



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Gicheru, Akiwumi & Tunoi JJ A)

CRIMINAL APPEAL NO 60 OF 1993

AYUAYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the Judgement of the High Court at Kisumu

(Mango J) in HCCC No.162 of 1992 delivered on June 28,1993)

Dated and Delivered at Kisumu this 26th Day of November, 1993

JUDGMENT

On the 21st June, 1993 the Resident Magistrate at Nyando (Mr Kiarie) convicted the appellant on his own plea of guilty on the offence of being in possession of *cannabis sativa* (bhang) contrary to section 10 (e) as read with section 18 (2) of the Dangerous Drugs Act Cap 245 of the Laws of Kenya and sentenced him to 12 months' imprisonment. His appeal to the High Court of Kenya at Kisumu was summarily rejected on 28th June 1993 by Mango, J purportedly under section 352 (2) of the Criminal Procedure Code. Against that summary rejection he has preferred an appeal to this Court.

The High Court's jurisdiction to dismiss an appeal summarily under the aforementioned section arises only when, in the opinion of the first appellate judge, the evidence before the trial court leaves no reasonable doubt as to the appellant's guilt, and that the appeal is manifestly frivolous, or without substance. See the case of *George Nguraiya and Another v Republic* Criminal Appeal No 28 of 1992 (unreported). But once a petition of appeal goes beyond the conviction being against the weight of the evidence or the sentence being excessive that Court in its appellate jurisdiction cases to have jurisdiction under section 352 (2) of the Criminal Procedure Code.

In the petition of appeal to the High Court, the appellant put forward three grounds of appeal which were not confined to the appellant's conviction being against the weight of the evidence or the sentence being excessive. Indeed, some of them concerned the first appellate judge's failure to detect defects in taking of the plea in the trial Magistrate's Court and that the purported plea of guilty was equivocal.

In our view, the High Court in its appellate jurisdiction was not competent to deal with the appellant's appeal summarily. That appeal's summary rejection was therefore wrong. Accordingly we allow the appellant's appeal to this court, set aside the orders of the High Court summarily rejecting his appeal to that Court.

Under section 3(2) of the Appellate Jurisdiction Act Cap 9 of the Laws of Kenya, we will dispose of this appeal once and for all.

The plea as it stood in the trial Magistrate's Court was defective in that the facts were never narrated to that court nor were they put to the appellant. In the circumstances the plea should not have been construed as being unequivocal admission of guilt of the offence charged.

We would allow this appeal. We quash the conviction and set aside the sentence of imprisonment and order that the appellant shall be entitled to his liberty forthwith unless otherwise lawfully held.

Dated and Delivered at Kisumu this 26th day of November, 1993

J.E. GICHERU

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JUDGE OF APPEAL

A.K. AKIWUMI

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JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL