



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL APPEAL NO. 21 OF 2016**

**BETWEEN**

**RODGERS SIKENYI NICHOLAS.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the conviction and sentence of Hon. B.S Khapoya**

**SRM in Kakamega Cr. Case No. 459 of 2016 delivered on 25.02.2016)**

**J U D G M E N T**

**Introduction**

1. The appellant Rodgers Sikenyi Nicholas was charged with the offence of being in possession of Narcotic drugs contrary to Section 3(1) and 3(2) (a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars of the offence were that on the 8<sup>th</sup> day of February, 2016 at Mungaka village Lusumu Sub location, Bunyala West Location in Navakholo sub-county within Kakamega county he was found in possession of a narcotic drug namely cannabis Sativa (bhang) to wit 500 gms with street value of kshs.1,000/= not in its medical form in contravention of the said act.
2. He was convicted on his own plea of guilty and sentenced to serve 10 years in jail.

**The Appeal.**

3. The appellant has appealed against both the conviction and sentence of ten (10) years imprisonment on the following homemade grounds.
  1. That I pleaded guilty to the charge
  2. That I was advised by the police officer to say yes and I will be released only to find myself in jail.
  3. That I pray for full retrial before court
  4. That the trial court did not consider that I was first offender
  5. That I did not understand the charge facing me

6. That the trial court did not consider my mitigation

### **Submission**

4. The appeal was canvassed orally. In his submissions the appellant gives his reasons of appealing to be that the bhang was planted on him. He explains the circumstances under which he was arrested on the 08.02.2016 at 11.00am and why he admitted the charge

5. Mr. Ng'etich SPPC opposed the appeal on grounds that the plea being one of guilty the appellant can only appeal against sentence and not conviction. He maintained that ignorance cannot be used as a defence by the appellant adding that the trial court did consider the appellants mitigation and the fact that he was a first offender. It was counsel's contention that the appellant had ample time to change his plea if he so wished.

### **Duty of the court**

6. The duty of an appellate court is now well established and that is to evaluate and analyse the evidence a fresh and come up with its own findings/conclusions having in mind that it never saw nor heard the appellant during the trial to be able to gauge his demeanor. The Law is that issues of demeanor are best left to the trial court which heard the appellant and chose to convict and sentence him. **See Okeno – vrs Republic [1972] E A 32.**

### **Determination**

7. This appeal arises out of a plea of guilty to the charge of being in possession of bhang. The issue that arises is whether the plea of guilty was unequivocal according to the principles set out in the case of **Adan – vs – Republic [1973] EA 445** and also the case of **Olel – vs – Republic [1989] KLR 444**. The latter case supports the states contention that where an accused person is convicted on his own plea of guilty, he can only appeal against the legality or severity of the sentence. In the case of **Ndede – vs – Republic [1991] KLR 561**, the Court of Appeal held that the bar against appellant conviction on plea of guilty is not absolute as Section 348 of the Criminal Procedure Code seems to suggest.

8. What emerges from the above authorities therefore is that a plea of guilty is not an absolute bar to appealing against conviction on any ground which the court in its absolute discretion may find justifiable. The appellant herein alleges that his plea of guilty was not unequivocal. He asks for a retrial of his case.

9. The courts have absolutely no reason not to accept a plea of guilty from an accused person though caution and circumspection must be taken in the way in which such pleas are taken. The requirements for a plea of guilty were codified by the court of appeal in the Adan case (above) where the Court of Appeal said, inter alia that “The courts have always been concerned that an accused person should not be convicted on his plea unless it was certain that he really understood the charge and had no defence to it. The danger of an equivocal plea is obviously greatest where the accused is unrepresented and is of limited education and does not speak the language of the court.”

10. In **Ngigi – Vrs – Republic [1987] KLR 98** it was further held by the High Court that the accused should be required to admit or deny every element of the charge unequivocally. In the case of **Kariuki – vs – Republic [1984] KLR 809** the Court provided on outline of the manner in which a plea of guilty is to be recorded. The plea must be free and voluntary as it is inappropriate for the judge/Magistrate to advise an accused person as to whether to plead guilty or not. His only function is only to explain the charge and make sure the accused understands it.”

11. In the **Olel case (above) the High Court persuasively** stated that if a plea of guilty is not voluntary or is obtained by force or threats or torture or even deception it cannot be said to be unequivocal it would in these circumstances be a nullify.

12. In the instant case, and from the hand written record, it is clear that the trial court observed all the

steps required by law before recording a plea of guilty. After the facts were read out to the appellant the accused stated, "the facts are correct." This means therefore that contrary to what the appellant alleged the plea was unequivocal.

13. Before concluding this appeal, the appellant has raised the issue of having been misled into admitting the offence with the promise that he would be set free if he pleaded guilty. However, a look at the record does not show that he raised this issue with the trial court. In fact during mitigation the appellant stated, "My life has been full of hardship. I was led to that it is for medicinal value. I have never been remanded before." Having been misled into believing that the bhang was for medicinal value is not the same as being made to believe that a plea of guilty would lead to being set free. It is my considered view that this whole issue of deception raised by the appellant is an afterthought and I hereby reject it altogether.

14. For the reasons given above, I find no merit in the appellant's appeal on both conviction and sentence. The appeal be and is hereby dismissed in its entirety. Right of appeal within 14 days from today.

It is so ordered

Judgment delivered, dated and signed in open court at Kakamega this 16<sup>th</sup> day of March 2017

**RUTH N. SITATI**

**JUDGE**

In the presence of;-

...Present in person.....for Appellant

...Mr. Ng'etich(present).....for State

...Polycap.....Court Assistant