REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 292 OF 2004

(From original conviction and sentence of the Senior Principal Magistrate's Court at Nakuru in Criminal Case Number 2509 of 2004 – G. C. Mutembei (S.P.M.)

STESIA ANYANGO ODONGO……..……...…APPELLANT

VERSUS

REPUBLIC……...……RESPONDENT

JUDGMENT

The Appellant, Stesia Anyango Odongo, was charged with the offence of trafficking Narcotic drugs contrary to **Section 4(a) of the Narcotic drugs and Psychotropic Substances (Control) Act of 1994.** The particulars of the offence were that on the 25th of October 2004 along Eldoret-Nakuru road in Nakuru District the Appellant trafficked in Narcotic drugs to wit 129 stones (25 kgs) of Cannabis Sativa with a street value of Kshs 25,800/- by transporting it in a motor vehicle registration No. KAP 647G Scania Bus in contravention of the said Act. When the Appellant was arraigned before the Senior Principal Magistrate, Nakuru she pleaded guilty to the charge. She was sentenced to serve six years imprisonment. The Appellant was aggrieved by the said conviction and sentence and has appealed to his court.

The main thrust of the Appellant's appeal is that the plea of guilty that was recorded was equivocal. The Appellant was aggrieved that the trial magistrate failed to explain to her all the essential ingredients of the offence in the language that she understood. At the hearing of the Appeal, Mr Ochanda, Learned Counsel for the Appellant reiterated the contents of the Petition of Appeal. He argued that the plea as taken by the trial magistrate was not unequivocal. He further argued that the language of the Court was not stated. It was his argument that the language which the plea was taken was stated as English/Kiswahili. He further contended that the Appellant did not know what transpired in Court as she did not understand the language that was used in Court. Learned Counsel further submitted that in her mitigation the Appellant had denied the charge. He further argued that there was contradiction between what was stated in the charge sheet and the facts that were stated in Court in support of the charge. It was his submission that while the charge sheet talked of 129 stones of bhang the facts stated before the Court mentioned 109 stones of bhang. It was further contended on behalf of the Appellant that the stones of bhang that were allegedly found in possession of the Appellant were not produced in Court as exhibits as required by the law. Learned Counsel argued that while it could be ideal for this Court to order that the Appellant be retried, the fact that the bhang was ordered destroyed after the plea was taken meant that there would be no evidence upon which the Appellant would be charged. In the circumstances of the case, it was the Appellant's submission that she be discharged.

Mr Gumo, Learned Assistant Deputy Public Prosecutor conceded to the Appeal. He submitted that in taking the plea, the words recorded should be as nearly as possible to what the accused person actually said in Court. He further submitted that the word "guilty" could not have emerged from the mouth of the Appellant. He argued that offences of the nature which the Appellant was charged required that the exhibit be taken to the Government Chemist to establish whether the alleged drugs found in possession of the Appellant fitted the description of what constitutes a Narcotic drug **under the Narcotic drugs and Psychotropic Substances (Control) Act, 1994.** No report of the analysis made by the Government

Chemist was presented to the Court. He further submitted that the whole exercise of taking the plea of guilty was a nullity. He submitted that since the exhibit had been already destroyed, the State would not be asking for a retrial. Mr Gumo however urged the Court to admonish the Appellant and warn her not to repeat the offence.

I have considered the arguments made in respect of this Appeal. I have also read the record of the trial magistrate when he took the plea in respect of which this Appeal arose. It is clear from the record that the language which the plea was taken was not stated. What is recorded is the words "Eng/Swa". It is not known if the language used was Kiswahili or English. If the language used was Kiswahili, it is not shown that the charge was interpreted to the Appellant by an interpreter from the English language to the Kiswahili language. Further when the charge was read to the Appellant, it is recorded that she replied "guilty". The law mandates the Court to record the response of an accused person, in so far as possible, in the exact words that the accused person used. In the instant case, the Appellant could not have obviously replied "guilty". The term "guilty" is a legal terminology that implies the finding of the court upon a plea being taken. The submissions made by both the counsel for the Appellant and the Learned Assistant Deputy Public Prosecutor is not therefore without merit. The trial magistrate did not take the plea of guilty as provided by **Section 207 of the Criminal Procedure Code.** He further did not follow the procedure for taking pleas as laid down in the case of **Adan –versus- Republic [1973]E.A. 445.** In the circumstances of this case, the Appeal filed by the Appellant has merit. The same is allowed. The conviction is consequently quashed and the sentence imposed set aside.

It has been submitted that the exhibit was destroyed after the Appellant had pleaded "guilty" in the vitiated trial. This fact has been conceded by the state. This Court suggests that in cases such as this one, the trial court should not make an order for the destruction of the exhibits until the expiry of fourteen (14) days so that it may be established if the convicted person has filed an Appeal or not. In the instant case, though this Court would have been inclined to order that the Appellant be retried, the fact that the exhibits were destroyed makes such an order for retrial superfluous. The trial magistrate by making a determination that the exhibits be destroyed, has in the instance case occasioned a miscarriage of justice. In the circumstances therefore, I agree with the submissions made. There being no exhibits, the Appellant is ordered discharged. She is set at liberty unless otherwise lawfully held.

DATED at NAKURU this 15th day of December 2004.

L. KIMARU

JUDGE