REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

MISC. CR. (APPLICATION) APPEAL NO.5 OF 2018

Consolidated with Misc. Criminal Appeal (APPLICATION) No.4 of 2018

(Being Appeals from the decision of the Hon. B. Limo –(RM) in Kericho CMCr. 2946 of 2017 delivered on 24th November 2017)

ZENNETH KIPLANGAT NGETICH.....1ST APPELLANT

JOSPHAT KIBET BII.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The two appellants Zenneth Kiplangat Ngetich and Josephat Kibet Bii were charged in the magistrate's court at Kericho in CM Criminal Case No.2946 of 2017 with 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 which were that on 8th November 2017 at about 9.00 p.m. at Ndonyomare Village Soin Location within Kericho County jointly trafficked by storing in their house a narcotic drug namely cannabis sativa (bhang) to wit 23 pieces of sticks with a street value of Kshs.4,600/= in contravention of the said Act.

2. They were recorded as having pleaded guilty to the charge, and were convicted and each sentenced to a fine of Kshs.1 million, in addition to imprisonment for life, after a pretence report was filed and considered by the trial court.

3. They have now came to this court on appeal on the grounds that the trial court did not warn then of the serious consequences of pleading guilty, and that the trial court did not inform them of their rights under Article 50 of the Constitution with regard to representation by legal counsel, and that it was the police who unduly influenced them to admit the offence.

4. The appellants filed written submission in support of their appeals. The learned Prosecuting Counsel Ms. Keli opposed the appeals and stated that the appellants were properly convicted on their own plea of guilty, that the trial court did not have a duty to inform them about the consequences of pleading guilty, that the sentence imposed was within the law, and that there was no obligation on the State to provide legal representation to the appellants.

5. This is an appeal both against conviction and sentence, though the appellants were recorded as having pleaded guilty. As a first appellate court, I have an obligation to re-consider all the record, and evidence and come to my own independent conclusions – see **Okeno -vs- Republic [1972] EA 32.**

6. With regard to issue of the trial court informing the appellants about the serious consequences of pleading guilty, there is no constitutional or statutory requirement that trial courts to do so. However, the Court of Appeal has stated that trial courts should inform accused persons about the consequences of pleading guilty in cases where the sentences are severe. The trial court did not do so, which was an error. However, sentencing is a discretion of a trial court, and mere failure to inform an accused person about the severity of sentence before pleading guilty is neither fatal to a conviction nor to the sentence imposed. It may however be a sufficient reason for review of sentence. I will come back to this issue later.

7. With regard to legal representation under Article 50 of the Constitution, the court has no obligation to provide legal representation to an accused. It is the obligation of the State or the accused to do so. Therefore, the court was not in error by not informing the appellants of their rights to legal representation as they should have been aware of their right and if they wanted the indulgence of the court, they should have raised the issue, which they did not do.

8. With regard to the plea of guilty, I have perused the proceedings of the trial court. In my view, the trial court was correct in recording a plea of guilty and convicting the appellants, as the court substantially complied with the requirements laid down in the case of **Adan -vs-**

Republic [1973] EA 445 for taking a plea of guilty, and this court does not thus fault the magistrate.

9. With regard to the sentence imposed, indeed the offence of trafficking in narcotic drugs under section 4 of the Act is a serious offence, especially where the trafficking targets the youth as the market. However, in my view, the fine of Kshs.1 million and imprisonment for life is too harsh in the circumstances of this case as captured in the facts given by the prosecutor and the pre-sentencing report, as the only adverse thing that the Probation Officer said in the pre-sentencing report was that the intended market for trafficking of the drugs were the youth in the area and that the community and local administration felt that an exemplary sentence be imposed as a deterrence to others.

10. In my view, the learned trial magistrate misconstrued the provisions of section 4 (a) of the Act and thought that the fine of Kshs.1 million and life imprisonment was a mandatory sentence, while it was only the maximum. I will thus set aside the sentence imposed and order that each of the appellants will instead pay a fine of Kshs.300,000/- or in default serve 5 years imprisonment.

11. To conclude therefore, the appeal succeeds in part. The conviction of the trial court is hereby upheld. The sentence against the two appellants is set aside. Each of the appellants will instead pay a fine of Kshs.300,000/- or in default serve five (5) years imprisonment from the date on which they were sentenced by the trial court.

Dated and delivered at Kericho this 16th day of October 2019.

George Dulu

JUDGE