



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 348 OF 2003
PHILLIP NJOROGE WAMAITHA APPELLANT
VERSUS
REPUBLIC RESPONDENT

**From the conviction and sentence of hon. G. Njuguna SRM
in Kiambu Court Criminal Case No. 935 of 2003)**

JUDGMENT OF COURT

The appellant, Phillip Njoroge Wamaitha was charged with the offence of being found in possession of Narcotic Drugs contrary to section 3(i) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 as read together with subsection 2(a) of the said Act. He pleaded guilty and was convicted and sentenced to 3 years imprisonment. He appealed against both the conviction and sentence.

The brief facts of the case are that the appellant was on 17.4.2003 arrested by police officers at Ndenderu Village. He was found carrying 52 rolls of bhang otherwise called Cannabis Sativa, from his trousers. He could not explain how he came into possession and failed to give an account, which could in law excuse him in respect to the said possession. He was eventually charged with the offence by Karura police station at Kiambu court. On being asked to answer to the charge, he said :-

“It is true”

Then the facts were summarized as stated above and he then said:-

“I admit the facts.”

The court then proceeded to convict the appellant on his own plea of guilty. The appellant now argues that the plea of guilty was not unequivocal and should not stand.

I have considered the issue and have also considered the manner in which the plea was entered. It is not disputed that after the appellant had said that the charge was true, the prosecutor then proceeded to state the facts indicating how the appellant was arrested with the 52 rolls of bhang and how he failed to show that he did so within the exceptions which could have given him a legal excuse to carry the drug. The prosecutor also recorded the fact that he produced the drugs as exhibit 1. He failed to put it on the record that the stuff after being recovered from the appellant had, or part of it had been sent to the Government Analyst for its analysis to establish that the stuff was indeed bhang or Cannabis Sativa. He also failed to

produce into the facts before the court any certificate or report confirming the drug as bhang or Cannabis Sativa. In my view it would then be at this point that the facts could be put to the appellant to admit them or deny them after which a conviction would follow if the appellant admitted them. If however he denied the facts as they would have been thus put, a plea of not guilty would necessarily follow.

In this case the prosecutor failed to put on the record all the facts that contained the full ingredients of the offence. Without the analyst's report or facts proving the "bhang" to be the drug envisaged under the Act the facts recorded created no offence under the Act. The plea was therefore not unequivocal and a conviction should not have followed. The upshot therefore is that this appeal must succeed. The conviction is hereby quashed and the sentence set aside.

I have considered the issue as to whether or not this is a suitable case for a retrial. It was the duty of the prosecution to include in its statement of facts all the facts that would include the necessary ingredients required to prove the charge. They in my view had no excuse for leaving out the facts which would show that the drug was one envisaged under the Act. In not including the analyst's certificate or report, the prosecutor took a deliberate risk with consequences such as this where this appellate court has to quash the conviction. A retrial would be possible where the appellant has not only failed to have a satisfactory trial but where as well in the retrial the prosecution would not be handed over an opportunity to fill in gaps in the failed evidence with a view not to miss a conviction. In other words the available evidence on the record would be less than enough to convict, unless further additional evidence is called. I hold that this is such a case. I accordingly hold that it is not a suitable case for a retrial.

The appellant shall be set at liberty forthwith unless lawfully held in prison.

It is so ordered.

Dated and delivered at Nairobi this 28th day of May, 2003.

D.A. ONYANCHA

JUDGE