Mueke v Republic (Criminal Appeal E040 of 2022)
[2023] KEHC 23853 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23853 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CRIMINAL APPEAL E040 OF 2022

RK LIMO, J

OCTOBER 19, 2023

BETWEEN

BEN MBALA MUEKE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal against the Judgement therein vide Kitui Chief Magistrate's Court Criminal Case No. E764/2022)

JUDGMENT

1. Ben Mbala Mueke, the appellant here, was charged vide Kitui Chief Magistrate's Court Criminal Case No. E764/22 with three counts namely.

    i. Count I –Malicious damage to properly contrary to Section 339(1) of the Penal Code which he denied.

    ii. Count II- Stealing contrary to Section 268 as read with Section 275 of the Penal Code which he also denied.

    iii. Count III- Cultivating a prohibited plant namely Bhang contrary to Section 6(a) of the Narcotics Drugs and Psychotropic Substances Act No. 4 of 1994. The particulars of this change which is relevant to this appeal are that on the 1st day of September, 2022 at 12:30 PM at Ngengi Village Kyanika Location, Nzambani Sub-County within Kitui County, the appellant was found cultivating prohibited plants namely bhang to wit 23 stems.

2. The appellant pleaded guilty to the 3rd Count and confirmed the facts as correct when they were read over to him. He was therefore, convicted on his own plea of guilty by the trial court and sentenced to pay a time of Kshs. 250,000 or in default serve 5 years in prison.

3. The appellant felt aggrieved and lodged this appeal raising the following grounds namely: -

   i. That the learned trial magistrate erred in fact and law by failing to follow proper procedures of plea taking.

   ii. That the learned trial magistrate failed to have the facts read to the appellant in a language he understood.

   iii. That the learned Trial Magistrate erred by convicting the appellant without proof that the substance was cannabis sativa (bhang).

   iv. That the sentence meted out was harsh and excessive.

   v. That the trial magistrate demonstrated bias by accepting the facts read out without a certificate from Government chemist.

   vi. That the trial court magistrate failed to find that the prosecution evidence was not in conformity with the law of Anti-Narcotics Act.

   vii. That the appellant was convicted without proper evidence.

   viii. That the decision of the trial court was against the weight of the evidence.

   ix. That the learned trial magistrate erred in law by considering extraneous matter-not in evidence when sentencing the appellant.

4. In his written submission through the learned Counsel M/s Mulinga Mbaluka & Co. Advocates, the appellant contends that the trial court ought to have informed him in a language he understood before the plea was taken.

5. The appellant contends that the trial court did not follow the principles laid down in the case of Adan versus Republic (citation not given) which he submits underpins a system of jurisprudence geared toward a fair trial. He submits that it was essential that the essential ingredients of the offends be explained to him in a language he understands well. He claims that the same was not adhered to when the plea was taken.

6. He further claims that the substances upon which the charge was based was not taken to Government chemists for analysis and certification.

7. He contends that the trial court relied on the opinion of the Police that the substance was bhang. He submits that the Police Officers were not experts to know that the plants were Cannabis Sativa.

   He contends that the trial court should have ensured that the plants were scientifically proven to be bhang before rendering a conviction.

8. He also faults the trial court for not calling for a pre-sentence report to know the circumstances under which the offence was committed.

9. He further claims that he suffered hearing impairment and that the trial court should have called for medical report to confirm that. That ground however can be raised improperly as an additional new ground in the petition of appeal without leave of this court pursuant to Section 350(b) of the Criminal Procedure Code.

10. He faults the trial court for not counting the 23 stems to ensure that the number tallied with the number given in the charge sheet.

11. The State through written submissions by M/s Pauline Mwaniki from the Office of the Director of Public Prosecution concedes to this appeal stating that the plea taken was not unequivocal because the language used in her view was not indicated.

12. The State contends that, going by the provisions of Section 207 of the Criminal Procedure Code and the decision of Adam versus Republic [1973] EA445 all the essential ingredients of the offence must be explained to an accused person in a language he understands.

13. The State further concedes that the omission to tender a government chemist analyst report confirming that the plants found with the appellant was bhang was fatal as it rendered the conviction unsafe. She submits that the trial court in her view committed a fundamental mistake which resulted in a mistrial adding that mitigation by the appellant was brief and that is why he was not found to be remorseful.

14. This Court has considered this appeal and the response made by the State. The Respondent has conceded to this appeal however, this court shall nevertheless, determine the same on its merit.

15. This Court has perused through the brief proceedings from the trial court and has re-evaluated the manner in which the plea was taken and how the court rendered itself on the conviction and sentence.

16. As observed above, the appellant faced 3 counts as per the charge sheet presented to the trial court. He pleaded not guilty to the first two counts but pleaded guilty to the 3rd Count which was in respect to cultivating a prohibited plant namely bhang contrary to Section 6(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. Section 6(a) of the statute makes it an offence for anyone to cultivate a prohibited plant. A prohibited plant is defined under 3rd Schedule of the Act to include cannabis (bhang). The penalty prescribed thereof for anyone found guilty is Kshs. 250,000 or three times the market value of the prohibited plant, whichever is greater or a jail term not exceeding 20 years or both.

17. I have keenly looked at the record of proceedings with a view to determining 2 issues which have been raised in this appeal. The issues basically are; -

    i. Whether the plea taken was unequivocal that it to say if the appellant really understood the nature of the charge read over to him.

    ii. Whether the trial court should have called for forensic analysis report from Government Chemist.

18. I will begin with the taking of the plea. The appellant contends that the procedure of taking plea was not followed and that he was not asked the language he understood. The State has conceded to this ground but looking at the actual proceedings, the contrary is evident. The typed proceedings missed the crucial part indicating that the proceedings were conducted in Kiswahili. The trial magistrate clearly ticked the language used as "Kiswahili".

19. It is also evident that the appellant clearly understood Kiswahili because when he appeared in this court on 14/2/23 for directions, he told this court that he was familiar with Kiswahili language. I have of course noted that when he appeared much later, on 11/07/2023 to take a date for this judgement, he changed tune and said that he was familiar with Kikamba Language perhaps have briefed about the main ground in his appeal.

20. This Court finds that the issue raised on language used in the plea taking is evidently an afterthought. This is clearly seen from the fact that he pleaded not guilty to the first 2 counts and the trial court duly entered a plea of not guilty in Count 1 and Count II. When the appellant pleaded guilty to the 3rd Count, the facts were read out and the record shows that the facts were read and 23 stems of Cannabis

Sativa tendered as Ex 1. The appellant conceded to the facts and the trial court directed that the exhibits be destroyed after 14 days.

21. When the appellant was granted a chance to mitigate, he stated that he had no parents but they were three (3) in the family. Though he never clarified further, that in my view, does not suggest that he did not understand what was going on. The trial magistrate complied with the legal procedures of taking plea and the plea taken was unequivocal.

22. On the question of forensic report or forensic analysis of the 23 stems that the appellant was found growing, I find that having admitted that the 23 plants were Cannabis Sativa, there was no legal obligation to the prosecution or count to subject the plants to forensic analysis. The person best placed to know what they were is the appellant because he intentionally cultivated and grew them. When he was caught and arraigned he admitted that he was found cultivating the same. The 23 stems of bhang were tendered as exhibits and the appellant never raised any objection. Had raised an objection, then it could have been incumbent upon the trial court to direct the prosecution to take the recovered plants to Government Chemist for scientific analysis by an expert. The appellant cannot plead guilty and after the bhang has been destroyed he turns around to say that they should have been analyzed. This court finds that the issue of subjecting the substance for analysis after an accused has pleaded guilty is both unnecessary and burdensome because of the costs involved in transporting the stuff to Nairobi Government Chemist. This court finds that the ground raised by the appellant that the 23 stems of bhang should have been subjected to analysis is flimsy and an appeal cannot be allowed on such a ground because many accused persons illegally found with illicit drinks and other such stuff and after pleading guilty and getting convicted would find a way to escape or get away with such offences. The appellant in this matter was correctly convicted upon own plea and held to account for the offence committed.

23. This court finds that the sentence meted out on the appellant was lawful and cannot be termed excessive in light of the provisions of the law which I have highlighted above. The five-year jail term in my view is sufficient to make him reform and transform so that when he gets out of jail he will be a changed man, so that instead of cultivating cannabis sativa, he will be able to cultivate food for himself, his family and this Country at large. Cultivation of bhang in this Country is illegal and the trial court was well placed to discourage the act for the common good of the Society.

The long and short of this is that this court finds no merit in this appeal and the same is disallowed.

DATED, SIGNED AND DELIVERED AT KITUI THIS 19THDAY OF OCTOBER, 2023.

HON. JUSTICE R. LIMO-JUDGE