REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 172 OF 2015

JEDIEL GITUMA ……………………………………………………. APPELLANT

versus

REPUBLIC…………….……………………...........…………… RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. W. J. GICHIMU - PRINCIPAL MAGISTRATE dated 13th May, 2015 in Nanyuki Chief Magistrate's Court Criminal Case No. 408 of 2015)

JUDGMENT

1. **JEDIEL GITUMA** (the appellant) pleaded guilty before the Nanyuki Chief Magistrate's court to the **charge of the unlawful possession of narcotic drug contrary to section 3(2)(a) as read with section 2(a) of the Narcotic Drugs and Psychotropic substances (Control) Act,** herein after referred to as Narcotic Act. The appellant sentenced to serve 3 years imprisonment. He has filed this appeal against that sentence.

2. On the appellant pleading guilty to the offence prosecution stated the facts of the case. The facts were that on 27th April 2015 the appellant, together with another person were arrested by police in a room while preparing bhang (narcotic drug) for sale. The police recovered 230 gm of bhang, roller packet, a pair of scissors, and a nylon blue sack. The value of the bhang was kshs.2,600. The prosecution on concluding the facts stated:

> **"These are the exhibits P Exhibit 1".**

The appellant confirmed that the facts were correct and the trial court proceeded to record his plea of guilty. As stated before appellant was sentence to serve 3 years in imprisonment.

3. Before considering the submissions of the appellant I will first examine whether indeed the appellant's plea of guilt was unequivocal.

4. Firstly it is important to note that the trial court did not record what was exhibited by the prosecution when the facts of the case were narrated. The court simply noted that the prosecution had produced "P exhibit 1." What that exhibit represented was not recorded. The court's index which ordinarily records the exhibit produced was not in the trial court's file while I considered this appeal. The question that arises for this court consideration is, was what was exhibited the narcotic drug and the paraphernalia recovered in the room that appellant was arrested, or something else. Indeed this court is left in doubt whether the narcotic drug allegedly recovered from the appellant was presented to the trial court, at all. The doubt this court entertains as a result of that failure to clarify the exhibit must be given to the benefit

of the appellant. It will lead this court to find that the appellant's plea of guilty was equivocal.

5. Secondly the prosecution, as far as I can tell from the trial court's proceedings, failed to produce a certificate as required under section 74A of the Narcotic Act. This court in the case **NANYUKI HIGH COURT CRIMINAL APPEAL NO. 11 OF 2016 PETER NJOROGE MUNGA –V- REPUBLIC** has had the opportunity to consider the consequences of the prosecution's failure to comply with **section 74 A** of the **Narcotic Act.** This court stated in that case thus:-

> ***"On the 3rd count the prosecution's facts of the case were that when the police went to the appellant's home, and arrested him, on carrying out a search of his house they recovered 20 grams of Cannabis Sativa. Appellant confirmed those facts and was convicted on his plea of guilt. In this court's view that plea was not unequivocal because section 74A of the Narcotic Act was not complied with. This is the section that sets out the procedure that has to be followed on seizure of narcotic drug. That section provides that on seizure of a narcotic drug the police, and a medical services person in the presence of the person to be charged and his advocate, if any, weigh the seized narcotic drug and take one or more samples for the purpose of analyzing and identifying the same. On carrying out analysis an analysis certificate shall be issued. The production before the trial court of the samples of the drug and analyst certificate "shall be conclusive proof as to the nature and quantity of the narcotic drug" substance concerned.***
>
> ***9. Although the prosecution produced before the trial court 10 grams of plant "bhang" there was no certificate produced by the prosecution as required under Section 74A. Such a certificate would have proved that the substance recovered from the appellant was a narcotic drug. It is for that reason that the conviction and sentence on the 3rd count will be quashed and set aside respectively.***
>
> ***10. The Court of Appeal in the case MOSES BANDA DANIEL V REPUBLIC (2016) eKLR in discussing the need to comply with the strict procedure of seizure of narcotic drug under section 74 A stated:-***
>
> ***"…….. regarding the application of section 74 A ……….. it is of utmost importance that procedure contained in the substantive provisions of the law be observed and followed with extreme diligence and scrupulous care. Although complex as we have noted, the procedure laid down in section 74 A must be strictly followed ………***
>
> ***After the seizure, an expert opinion must be obtained to ascertain the nature and the weight of the drugs."***

6. With the above discussion it is clear that the appellant's plea of guilt was equivocal and accordingly his conviction shall be quashed and his sentence be set aside.

7. In the end the appellant's appeal succeeds. The appellant's conviction is hereby quashed and his sentence is hereby set aside. The appellant is ordered to be set free from custody unless he is otherwise lawfully held.

DATED AND DELIVERED THIS 25TH DAY OF JANUARY 2017.

MARY KASANGO

JUDGE

CORAM:

Before Justice Mary Kasango

Court Assistant ……………………………………………………………..

Appellants: Jediel Gituma …………………..……..……..…………

For the State: …...

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE