REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 5 OF 2021

WILFRED ODUOR OCHIENG.....APPELLANT

VERSUS

THE STATE THRO' DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. R. Langat Senior Resident Magistrate

in Rongo Senior Resident Magistrate's Court Criminal Case No. E049 of 2021 delivered on26/1/2021)

JUDGMENT

Wilfred Oduor Ochieng was convicted on his own plea of guilty by Hon. Langat, in Criminal case No. E049 of 2021, Rongo Senior Resident Magistrate Court.

The appellant was charged with the offence of being in possession of Narcotic Drugs (Bhang) contrary to Section 3(1) as read with Section 3(2)(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 (Hereinafter referred to as the Act).

The particulars of the charge are that on 25/1/2021 at Rongo Sub County in Migori County, was found in possession of 150 rolls, 52 tariffs and 500 grams of cannabis sativa with a street value of Kshs. 13,000/= in contravention of the Act.

Upon conviction the appellant was sentenced to serve three years imprisonment.

Being dissatisfied with both the conviction and sentence, the appellant preferred an appeal through the firm of Oduk Advocates on the following grounds:-

1. **That the trial was conducted based on a defective charge sheet;**

2. **That the applicant was convicted on a plea that was not unequivocal;**

3. **That the court conducted the proceedings in a language that was unknown to the appellant;**

4. **That the court failed to call for evidence to confirm that the appellant was found with narcotic drugs as defined in law;**

5. **That the facts did not disclose the offence of possession of narcotic drugs;**

6. **That the sentence was harsh and manifestly excessive.**

He prays that the conviction be quashed and sentence be set aside.

Mr. Oduk filed written submissions on 22/4/2021 in which he expounded the grounds of appeal. On the first ground, counsel submitted that Section 3(3) of the Act creates four offences but the charge did not disclose which offence the appellant committed and instead just stated that he contravened the Act which rendered the charge defective and the trial a nullity; that though the prosecutor indicated in the facts that it was not a medicinal preparation, the charge did not state that the bhang was not in medicinal preparation.

On grounds 2, counsel stated that the appellant's plea was merely "true' and after facts were read, he stated that the exhibits were his, but that did not amount to a plea in terms of the decision of **Oremo vs Republic (1990) KLR 290**. Further, that the facts did not disclose all the

elements of the offence. (See Kimani vs Republic (2010) KLR 310.

On ground 3, counsel submitted that the plea was taken in contravention of Article 50 (2) (m) and (3) of the Constitution in that the court did not specify what language the appellant understood and whether the court used English, Kiswahili or Dholuo at the same time as indicated in the court record.

On ground 4, counsel submitted that the court did not establish that what was produced before him was indeed narcotic drugs because the exhibits were not processed and analysed in terms of the Regulations made under the Act; that the Regulations 2006 require that the seized substance be analysed to determine its identity, quantity and purity under Part II thereof. Counsel also submitted that police failed to adhere to the procedure in Sections 71, 72, 73 and 74 regarding seizure and forfeiture and hence their actions were illegal.

Lastly, counsel was of the view that the court failed to consider the nature of the offence, failed to consider the option of fine though it was a deserving case and imposed a harsh and excessive sentence under the circumstances.

Mr. Kimanthi, the Prosecution Counsel filed his submissions and urged that the magistrate duly informed the appellant of his right to representation of his choice, and proceeded to take plea. Counsel argued that the trial court adhered to the procedure set out in Section 207 (2) and (3) of the Criminal Procedure Code which is to ensure that the plea is unequivocal and that the plea was properly taken.

On the allegation that the charge was defective, counsel submitted that the court adhered to provisions of Section 137 Criminal Procedure Code and that in any case, a defect in the charge cannot vitiate the proceedings unless it is demonstrated that the defect occasioned a failure of justice.

In respect to the language of the court, though he was asked which language he preferred, the court recorded the three languages English/Kiswhaili / Dholuo. Counsel admitted that the appellant could not have used all the three languages and the court needed to be specific.

On the issue of exhibits covered in grounds 4 – 6, counsel submitted that though the applicant admitted to having bhang / cannabis, the prosecutor did not produce the Government analyst report to confirm the substance that the appellant was found in possession. Counsel urged that in absence of the certificate, the conviction was unsafe.

I have considered the grounds of appeal and the submissions of both counsel.

Although Section 348 of the Criminal Procedure Code bars an appeal where a conviction follows a plea of guilty, the courts have repeatedly held that conviction on a plea of guilty can be challenged where the plea was not unequivocal. In this case, the conviction having been on a plea of guilty, the court has to examine the court record and determine whether the plea recorded by the lower court was proper and accorded with Section 207 of the Criminal Procedure Code.

Section 207 of the Criminal Procedure Code sets out the procedure for taking plea. The said section was elucidated in the celebrated case of **Adan vs Republic 1973 EA 446** where Spry V.P laid out the procedures as follows:-

> **" i. The charge and all the essential ingredients of the offence should be read to the accused in his language or in a language he understands;**
>
> **ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;**
>
> **iii. The prosecution should immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or add any relevant facts;**
>
> **iv. If the accused does not agree with the facts or raises any question as to his guilt, his reply must be recorded and a change of plea entered;**
>
> **v. If there is no change of plea, a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.**"

I have considered the proceedings of 26/1/2021 when the appellant was arraigned before the court. The court first asked what language the appellant would use in the proceedings, and it was recorded, dholuo. Then the court went ahead to inform the appellant of his right to have legal representation of his own choice and the appellant having understood, the substance of the charge was read to him and he answered "true". A plea of guilty was entered and the facts were read to him.

> **On 25/1/2021 at Nyaundo village, police officer received a tip off that accused person is in possession of narcotic drugs. In company of community policing members, they proceed to Nyaundo village where they found him and upon search at his home recovered 150 rolls, 52 tariffs and 500 grams cannabis wrapped in nylon bag. He was apprehended and Narcotic drugs recovered. He is placed in custody. The estimate standard value of the drugs is Kshs. 13,000/=. Same was not in medicinal preparation.**
>
> **150 rolls – Pexhbit 1**
>
> **52 tariffs – Pexhibt 2**

500 grams – Pexhibits 3

Nylon Bag - Pexhibit 4

The appellant replies "the facts are true. They are mine. They are bhang/cannabis."

On interpretation, the court in **Desai =vs= Republic 1974 EA 416 page 418,** the court held:-

> **"We would interpose here that we are of the opinion that whenever interpretation is required in any court proceedings the facts should be recorded and the name of the interpreter and the language used should be shown."**

I will first address the issue of the language used. I have made reference to the original hand written court record. When the court asked the appellant which language he understood, the court used a pre-typed record of plea where the two languages English and Kiswahili were already recorded. The magistrate recorded in biro pen "Dholuo".

In the instant case, the court clerk was Mercy Miyare and having observed that the court recorded in biro that the language was luo, I am satisfied that the appellant informed the court the language he understood, i.e Dholuo and that is why the court added dholuo in biro. The fact that the appellant took part in the proceedings by replying to the facts that the exhibits were his and was cannabis sativa goes to confirm that the appellant understood the proceedings. This court is satisfied that the appellant understood the language of the court. It complied with Article 50(2)(m)and that ground must fail.

Whether the plea was unequivocal:- the appellant admitted to having in his possession, 150 rolls, 52 tariffs and 500 grams cannabis wrapped in nylon bag which were produced as exhibits. I agree with the appellant's submission that the procedure to be followed in the seizure of the drugs was not followed because the police should have complied with the Narcotic Drugs and Psychotropic Substances Control Seizure, Analysis and Disposal Regulations 2006 which provide as follows:-

Part II: 3(i)…the police officer shall take all reasonable steps to ensure that:-

a) All material evidence relating to the seizure is collected and processed.

Part III: 5(1)…….

(2)… the designated analysis shall….carry out an analysis of the seizure substance to determine its:-

a) Identity

b) Quantify or mass

c) Purity."

There was no evidence that the items found with the appellant were subjected to an analysis and a certificate to that effect issued and produced in court in accordance with the above Rules. The substance found with the appellant could have been anything. For the plea to be unequivocal, the facts must support the charge. Without knowing what the appellant possessed or that they were drugs as provided under the Act, the charge cannot stand. I find that the plea was equivocal.

As respects the procedure in the search and seizure the same is provided for under Section 74 of the Act. The section reads as follows: -

> **"Section 74 Subject to this Act, all articles and things, including any narcotic drug or psychotropic substance, motor vehicle, aircraft, ship, carriage or other conveyance, that are liable to forfeiture under any provision of this Act may be seized and detained by any police officer or any other persons authorized in writing by the commissioner of police for the purposes of this Act."**

Counsel submitted that the above Section was not complied with because the alleged drugs were not seized by an authorized officer. The court of Appeal had occasion to consider the said provisions in **Criminal Appeal No. 2 of 2015 Moses Banda Daniel v Republic** the court observed:-

> **"After the seizure, an expert opinion must be obtained to ascertain the nature and the weight of the drugs. This is to be done, where practicable, in the presence of the accused person, his advocate, if any, an analyst, if any appointed by the accused person and the designated analyst. The use, in the section, of phrases like "*Where practicable*" and "*if any*" convey the meaning that the procedure is not mandatory but directory and the use of the word "*shall*" must be so interpreted. A procedural provision would be regarded as not being mandatory if no prejudice is likely to be caused to the other party or if there is substantial compliance with the procedure. On the other hand failure to comply with a mandatory provision must carry and result in a fatal consequence or vitiate the entire proceedings depending on the language of the statute"**.

Section 74 A was introduced to the Act to ensure that the drugs recovered are not interfered with before the trial; upon ascertaining the nature and weight of the drugs, and obtaining a certificate of the analyst, the rest of the drugs are to be destroyed immediately and only a sample preserved for purposes of production in court if so required. I have read the facts given by the prosecutor. There is no iota of evidence that

the officers who arrested the appellant attempted to comply with Section 74 and 74 A of the Act. As noted, above, compliance with the said Act does not need to be absolute. The prosecution did not comply with basic due process under Act 74 and the charge was not therefore proved to the required standard.

Having found as above, I find that the plea was equivocal. The conviction was made in error and it is hereby quashed and sentence set aside.

Should the court order a retrial?. This court seek guidance from the case law where courts have dealt with the issue of when a court can order a retrial. In **Ahmed Sumar vs Republic 1964 EALR 483**, the Eastern Court of Appeal said

> ***"……in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiently of evidence or for the purposes of enabling the prosecution to fill up the gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessary follow that a retrial should be ordered …. In this judgment the court accepted that a retrial should not be ordered unless the court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case depends on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person."***

Again In **Fetahali Manji =vs= Republic (1966)EA 343**, the court said:-

> **Although some factors may be considered such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial at the end of the day, such a case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice require it.**"

In this case, the plea was taken on 26/1/2021, only five months ago. The time that has lapsed is very short and it would not be prejudicial to the appellant if a retrial was ordered.

The witnesses to be called would have been police officers who did the arrest. They would not be difficult trace.

However, the elephant in the room is that the recovered exhibits were never analysed to determine what they were. It is unknown what happened to the said exhibits as the court did the court make an order for their disposal. Even if the court were to order a retrial the potentially admissible evidence might not result in a conviction. For the above reasons, it would be a futile exercise if this court were to orders a retrial.

In the end, the appellant is set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 13TH DAY OF JULY, 2021.

R. WENDOH

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Kimanthi for State Counsel

Ms. Nyauke court assistant