unlawful hence it cannot be allowed to stand.

I have been urged to order for a retrial in the matter. I think it will not be fair and just in the circumstances of this case to order for a retrial for two reasons; first, most probably the substances which were not produced have either been destroyed or interfered with. Secondly, that it will cause a miscarriage of justice on the part of the appellant in that the prosecution will have been given a second chance to patch up the loopholes in its case.

In view of the position I have taken in this matter I think it is not necessary to consider whether or not the sentence was excessive.

The upshot therefore is that this appeal is allowed with the consequential order that conviction is quashed and the sentence is set aside. Any fines that may have been paid should be refunded forthwith and the appellant if still in prison should be released forthwith unless lawfully held for any other purpose.

**DATED AND DELIVERED THIS 24th DAY OF June 2005**

**J.K. SERGON**

**JUDGE**