REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 11 OF 2019

(From Original Conviction and Sentence in Criminal Case No. 460 of 2016 by the Principal Magistrate's Court at Kakamega)

EDWIN KAHERE MAKOKHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon FM Nyakundi, Resident Magistrate, on one count of possession of narcotic drugs contrary to section 3(1) of the Narcotic Drugs and Psychotropic Substances Control Act, No. 4 of 2004, as read with section 3(2) of the same statute, and was accordingly sentenced to serve three (3) years imprisonment. The particulars of the offence charged were that the appellant, on the 16th February 2018, at Mayoni Village, Mayoni Location, in Matungu Sub-County, within Kakamega County, he was found in possession of a narcotic drug, namely cannabis (bhang), to wit 100 grammes, with a street value of Kshs. 300.00.

2. He pleaded guilty to the charge before the trial court on 17th November 2018, a plea of guilty was entered and he was sentenced, the same day, to serve the term stated in paragraph 1 of this judgment.

3. Being dissatisfied with the conviction and sentence, the appellant appealed to this court and raised several grounds of appeal. He avers that the plea of guilty was not unequivocal, the language used at his trial was not indicated, the alleged drug had not been tested, and mitigation was not considered.

4. As the first appellate court, I have re-evaluated the record of the trial court. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the appellant as he took plea. I am guided in that regard by the decision of the Court of Appeal decision in the case of ***Okeno vs. Republic*** **(1972) EA 32.**

5. The appeal was canvassed on 5th December, 2019. The appellant relied on his written submissions that had been filed in court on 16th July 2019. Mr. Mutua, Prosecution Counsel, relied on the trial court's record.

6. The appellant in his written submissions submits that the language in which the charge was read to him was not indicated, and it is not indicated whether the appellant was asked to confirm he understood the language or not. It is also submitted that it was not indicated whether or not there was interpretation, and if so to which language. . He further submits that there was no proof that the substance referred to as a drug was chemically tested.

7. The law that guides the taking of plea by a trial court are set out in section 207 of the Criminal Procedure Code, Cap 75, Laws of Kenya. The said provision states as follows –

> *"(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;*
>
> *(2) If the accused person admits the truth of the charge otherwise than by plea agreement his admission shall be recorded as nearly as possible in the words used by him, and eth court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary;*
>
> *Provided that after conviction and before passing sentence or making an order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded."*

8. The Court of Appeal in *Adan vs. Republic* (1973) EA 445, explained the application of section 207 of the Penal Code in cases where an accused pleads not guilty. The court said –

> *"When a person is charged and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak or understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or assert additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to 'not guilty' and proceed to hold a trial. If the accused does not deny the facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and eth accused's reply must, of course, be recorded."*

9. Then there is the Court of Appeal decision in *Elijah Njihia Wakianda vs. Republic* [2016] eKLR, where the court had to deal with a record in respect of plea which read as follows:

> *"Court: the substance of the charge(s) and every element thereof has been stated by the court to the accused person in a language he understands who being asked whether he admits or denies the truth of the charge replies in Kiswahili: - it is true."*

With respect to that record, the court said –

> *"With respect, we find this disturbing. It seems to us that this is part of a template used by courts at plea taking. That is why it speaks of 'charges(s) when there was a single charge and the rather odd 'in a language he understands,' when it is more normal and logical to simply state the language used. This smacks of a mere going through the motions, a recital of ritual. While that may not much matter when the plea entered is one of not guilty followed by a trial with all its attendant safeguards, it assumes a critical dimension when the plea is one is guilty and leads to conviction.*
>
> *We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specially asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring a translator is present to convey the proceedings to him in the chosen language … We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the Constitution guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare … The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often-intimidating judicial process."*

10. I have gone through the record of the trial court to satisfy myself that the requirements of section 207 had been complied with, and that the test set out in *Adan vs. Republic* (supra) and *Elijah Njihia Wakianda vs. Republic* (supra) had been met. I have not found anything untoward about the process of plea taking in this particular case. The trial court cannot, therefore, be faulted for the way it handled the process. The language used in the reading and explanation of the charge is indicated. The plea taking process was not ambiguous.

11. The appellant complains that there was no proof that the substance claimed to be cannabis was not tested to establish that fact. The appellant pleaded guilty, and the state did not, therefore, have to place before the court evidence that the substance in question was indeed cannabis. The appellant conceded that it was cannabis by pleading guilty to the charges, there was nothing else to prove thereafter.

12. With respect to severity of sentence of three years' imprisonment, I note that the appellant pleaded guilty. The amount of bhang found in his possession was fairly small – 100 grammes whose street value was Kshs. 300.00 only. I doubt whether that amount of bhang would have been for commercial purposes. I believe the penalty of three years' imprisonment would be too stiff in the circumstances.

13. The Judiciary's 'Sentencing Policy Guidelines' urge that where the option of a non-custodial sentence is available the same should be treated as the norm and a custodial sentence the exception, to be awarded only in cases in which the objectives of sentencing cannot be met through a non-custodial sentence. The high rates of recidivism associated with imprisonment should be upmost in the minds of all involved in the sentencing process, and an endeavor should be made towards imposing sentences which are geared towards steering the offender away from crime. The guidelines point out that custodial sentences, in particular, should be avoided as the rehabilitative objective of sentencing is rarely met when offenders serve short sentences in custody. In any event short sentences are disruptive and contribute to reoffending.

14. In *Samuel Mogoyi Nyangau vs. Republic* [2017) eKLR the court considered that the appellant had no previous criminal record and had been treated as a first offender, he had been in remand custody for a while before sentencing and the street value of the bhang he was found in possession was Kshs 350.00 which the courts considered small compared to the ten years' imprisonment handed to him., it was also considered that he had served ten months of the sentence. The court considered that the time served was adequate punishment for the offence charged, and allowed the appeal to the extent of reducing the same to the period served. See also *Gaston January Stephen vs. Republic* [2017] eKLR and *Mzee Athman Sudi vs. Republic* [2019] eKLR. The circumstances of the instant case are similar to those in *Samuel Mogoyi Nyangau vs. Republic* (supra) and *Mzee Athman Sudi vs. Republic* (supra), and so are the antecedents.

15. After taking everything into account, I do hereby disallow the appeal herein on conviction. I shall accordingly uphold the conviction, but I shall reduce the sentence to the time served. The appellant shall be released from prison custody, unless he is otherwise lawfully held. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17th DAY OF January, 2020

W MUSYOKA

JUDGE