REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

CRIMINAL APPEAL NO. 65 OF 2019

DAVIS MUSAU KYALO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal arising from the judgement in Machakos Chief Magistrate's Court by (Hon. Evans Keago S.P.M.) in Machakos Criminal Case No. 460 of 2019 delivered on 12.07.2019)

BETWEEN

REPUBLIC .....PROSECUTOR

-VERSUS-

DAVIS MUSAU KYALO.....ACCUSED

JUDGEMENT

1. This is an appeal from the judgement of Hon. E. Keago, Senior Principal Magistrate in **Criminal Case 460 of 2019** on 12.7.2019. The Appellant was on 12.7.2019 charged with the offence of possession of narcotic drugs contrary to Section 3(1) as read with Section 3(2) of the Narcotic Drugs and Psychotropic Substance Act No. 4 of 1994. The particulars of the charge were that the appellant "on the 11th day of July at Kariobangi area, Machakos Sub County within Machakos County was found being in possession of cannabis to wit 13 ½ sachets with a street value of Kshs 700/- which was not in medical preparation form.

2. The charge was read to the appellant and the record indicates that the stated that the same was true and that a plea of guilty was entered. The facts were read to him and it was indicated that he stated that the facts were correct. He was convicted on his own plea and after mitigation he was sentenced to 12 months' imprisonment.

3. The appellant is dissatisfied with the judgement of the lower court and hence this appeal.

4. Submitting in support of the appeal, the appellant's counsel in citing section 207 of the Criminal Procedure Code submitted that the court did not indicate the language that was used to explain the facts to the appellant hence urged the court to reverse the sentence.

5. In response, the learned counsel for the state conceded to the appeal and argued that the plea was not recorded in line with the procedure in the case of **Adan v R (1973) EA 446**. Counsel pointed out to court that the language that was used to read the facts was not indicated and thus urged the court to interfere with the conviction and sentence passed by the lower court.

6. The issues to be determined are the propriety of the plea of guilty and the orders that the court may grant. According to section 348 of *The Criminal Procedure Code*, no appeal is allowed in the case of any person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the legality of the plea or to the extent or legality of the sentence.

7. The correct procedure of recording a plea of guilty and the steps to be followed by the court is now well established following the decision in ***Adan v. Republic, [1973] EA 446*** where Spry V.P. at page 446 stated it in the following terms:

"When a person is charged, the charge 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 and 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 asserts 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 alleged 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 the accused's reply must of course be recorded."

8. It is incumbent upon a trial court when recording a plea to be meticulous in ensuring first that the charge is read and explained to the accused in the language he or she understands or is familiar with to enable him or her plead to the same properly and in unequivocal manner. In cases where an accused pleads guilty, to record the answer the accused gives as clearly as possible in the exact words used by the accused. Reading the facts of the case is meant to ensure that an accused's plea is taken in unequivocal manner and there should be no doubt as whether the accused has understood the charges facing him in addition to the substance and every element of the charge.

9. The importance of statement of facts is that it enables the trial court to satisfy itself that the plea of guilty was really unequivocal and that the accused understood the facts to which he was pleading guilty and has no defence. A plea is considered unequivocal if the charge is read to an accused person and he pleads guilty and thereafter, the facts are narrated to the accused person and he or she is once more upon being asked to respond to the facts confirms the same to be correct as stated. It is important that both the statement of offence as contained in the charge sheet as well the facts as narrated by the prosecution must each disclose an offence, otherwise the plea is not unequivocal. The facts as read to the accused must disclose the offence. The accused is only to be convicted when facts narrated are in unison with the offence charged (see ***R v Peter Muiruri & Another (2014) eKLR***).

10. With all due respect to the trial magistrate, the facts as read out do not indicate the language that was used. Hence it was not clear that the appellant understood the details of the charges that were facing him. In the result, the facts as narrated by the prosecution not being in the language the appellant understood, the plea was equivocal and cannot sustain the conviction. Therefore the appeal succeeds, the conviction is quashed, sentence set aside and the appellant discharged.

11. Where a conviction is quashed and sentence set aside, the question that always follows is in regard to whether there should be a re-trial. It is a basic principle of constitutional law, that no person may be twice placed in jeopardy that is, put on trial with the possibility of conviction and punishment, for the same criminal offense. In cases where the appellate court forms the opinion that a defect in procedure resulted in a failure of justice, it is empowered to direct a retrial but from the nature of this power, it should be exercised with great care and caution. An order for a retrial should not be made where for example due to the lapse of such a long period of time, it is no longer possible to conduct a fair trial due to loss of evidence, witnesses or such other similar adverse occurrence.

12. The Court of Appeal in the case of **Mwangi vs. Republic [1983] KLR 522 held** as follows;

"…several factors have therefore to be considered. These include:

1. ***A retrial will not be ordered if the conviction was set aside because of insufficient evidence.***
2. ***A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.***
3. ***A retrial should not be ordered where it is likely to cause an injustice to the accused person.***
4. ***A retrial should be ordered where the interest of justice so demand.***

Each case should be decided on its own merits."

13. Because of the infraction on the procedure of narrating the facts to the appellant, I find that a retrial will occasion injustice because the appellant was sentenced to 12 months' imprisonment running from July 2019 when he had been in custody and by the time the matter is sent back to the trial court, he will have served the bulk of his sentence. Further there is no guarantee that the matter will be heard and finalized in the trial court before the bulk of the sentence is served. In this regard the circumstances of the case does not warrant an order for a retrial.

14. In the result it is my finding that the appellant's appeal has merit. The same is allowed. The conviction is hereby quashed and the sentence set aside. The appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at **Machakos** this **13th** of **May, 2020.**

D. K. Kemei

Judge