**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL NO. 47 OF 2018**

**SAMUEL KANYIRI WANJIRA.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

(***Appeal from original conviction and sentence in Nyeri Chief Magistrates Court***

***Criminal Case No. 126 of 2018 (Hon. Nelly Kariuki, Senior Resident Magistrate)***

***on 12 April 2018)***

**JUDGMENT**

The appellant was charged in the magistrates' court with the offence of being in possession of narcotic drugs contrary to section 3 (2) of the Psychotropic Substances Control Act No. 4 of 1994. The particulars were that on the 27th January 2018 at around 18:50 hours at Muthinga Market in Nyeri County, he was found in possession of 34 rolls of cannabis valued at Kshs. 680/=.

He initially pleaded not guilty when he was arraigned on 29 January 2018 and was given a cash bail of Kshs. 20,000/=.

On 12 April 2018, the charge was read afresh to the appellant at his request. This time round he pleaded guilty and consequently a plea of guilty was entered. The statement of facts was read to him; he admitted the facts to be true and even confirmed that the exhibits were found on his person. The learned magistrate then convicted him on his own plea of guilty.

Before he was sentenced, the court heard that the appellant had on two previous occasions been convicted and sentenced of the same offence. At the time of his conviction, he was on probation on one of these convictions.

When he was given an opportunity to mitigate, he told the court that he got into the habit of committing this offence after his previous convictions; he pledged not to repeat the offence.

The court formed the view that since the appellant was a repeat offender, he deserved a deterrence sentence; he was therefore sentenced to five years' imprisonment.

On 9 November 2018, the appellant filed a 'memorandum of appeal' rather than a petition of appeal against a "judgment delivered on 13th April 2018". The purported memorandum is obviously in breach of section 350 (1) of the Criminal Procedure Code, cap. 75 which prescribes a petition as the proper form an appeal from a criminal trial takes; it states as follows:

> ***350. Petition of appeal***
>
> ***(1) An appeal shall be made in the form of a petition in writing presented by the appellant or his advocate, and every petition shall (unless the High Court otherwise directs) be accompanied by a copy of the judgment or order appealed against.***

Notwithstanding the breach of this provision of the law, the appellant raised the following as his grounds of appeal: -

> 1. The plea read to the appellant on 12 April 2018 was an equivocal and it is not clear the appellant understood the language of the court

2. The particulars of the offence or the ingredients of the offence as read to the appellant did not amount to explanation of all the ingredients of the offence as required in law.

3.The language used during the taking of the plea was said to be a language the appellant understood without any indication that he understood the language.

4. The charge did not raise any offence and was defective

5. The sentence meted out was harsh and oppressive and based on purported previous conviction that was not proved before court.

Although the appeal was admitted for hearing, it appears on its face that it was filed way out of time. The appellant was convicted and sentenced on 12 April 2018 and going by the provisions of section 349 of the Criminal Procedure Code, cap. 75 the fourteen days within which the appeal ought to have been filed lapsed on 26 April 2018. That section reads as follows:

***349. Limitation of time of appeal***

***An appeal shall be entered within fourteen days of the date of the order or sentence appealed against:***

***Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor***

There is no evidence that the appellant invoked the proviso to this section and obtained an order to file the appeal outside the limitation period because of the prescribed reasons.

But if the appellant was to be given the benefit of doubt and was assumed to have obtained the necessary leave to file the appeal though, as noted, no order for such leave has been disclosed, would his appeal have a chance?

According to section 348 of the Criminal Procedure Code, no appeal lies against a conviction on an accused's own plea of guilty. That section reads as follows:

***348. No appeal on plea of guilty, nor in petty cases***

***No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.***

In **Kisumu Criminal Appeal No.581 of 2010, Alexander Likoye Malika versus Republic (2015) eKLR** the Court of Appeal made reference to this section and stated as follows:

***"May we by way of commentary only remind that there is ordinarily no appeal against conviction resulting from a plea of guilty- see section 348 of the Criminal Procedure Code which only permits an appeal regarding legality of sentence. A court may only interfere with a situation where an accused has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused to which he has pleaded disclosed no offence known to law. Also where upon admitted facts the appellant could not in law have been convicted of the offence charged…***

***"…the record then shows that the charge was read out in English language and translated to the Kiswahili language and the appellant admitted the charge and the facts when they were read out in some detail by the court prosecutor.***

***"Although the record does not indicate whether English language in the first appellate court was translated to the appellant we noted that the appellant addressed us in Kiswahili language when the appeal came for hearing before us."***

Thus, everything else being equal, no appeal lies against a conviction arising out of an accused's own plea of guilty. However, if the plea is tainted in any of the ways to which the Court of Appeal made reference, a conviction on such a plea would not stand and the accused convicted on its basis would be entitled to feel aggrieved.

Apart from the grounds itemised in his "memorandum of appeal" all that the appellant said when his appeal came up for hearing was that he did not understand the proceedings in the magistrates' court because they were conducted in a language he did not understand. He argued further that although he pleaded guilty, he did not know that the sentence was that harsh. He concluded his arguments by what, in my humble view, would have been mitigation before the trial court; he urged that he will not repeat the offence again and that he was sick. He also urged the court to review the sentence taking into consideration the time he had spent in prison.

So, there is no doubt that the appellant pleaded guilty but he was out to convince this honourable court that the plea was tainted in at least one way; he did not understand the language which the court adopted.

The record, however, proves the appellant wrong. It shows that long before he took the plea of guilty, he had actively participated in the proceedings which were conducted in English but translated or interpreted in Swahili.

In particular, on 29 January, 2018 when the appellant was first arraigned, he pleaded not guilty to the charge. Again on 8 February 2018, when the matter came up for mention, the language used was English interpreted in Swahili. When the issue of the supply of statements arose on this date, the appellant is recorded to have said as follows:

> ***"I have received the statements"***

Similarly, on 19 February 2018 when the matter came up for hearing but could not proceed because the government analyst report was not ready; the appellant is recorded to have raised no objection to the prosecution application for adjournment.

The same procedure was adopted on 4 February 2018; this time round, the appellant was not ready to proceed and the hearing was adjourned at his instance; the record reflects that he stated as follows:

> ***"Accused: I was not ready because I had not been supplied with the government analyst request (sic)."***

The court must have been referring to the analyst report rather than "an analyst request".

And on 12 April 2018 when the matter came up for hearing the accused requested the charge to be read afresh; the record of that particular date reads as follows:

> ***"12/4/18***
>
> ***Before Hon. N. Kariuki-SRM***
>
> ***State Counsel-Kitoto***
>
> ***Court Assistant-Mercy***
>
> ***Accused present***
>
> ***Intter-Swahili/English***
>
> ***Prosecutor-I have one witness.***
>
> ***Accused- I pray to have the charge read afresh***
>
> ***Hon. N. Kariuki-SRM***
>
> ***Court-charge read afresh to the accused in Swahili language which he understands best.***
>
> ***He pleads;***
>
> ***Accused-It's not true***
>
> ***Hon. N. Kariuki-SRM***
>
> ***Court Plea of Guilty entered"***

The learned counsel for the state then proceeded to read the statement of facts to which the accused responded as follows:

> ***"Accused-the facts are true. The exhibits were what I was found with".***

There's nothing from this record that suggests that the appellant did not understand the language of the proceedings. Prior to the taking of the impugned plea, he had been in court on several occasions without raising any issue on the language used; as a matter of fact, he had actively participated in those proceedings in a particular language.

It follows that it cannot be that the appellant only understood the language in which the proceedings were conducted when he initially pleaded not guilty to the charge and proceeded to participate in the trial in the same language in which he took this plea but for some reason, could not understand that very language on 12 April 2018 when he entered the plea of guilty more so after he himself requested the charge to be read to him afresh.

It must be noted that on the material date, the state was ready to proceed with its case when the appellant intervened and requested the charge

be read afresh; it stands to reason and logic that, considering that the state was prepared to proceed with its case, the appellant requested for the charge to be read afresh only because he wanted to change his plea. He eventually unequivocally changed it.

The proceedings of the material date and, in particular, the plea taken, cannot therefore be vitiated on the basis of a language barrier. Neither is the plea tainted merely because the appellant did not think the sentence meted out would, in his view, not be lenient.

In my humble view, the learned magistrate largely complied with the material aspects of section 207 (1) and (2) of the Criminal Procedure Code in taking a plea that the appellant took; that section reads as follows:

> ***207. Accused to be called upon to plead***
>
> ***(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 a***
>
> ***plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the 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 any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.***
>
> ***(3) ...***
>
> ***(4) …***
>
> ***(5) …***

The charge was read to the appellant and his answer to that charge was that “it is true”. When the facts were read to him, he not only admitted the facts but he went further to confirm that he was found in possession of the exhibits, the basis upon which he was charged.

In its entirety, the record shows that the appellant was not prejudiced in any way. He not only understood the language of the proceedings but his answers to the charge and the facts were unequivocal.

I am therefore inclined to conclude that there is no merit in the appellant’s appeal; it is hereby dismissed.

**Signed, dated and delivered on 2nd October 2020**

**Ngaah Jairus**

**JUDGE**