**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL APPEAL 14 OF 2015**

**ANTHONY KYALO….APPELLANT**

**VERSUS**

**REPUBLIC…....……RESPONDENT**

**(An Appeal arising out of the conviction and sentence of Hon. E.K. Too Ag. SRM in Criminal Case No. 25 of 2015, delivered on 20th January 2015 in the Principal Magistrate's Court at Mavoko)**

**JUDGMENT**

On 13th January 2015 the Appellant was arraigned before the trial Court and charged with being in possession of narcotics drugs, contrary to section 3(1) as read together with section 3(2) of the Narcotic Drugs and Psychotropic Substances Control Act. The particulars of the charge were that on 12th January 2015 at Mlolongo township in Athi River District within Machakos County, the Appellant was found with one hundred and forty four (144) rolls and two kilograms of cannabis sativa (bhang) all valued at Kshs 10,000/=, which were not medically prepared and not authorized under the regulation of the Act.

The Appellant is recorded as having stated "guilty" after the said charge and particulars thereof were read out to him. The Prosecutor then prayed for another date for facts. The trial magistrate then entered the pleas as follows: "Facts on 20/1/2015. Plea of guilty entered". On 20th January 2015 the prosecution read out the facts in Court to which the Appellant responded "the above facts are correct". The trial magistrate then convicted the Appellant on his own admission and sentenced him to two years imprisonment.

The above procedure is the basis of the grounds in the Appellant's Petition of Appeal dated 3rd February 2015 and submissions dated 30th June 2016 filed by his learned counsel, Nzei & Company Advocates, wherein it is stated that the Appellant's plea was not unequivocal as the trial magistrate entered a plea of guilty before the facts of the offence had been read out to the Appellant, and that the conviction and sentence resulting therefrom were unlawful.

Ms. Mogoi Lillian, the learned prosecution counsel justified the procedure employed by the trail Court in submissions dated 2nd August 2016, wherein it was submitted that nothing hinders a Court from recording a response as guilty in the event that this is the accused person's exact words. Further, that the sampling of exhibits at the government chemist takes time, and this was the reason for the delay in reading out the facts. In addition, the fact that the government chemist acted very fast ought to be appreciated. Lastly, it was also submitted that the sentence imposed on the Appellant was lenient as the maximum sentence under section 3(2) of the Narcotic Drugs and Psychotropic Substances Control Act is twenty (20) years imprisonment.

I find that I have to agree with the Appellant that there was an obvious irregularity in the recording of the

plea as illustrated in the foregoing, for the following reasons. The procedure to be applied on the taking of a guilty plea was explained in the case *of* **Adan vs Republic, [1973] EA 445** where the Court held as follows:-

> ***"(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.***
>
> ***(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.***
>
> ***(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.***
>
> ***(iv) If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.***
>
> ***(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded."***

This procedure was reiterated by the Court of Appeal in **Kariuki vs Republic (1984) KLR 809** i.

The elements of a charge, the particulars thereof and the facts giving rise to the charge are a package so to speak, when it comes to the recording an unequivocal plea of guilty. Consequently, the facts giving rise to the charge are required to be read immediately after the admission of a charge to ensure that the Accused person fully understands the facts that he or she is pleading to that constitute the offence he or she is accused of, and is still at liberty after the facts are read to dispute the same and plead not guilty. This also enable the trial court to relate the facts to the offence charged, and determine if they disclose the occurrence of the alleged offence, before proceeding to convict an accused person.

Therefore, the reading of facts on 20th January 2015 by the trial magistrate, one week after the entering of a plea of guilty on the alleged admission of the charge by the Accused person on 13th January 2015 was in error, and the consequent conviction and sentencing unlawful. The Court also notes the other irregularities pointed out by the Appellant's learned counsel, firstly in the recording of the Appellant's reply to the charge as "guilty", which is a technical term and finding entered by the Court after recording the exact words spoken by an accused person in answer to a charge which indicate an admission.

In answer to the prosecution's arguments, if indeed an accused person does answer "guilty" to the charge, the trial Court is under a legal obligation to ask the accused person to explain the said response, and record the explanation, so as to confirm if the same is a denial or admission of the charge.

Secondly, the Appellant was also not given any opportunity to present any facts in mitigation before sentencing.

The Appeal is therefore allowed for the foregoing reasons, and taking into account that the Appellant has been in custody since 13th January 2015, he is hereby set at liberty unless otherwise lawfully held.

Orders accordingly.

**DATED AT MACHAKOS THIS 1ST NOVEMBER 2016.**

**P. NYAMWEYA**

**JUDGE**