REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
HIGH COURT CRIMINAL APPEAL 103 OF 2004
(From Original Conviction(s) and Sentence(s) in Criminal Case No.757 of 2004 of the Resident Magistrate's Court at Yatta M.Maundu Esq. on 2 1/6/04)

SELA NZILANI NZAU .... APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

J U D G M E N T

The appellant Sela Nzilani Nzau appeals against the judgment of the Resident Magistrate Yatta court in Criminal Case 757/04. The appellant was charged with the offence of being in possession of *Cannabis Sativa* Contrary to Section 3 (1) as read with Section 2 (a) of the Narcotic Drugs and Psychotropic substances Control Act No. 4 of 1994. She was convicted on her own plea of guilty and was sentenced to serve 3 years imprisonment. The appellant is aggrieved by both the conviction and sentence. Grounds 1 and 2 of the notice of appeal were argued together. In the said ground, the appellant contends that the plea was not properly taken as the magistrate did not record the language in which the plea was taken and that no plea of guilty was entered after the appellant accepted the offence.

The learned state counsel did concede that the plea was not unequivocal. I have looked at the record of appeal and that of the lower court and it is apparent that the court did not record the language in which the charge was read to the appellant. It was recorded that it was explained to accused in *Kikamba.* The language of the court is not indicated. There is no evidence that appellant did not understand the *Kikamba* language. After the appellant allegedly admitted the offence the magistrate did not enter a plea of guilty before going on to take the facts of the case. For that reason the court does accept that the plea was not unequivocal. The court cannot say with certainty that appellant understood the charge. The plea was defective.

It is urged for the appellant that the facts do not disclose the offence as charged but disclosed an offence under Section 4 of the said Act. Under Section 4 of the Act, the value of the Cannabis Sativa would need to be disclosed. None is disclosed. Besides, if anything the appellant was charged with a lesser offence and that does not prejudice the appellant. She was properly charged.

It is also true that no Government Analyst report was adduced on the date of the plea to ascertain whether the substance found with appellant was indeed Cannabis Sativa. In ground 3 and 4 the appellant submitted that the sentence was harsh considering that the appellant was a first offender, her plea in mitigation, a more lenient sentence should have been considered.

On the same issue of the sentence the state counsel submitted that the sentence was one sided and not as provided that one will be sentenced to both fine and custodial sentence. The sentence provided for under

Section 3 (1) is under Section 3 (2) (a) which provides that:

> ***"a person gui lty of an offence under sub -section (1) shall be liable (a) in respect of Cannabis, where the person satisfies the court that the Cannabis was intended solely for his own consumption, to imprisonment for ten years and in even other case, imprisonment for 2 0 years."***

In the present case the appellant never proved that the Cannabis was for his own consumption and so the sentence was 20 years. The court, therefore, exercised its discretion under that provision of the Act and sentenced appellant to 3 years imprisonment. The sentence was not one sided or irregular but was based on an irregular plea and, therefore, cannot stand.

Having found that the plea was not unequivocal and the fact that the Government Analyst report was not availed, the court finds that the plea was defective and hence null and void. That being the case the court quashes the conviction and the sentence is hereby set aside.

The learned state counsel urged that a retrial be ordered since the exhibit is still available at the Yatta court; that the offence was only committed 5 months ago on 17/6/04 and the appellant will not suffer any prejudice. The appellant's counsel did not seem to have an objection to a retrial.

The courts have held that a retrial will generally be ordered if the trial in the lower court is defective or illegal (see ***MANJI versus REPUBLIC 1966 E.A 343***) and that the said retrial should not be prejudicial to the accused.

In this case the trial in the lower court was defective and, therefore, nullified. There is good reason to order a retrial.

The appellant was sentenced to 3 years imprisonment on 21/6/04 hardly 6 months ago. She had not even served a sixth of the sentence. The charge with which she is charged is serious offence. She deals in drugs and the court is alert to the Government's effort to try and eradicate the vice from society. It is my view that this is a good case to order a retrial. The witnesses are likely to be police officers who will easily be traced and since the exhibit is said to be still available the court is inclined to order a retrial and it is hereby ordered that the appellant do appear before Yatta Court for plea on 10/11/04.

Dated at Machakos this 8th day of December 2004

R.V. WENDOH

JUDGE