REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 40 OF 2018

EMMANUEL CHACHA..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(An appeal from the original conviction and sentence of Hon. E. Kagoni, SRM in Mombasa Chief Magistrate's Criminal Case No. 831 of 2018 delivered on 16th May, 2018)

JUDGMENT

1. The appellant, Emmanuel Chacha, was on 15th May, 2018 charged with the offence of trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic drugs and Psychotropic Substances Control Act. No. 4 of 1994.The particulars of the charge were that on the 14th day of May, 2018 at Ferry area within Likoni Sub-County in Mombasa County, he was found trafficking in 155 big rolls of cannabis by conveying of (sic) street value Kshs. 23,250/= in contravention of the said Act.

2. The appellant pleaded guilty to the charge and was sentenced to life imprisonment. He filed a petition and grounds of appeal on 24th May, 2018. His Advocate filed a petition of appeal on 25th May, 2018. On 30th January, 2019, the appellant filed amended grounds of appeal, with leave of the court. He raised the following issues:-

(i) That the Learned Trial Magistrate erred in law and fact by convicting him to life imprisonment without considering that the plea taken by him was equivocal;

(ii) That the Learned Trial Magistrate erred in law and fact by convicting and sentencing him to life imprisonment without considering that the sentence imposed against him was too harsh yet he pleaded guilty thereby saving the court's time;

(iii) That the Learned Trial Magistrate erred in law and fact by sentencing him to life imprisonment without considering that there were critical witnesses whose evidence was relied upon to form the basis of his conviction yet they were never called to testify in court;

(iv) That the Learned Trial Magistrate erred in law by sentencing him to life imprisonment without considering that the admission of the Government Chemist's report was not in conformity with Section 33 of the Evidence Act;

(v) That the Learned Trial Magistrate erred in law and fact by sentencing him to life imprisonment without writing a Judgment to confirm if he was really convicted as per Section 169(2) of the Criminal Procedure Code; and

(vi) That the Learned Trial Magistrate erred in law and in fact by sentencing him to life imprisonment without considering that the exhibits relied upon by the prosecution were never produced in court to confirm if they really existed.

3. In his written submissions, the appellant submitted that whereas he was aware of the provisions of Section 348 of the Criminal Procedure Code, in this case, the provisions of Article 50(2)(b) of the Constitution of Kenya with regard to a fair trial were not adhered to. He amplified the foregoing by stating that the language in which the plea was taken is not evident from the record or if the appellant understood the charge and made an informed decision to plead to the same. He relied on the case of **Adan vs Republic** [1973] EA 445 to reinforce his argument that his plea was equivocal.

4. The appellant also submitted that the sentence of life imprisonment was harsh and excessive in the circumstances of the case. He claimed that the Trial Magistrate misdirected himself by thinking that life imprisonment was a mandatory sentence for the offence of trafficking in cannabis. He relied on the case of **Opoya vs Uganda** [1967] EA 752 at 755.

5. The appellant also submitted that witnesses were not called in support of the prosecution's case, namely, a witness who adversely mentioned him and the Government Chemist thus contravening the provisions of Sections 33 and 77 of the Evidence Act.

6. The appellant also said that exhibits referred to in the proceedings before the Trial Court were not produced. He further contended that there was no Judgment that was written in accordance with the provisions of Section 169 (2) of the Criminal Procedure Code.

7. Ms Ogweno, Principal Prosecution Counsel, filed written submissions on 5th February, 2019. She contended that the language of the court was not indicated in the proceedings of the lower court.

8. She submitted that there was no conviction because after the facts were read out to the appellant, the Trial Magistrate recorded **"accused convicted on PGE"**. She cited the case of **Julieta Luvasia and Another vs Republic** [2017] eKLR where the lower court had written **"PGE"** in its proceedings. The High Court in the said case held that the plea therein could be based on assumptions. She also relied on the case of **Simon Gitau Kinene vs Republic** [2016] eKLR where the High Court held that a guilty plea should not be left to any deductions or conjecture. It should be clear, unambiguous and unequivocal, especially when an accused person faces a serious charge capable of attracting a custodial sentence.

9. Ms Ogweno therefore conceded that the plea before the lower court was not clear and unequivocal as the procedure laid down in Section 207 of the Criminal Procedure Code was not complied with. She prayed for a retrial to be done in this case under the provisions of Section 354(3)(a) (i) and (3)(c) of the Criminal Procedure Code.

10. In response to the respondent's written submissions, the appellant filed further submissions on 18th February, 2019 stating that it would be unfair to subject him to a further trial as he had served sentence for almost 1 year as at the time his appeal was being heard. In his view, if a retrial was ordered it would take long and it would result in infringement of his rights to a speedy trial under Article 50(2)(e) of the Constitution of Kenya.

11. The appellant further submitted that the respondent knows the appellant's defence and weakness and would therefore fill the gaps.

ANALYSIS AND DETERMINATION

The issue for determination is if the appellant's plea was clear and unequivocal.

12. Section 207 of the Criminal Procedure Code provides the following Procedure for plea taking:-

> ***"(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) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.***
>
> ***(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.***
>
> ***(5) If the accused pleads-***
>
> ***(a) That he has been previously convicted or acquitted on the same facts of the same offence; or***
>
> ***(b) That he has obtained the President's pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge.***

13. The said procedure was well articulated in the case of **Adan vs Republic** [1973] EA 445 at 446. Subsequent thereto, the Court of Appeal in **Kariuki vs Republic** [1984] eKLR also outlined the manner in which a plea of guilty should be recorded as follows:-

> ***(i) The Trial Magistrate or Judge must read and explain to the accused the charge and all the ingredients of the offence, in the language of the accused or a language the accused understands;***
>
> ***(ii) He should then record the plea in the accused person's own words and if they are an admission, a plea of "guilty" should be entered;***
>
> ***(iii) The prosecution must then, immediately, state the facts and the accused person should be given an opportunity to dispute, to explain or to add any relevant facts;***

(iv) If the accused does not agree to the facts or raises any question to the facts, his answers should be recorded and a change of plea entered. If there is no change of plea, a conviction should be recorded alongside a statement of facts relevant as well as the reply of the accused".

14. In this case, although it is contended that the language in which the charge was read out to the appellant was not indicted, a perusal of the handwritten proceedings disclose that the charge was read out to the appellant in Kiswahili language which he understood and he responded by saying that it was true. The court then proceeded to record **"P.O.G entered"**. That happened on 15th May, 2018. On 16th May, 2018 the facts were read out to the appellant at length, he responded by stating that the facts were true. The Trial Magistrate proceeded to record **"Accused convicted on own P.O.G".** The record further reads:

"**PC: No records"**

"A.I.M: It's true I had the cannabis."

15. This court would have found the plea that was taken before the lower court as having been clear and unequivocal, but the manner in which the Hon. Magistrate recorded part of the proceedings invalidates the entire process. I take judicial notice of the common practice in which some Hon. Magistrates record some parts of the lower court proceedings in an abbreviated form. The said practice has however been frowned upon by appellate courts. It is common ground that abbreviations such as **P.O.G., P.O.G.E, A.I.M, and PC** are used time and again in lower court proceedings. The said abbreviations however have not acquired national acceptance and usage in the Kenyan judicial system. The record of a Trial Court must at all times be clear and understandable to any third party who peruses the proceedings. In the present scenario, this court can make assumptions as to what the abbreviations stand for but the same cannot be said of the appellant herein or many other persons who may peruse the said proceedings.

16. It must also not be forgotten that superior court Judges can be recruited from any commonwealth jurisdiction or any other jurisdiction approved by the Judicial Service Commission (JSC). It therefore behoves a Trial Court to keep a record of proceedings that is comprehensible to all who may be called upon to read such a record. It is a common rule of drafting that if an author intends to use abbreviations, the words to be abbreviated must be written in full and then the abbreviated form should be written enclosed in brackets, to alert a reader of the meaning of the abbreviated form. In the alternative, for a lengthy document, a list of abbreviations would pass muster.

17. With regard to the use of abbreviations in court proceedings, in **Julieta Luvasia and Another vs Republic** [2017] eKLR, Njagi J stated as follows:

"However instead of the trial Magistrate entering a "plea of guilty" he entered "PGE". It is not known what these abbreviations mean but I guess that they meant "plea of guilty entered". However, a plea cannot be based on assumptions".

18. Similarly in the case of **Simon Gitau Kinene vs Republic** [2016] eKLR, Ngugi J stated thus:-

" ..... I do not think that a guilty plea should be left to any deductions or conjecture. It should be clear, unambiguous and unequivocal. It shall be even more so when the accused faces a serious charge capable of attracting a custodial sentence."

19. I am persuaded by the above two decisions and I have no reason to depart from the findings thereof. I do concur with Ms Ogweno on some aspects of her submissions and in particular, as to the manner in which some court proceedings were recorded and that I should make an order for retrial. It is my finding that the Trial Magistrate failed to comply with the provisions of Section 207 of the Criminal Procedure Code and by so doing, the plea taken before him was rendered nugatory.

20. In **Julius Matheka and 2 Others vs Republic** [2005] eKLR, the issue in contention was with regard to abbreviation of the parties who were present in court by the Trial Court recording the words **"coram as before"** on 3 different dates. The Court of Appeal had the following to state:-

"This court has nonetheless had occasion to stress, and it bears repeating, the need to keep records of proceedings and has, in particular, deprecated the use of such abbreviations as are complained about in this matter........"

21. The appellant raised other issues of witnesses not having been called. The foregoing is not a matter to dwell on as in a plea of guilty, there is no necessity for the Prosecution Counsel to call witnesses to testify. A narration of the facts and production of exhibits be they documentary or otherwise is sufficient. There is also no requirement for writing of a Judgment once an accused person is convicted on his own plea of guilty. All that is needed is for the accused person to offer his mitigation, for the prosecutor to inform the court if an accused has previous convictions and for the court to pronounce the sentence.

22. The appellant urged this court not to make an order for retrial. He was convicted on 16th May, 2018. As at the time of delivering this Judgment, he will have served sentence for 1 year and 3 weeks in prison. The appellant was allegedly found with 155 big rolls of cannabis. That is not a small amount of narcotic drugs.

23. In the case of **Wahuni Ngugi vs Republic** [2012] eKLR, the Court of Appeal had the following to say on the issue of retrial:-

"The law as regards what the court should consider on whether or not to order retrial is now well settled. In the case of <u>Ahmed Samar vs Republic</u> [1964] EA 483, the predecessor of this court stated as concerns the issue of retrial in criminal cases as follows:-

"It is true where a conviction is vitiated by a gap in the evidence or other defect of which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.........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 must depend on the particular facts and circumstances of that case but an order for 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."

24. The appellant in this case cannot be said to have served a substantial part of his sentence to the extent that an order for retrial would occasion an injustice to him. He was charged with a serious offence of trafficking in 155 rolls of cannabis. The right to a fair trial cuts both ways, on the side of the prosecution and the accused person.

25. The anomaly brought about by the manner in which the plea of guilty and conviction on a plea of guilty were recorded, were occasioned by the Trial Court and not by the prosecution. The circumstances and justice of this case demand that this court makes an order for retrial. The final orders are that:-

(i) I hereby quash the conviction herein against the appellant for the offence of trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act. No. 4 of 1994;

(ii) I set aside the sentence of life imprisonment;

(iii) I hereby make an order for retrial of the appellant before any other court of competent jurisdiction in Mombasa Chief Magistrate's Court, save for Hon. E. Kagoni, Principal Magistrate;

(iv) A copy of this Judgment shall be supplied to the said Magistrate;

(v) The Deputy Registrar is directed to remit the lower court file back to the Chief Magistrate's Court, Mombasa;

(vi) The appellant shall be produced before the Chief Magistrate's Court, Mombasa on 12th June, 2019 for plea taking;

(vii) The appellant shall be detained at Shimo-la-Tewa prison pending plea taking.

It is so ordered.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this 7**th** day of **June, 2019**.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Ogweno, Prosecution Counsel for the DPP

Mr. Oliver Musundi – Court Assistant