REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 23 OF 2016

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

SOCRET AMURA KIDIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon B Khapoya, Senior Resident Magistrate, on one count of possession of narcotic drug contrary to section 3(2)(a) of the Narcotic Drugs and Psychotropic Substances Control Act, No. 4 of 2004, and was accordingly sentenced to serve ten (10) years imprisonment. The particulars of the offence stated that the appellant on the 9th February 2016 at Kakamega town in Kakamega Central District within Kakamega County he was found in possession of a narcotic drug namely cannabis (bhang) to wit 31 rolls with a street value of Kshs. 620.00.

2. The appellant pleaded guilty to the charge before the trial court on 10th February 2016, a plea of guilty was entered and he was sentenced, on 25th February 2016, to serve the terms stated in paragraph 1 of this judgment.

3. He was dissatisfied with the conviction and sentence the appellant appealed to this court and raised several grounds of appeal. He avers that he pleaded guilty upon being advised by the police to go and plead guilty so that he could be released only to be sentenced. He further avers that the court did not forewarn him of consequences of pleading guilty to the charge he faced. He also pleads that the sentence imposed was harsh in the circumstances.

4. Being the first appellate court, I have re-evaluated the record of the trial court as required of me 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 7th March, 2019. The appellant relied on his written submissions that had been filed in court on 15th November 2018. Mr. Ng'etich, Senior Prosecution Counsel, made oral submissions. Neither of the two cited any statutory provisions nor any case law touching on the matters in controversy. The appellant in his written submissions submits that he was ill-advised by the police to go and plea not guilty. He further submits that the trial court over-relied on intelligence reports and on the fact that he was found with a large quantity of the drug which it did not believe could be for personal use. He states that the trial court did not inform him of the implications of pleading guilty, neither had he been furnished with the prosecution evidence before the plea was taken. Mr. Ng'etich made oral submissions. He stated that the appellant had been pleaded guilty after the charges had been read to ohimand he had been given more than 12 hours to reconsider his plea. He also submitted that the sentence imposed was legal and proper.

6. 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."*

7. 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 the accused's reply must, of course, be recorded."*

8. 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."*

9. 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. I note though that the appellant blames the police and the court. The language used in the reading and explanation of the charge is indicated. The plea taking process was not ambiguous. The only thing that was not met, at least according to the record, is that the court did not go the extra mile, to warn the appellant of the consequences of pleading guilty to the charges given the severity of the sentence.

11. The other issue relates to what he calls violation of his rights to a fair trial in the sense that he was not furnished with the prosecution's case in advance. He pleads that Article 49 of the Constitution was violated.

12. Article 49 of the Constitution provides as follows:

> *"49. (1) An arrested person has the right—*
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> *(a) to be informed promptly, in language that the person understands, of—*
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> *(i) the reason for the arrest;*
>
> *(ii) the right to remain silent; and*
>
> *(iii) the consequences of not remaining silent;*
>
> *(b) to remain silent;*
>
> *(c) to communicate with an advocate, and other persons whose assistance is necessary;*
>
> *(d) not to be compelled to make any confession or admission that could be used in evidence against the person;*
>
> *(e) to be held separately from persons who are serving a sentence;*

(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

(g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

(2) A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months."

13. My understanding is that Article 49 of the Constitution largely addresses the rights of a person who has been arrested. It has less to do with the fair trial rights. It has more to do with the rights that the police or any other arresting authority has to accord a person that they have arrested. There is nothing in Article 49 which requires that an accused person be furnished with evidence. I have no basis therefore for me to hold that that provision was violated with respect to failure to be furnished with the prosecution's evidence.

14. Perhaps the appellant had Article 50(2)(j) of the Constitution, in mind which provides that

"50. (1) …

(2) Every accused person has the right to a fair trial, which includes the right—

(a) …

(b) …

(c) …

(d) …

(e) …

(f) …

(g) …

(h) …

(i) …

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) …

(l) …"

15. Article 50(2)(j) has been interpreted in a number of decisions to mean that an accused person is entitled to pretrial disclosure of the evidence that the prosecution proposes to rely on at the trial. The Court of Appeal dealt exhaustively with the effect of Article 50(2)(j) in *Simon Githaka Malombe vs. Republic* [2015] eKLR, where the court held that failure to provide witness statements to the appellant violated his fair trial rights. The court underlined the fact that it was the duty of the state to make Article 50(2)(j) work at its own expense, and lack of funds on the part of the appellant to obtain copies of the prosecution evidence should not be an excuse not to avail the statements to the appellant. The court emphasized the need to avail the statements so as to facilitate the appellant's participation in the proceedings, particularly in cases where the appellant is unrepresented. A conviction where witness statements had not been provided was quashed. The Court of Appeal in *Simon Ndichu Kahoro vs. Republic* [2016] eKLR appears to depart from the position in *Simon Githaka Malombe vs. Republic* (supra), by holding that the failure to give the accused statements was not, for that reason alone, fatal to the prosecution's case. The court stated that the failure amounted to a violation alright, but the automatic consequence of the violation should not be acquittal of an accused person, each case ought to be considered in the light of its own special circumstances as consequences of breach of fair trial rights depended on all the surrounding circumstances of a case. See also *Julius Rotich vs. Republic* [2019] eKLR.

16. I have carefully perused through several other determinations of the High Court and the Court of Appeal on Article 50(2)(j). The

emphasis by both courts is that the same is essential for the purpose of affording the accused a right to fair trial, and particularly for affording him an opportunity to prepare his defence. The High Court in *Joseph Ndungu Kagiri vs. Republic* [2016] eKLR said:

> *"Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time in cross-examination and in his defence. This provision must then be read together with Sub-Article 2(c) which provides that every accused person has a right to a fair trial which includes the right to have adequate time and facility to prepare a defence."*

17. The Court went on to state:

> *"The latter cannot be met if the accused is not furnished with the evidence the prosecution intends to rely on ahead of the trial. If this goal is not met, it means that the court shall be misinterpreting the letter and spirit of the supreme law of the land and thereby belittling the Constitution and the very purpose for which it was intended. Courts must therefore be very keen in ensuring that this provision is adequately given regard to so as to ensure that the rights of an accused person are not violated … the right to a fair trial is not one of those rights that can be limited under Article 24 of the Constitution. The cardinal principle in criminal justice is that an accused person is presumed innocent until proven guilty."*

18. I have not managed to come across a decision of either the High Court or Court of Appeal which has considered whether an accused person is entitled to pretrial disclosure before taking the plea for the focus has largely been on the pretrial disclosure for the purpose of trial. My understanding of the appellant's case herein is that he was entitled to pretrial disclosure in advance of taking plea so that he could inform himself of the case against him and to afford him a chance to decide on how to plead to the charges.

19. Whether the constitutional right to pretrial disclosure extends to include disclosure before plea-taking would of necessity take us to the question when a criminal trial commences under Kenyan law. That issue was adverted to by the High Court in *Kimani vs. Kahara* [1985] KLR 79, where, in the context of a private prosecution, it was remarked:

> *"In the context of section 88 (of the Criminal Procedure Code), however, trying we think must include taking a plea. It is with think clear that the trial of the case cannot start before the accused person is before the court. As soon as an accused person is before him in court for the purpose of pleading to a formal charge no magistrate can properly be described as "trying a case." It is at this stage that an application may be made for permission to prosecute. if in the absence of the accused permission is purportedly granted to a private prosecutor to conduct a prosecution the power to grant permission cannot be taken to been exercised by a magistrate trying the case."*

20. The High Court in *Otieno Clifford Richard vs. Republic* [2006] eKLR interpreted the court in *Kimani vs. Kahara* (supra) to be saying that:

> *"We understand the judges in the Kahara case to be saying that in the context of section 88 of the Criminal Procedure Code "trying a case" includes taking a plea and that no criminal trial can start before the accused is before the court to plead to the charge. That interpretation is quite correct … We have already found that the "trial of the accused person" had not begun because the accused person was not before the court. However, the proceedings had commenced. The proceedings commenced the moment the complaint was filed in court in writing … However, at that stage the "trial of the accused person" cannot be regarded as having begun."*
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> See also *Absolom Giteru Kibe vs. Republic* [2014] eKLR.

21. Although the authorities that I have cited above relate commencement of private prosecutions, I take the view that the general principle is the same. Criminal proceedings generally commence once a complaint or charge sheet is presented at the criminal registry, but the trial itself does not start until the accused is presented before the magistrate or judge for the purpose of taking plea. The trial thus starts at the taking of the plea. Pretrial disclosure therefore would include disclosure before the accused is arraigned. I am persuaded that Article 50(2)(j) does apply to the case of a suspect who is presented in court in readiness to take plea.

22. Pretrial disclosure, including pre-plea disclosure, would obviate the challenge of persons who have been convicted on their own plea of guilty moving the appellate court on grounds such as those advanced in this appeal, that they had not been forewarned of the consequences of the charges that faced then before they took the plea and that their rights to advance access to the prosecution's case was violated by their not being furnished with that evidence before they took plea. As I stated here above, such disclosure would assist a suspect to decide on the nature of plea to make at arraignment. It is part of the larger effort to ensure that persons who are brought before the courts accused of committing crimes get fair trial, which includes getting advance disclosure of the prosecution's case at all the stages of the trial so that they can deal with the allegations they face at any of the stages of the trial. I dare say that that disclosure is more critical at the very initial stages of the trial, for it is at those points that critical decisions have to be made.

23. My conclusion, therefore, is that there would be failure to comply with Article 50(2)(j) of the Constitution if an accused person is not furnished with the prosecution's evidence prior to the suspect being called upon to take plea.

24. The record does not indicate whether or not the appellant herein had been furnished with the evidence that the prosecution proposed to rely on before he was called upon to take plea. The practice that has taken root in this country is that such disclosure is only made after the accused person has pleaded not guilty. That would suggest that in cases where a person pleads guilty there would be no necessity for such disclosure. There is, however, a case for pretrial disclosure before the accused is called upon to take plea for the reasons that I have given above. An accused person would generally have a blank mind regarding the cases he faces before he takes plea. He only begins to get a clear picture when the charge documents and the statements are availed to him after he has taken plea. It would be more prudent and useful to have

the disclosure happen before plea-taking so that the accused person can assess his position and face the plea-taking session from a point of information and knowledge.

25. I am ready to give the appellant the benefit of doubt, and be persuaded that the omission to give him advance access to the evidence that the prosecution had against him did not grant him adequate facilities for him to prepare himself for trial, including preparing himself for taking plea. Taken together with the failure to be forewarned as was required in *Elijah Njihia Wakianda vs. Republic* (supra) it means that the appellant approached the plea-taking event unprepared and unsure of what was expected of him. He was, therefore, not afforded a fair trial. The appeal should therefore succeed on that score.

26. Without prejudice to the foregoing, on the matter of severity of sentence of ten years' imprisonment, I note that the appellant pleaded guilty. The amount of bhang found in his possession was fairly small, contrary to what the trial court concluded. He had 31 rolls whose market value was Kshs. 620.00 only. I doubt whether that number would have been for commercial purposes. When the facts were read on 11th February 2016 it was stated that the intelligence the police had at the time of arrest was that he was suspected of smoking the drug and not selling the same. I believe a penalty of ten years' imprisonment would be too stiff in the circumstances.

27. In assessing the sentence that the trial court ought to have imposed in the circumstances I am guided by the principles of sentencing that were stated in *Dalmas Omboko Ongaro vs. Republic* [2016] eKLR, in the following words:

> *"The principles of sentencing were summarized at page 86 paragraph B of the Judiciary Bench Book for Magistrates in Criminal Proceedings (published by the Kenyan Judiciary in 2004) as follows:*
>
> > *"In determining what is the appropriate sentence to mete out, the Court has to consider such factors as the nature of the offence, the attitude of the accused person, prevalence of the type of offence, the seriousness of the offence, the circumstances under which the offence was committed, the effect of the sentence on the accused person, the fact that the maximum sentence is intended for the worst offenders of the class for which the punishment is provided, etc. … The court may consider the value of the subject matter of the charge … and whether there has been restitution …"*
>
> *The antecedents of an accused person also come into play when the Court is considering the appropriate the sentence. If an accused person is a first offender the sentence ought to reflect this fact as the aim of the Court is to encourage reform and discourage recidivism."*

28. Then there is the Judiciary's 'Sentencing Policy Guidelines' which 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 that are geared towards steering the offender away from crime.

29. 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 of was Kshs 350.00 which the court 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. The appellant ought to have been considered for non-custodial sentence.

30. After taking everything into account, I do hereby allow the appeal herein for the reasons given above. I shall accordingly quash the conviction and set aside the sentence imposed by the trial court. 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 14TH DAY OF JUNE 2019

W MUSYOKA

JUDGE