



REPUBLIC OF KENYA



**Kingi v Republic (Criminal Case E045 of 2021)  
[2022] KEHC 13152 (KLR) (26 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 13152 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL CASE E045 OF 2021**

**A. ONG'INJO, J**

**JULY 26, 2022**

**BETWEEN**

**BAKARI MOHAMMED KINGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appellant Bakari Mohammed Kingi was charged in Msambweni Magistrate's Court Criminal Case No 31 of 2020 with the offence of being in possession of Narcotic drugs contrary to section 3(1) as read with sections 3 (2)(b) of the *Narcotic Drugs and Psychotropic Substances Control Act* No 4 of 1994. Particulars are that Bakari Mohamed Kingi on the January 15, 2020 at Kikinelzani area in Vanga Location of Kwale County, within Coast Region was found in possession of Narcotic drugs 44 sachets (519 grams) of heroin valued at Kshs 17,700/=.
2. The trial magistrate believed the evidence of the 3 prosecution witnesses that appellant was found in possession of heroin and he was convicted and sentenced to serve 7 years imprisonment on June 9, 2021. The appellant admitted that the heroin was recovered in a package he was given by a woman to drop to her at Kipainga.
3. The appellant was aggrieved by the decision of the trial magistrate and filed petition of appeal on June 21, 2021 on the following grounds;
  1. That the accused was not afforded a fair trial within the tenets of article 50(9) of the *Constitution, 2010* for the learned trial magistrate made the accused proceed with hearing of prosecution witnesses without input of his advocate of choice despite accused's prayer to bequeath leave to proceed in presence of his advocate on record.
  2. That the learned trial magistrate erred in fact and in law for relying on actus reus perse in concluding that the prosecution proved their case beyond reasonable doubt without



considering circumstances of the offence and/or accused defence which was manifest that the accused lacked the mens rea to commit the charge before court.

3. That the learned magistrate erred in law and fact by exercising her discretion punitively thus failing not take into account the probation officers report recommendations that the accused was a proper candidate for non-custodial sentence. The appellant prayed that the appeal be allowed, conviction quashed and sentence set aside.
4. Directions were taken for hearing of appeal by way of written submissions.
5. The appellants counsel filed submissions on March 9, 2022 and submitted that the trial magistrate failed to make sure the appellant's right to legal representation was explained and relied in the holding of the Supreme Court in *Republic v Karisa Chengo and 2 others* [2017] eKLR where it was held that the right to legal representation is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional elect without more.
6. The appellant also relied in Lord Dennings holding *Pett v Greyhound Racing Association* (1968) 2 ALL ER 545, where he presented himself thus.

“It is not everyman who has the ability to present himself on his own. He cannot bring out the point in his own favour or the weaknesses in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross examine witnesses. If justice is to be done the ought to have help of someone to speak for him and who better than a lawyer who has trained for the task.”

7. It was submitted that the trial magistrate explained right to representation to the appellant at the defence stage after the accused had raised it too far late into the proceedings.
8. In *Joseph Kiema Philp v Republic* [2019] eKLR Nyakundi J held:-

“It is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation and whether or not in the case that he cannot afford an advocate, one may be appointed at the expense of the state.

If (the court record) must show that the court did take the profile of the accused before the trial commenced in the earliest opportunity therefore, should be at the time of plea taking. The 1<sup>st</sup> appearance before plea is taken on at the commencement of the proceedings.”

9. It was argued that appellants right to fair trial under article 50(2)(g) was infringed rendering the trial unfair. On 2<sup>nd</sup> ground the appellant submitted that the prosecution's case was not proved beyond all reasonable doubt. It was agreed that the trial magistrate did not consider the circumstances of the offence and/or appellant's defence which was manifest that he lacked mens rea to commit the charges before the court.
10. Appellant's position was supported by the decision in *Sweet v Parsley* [1970] AC 132, where House of Lords held:

“*Mens rea* is an essential ingredient of every offence unless some reason can be found holding that it is not necessary and the court ought not to hold that an offence is an absolute offence unless it appears that it must have the intention of parliament”.
11. The applicant sought that the court re-evaluates and analysis the evidence and find that the trial court erred in finding that the prosecution proved its case beyond reasonable doubt.



12. The 3<sup>rd</sup> ground submitted upon was that the trial magistrate exercised discretion punitively and dialed to take into account the probation officers report that recommended that appellant was suitable for non-custodial sentencing.
13. It was agreed that sentence of 7 years for an offence of being in possession of heroin worth Kshs 17,700/= was harsh and excessive in the circumstances. It was submitted that from the sentiments of the trial magistrate it is clear she treated the matter as that for trafficking narcotics as opposed to that of personal consumption for she felt the accused was charged with a lesser charge and such was reflective of the number of years the accused was sentenced to serve.
14. The appellant counsel argued that the trial magistrate ought to have considered the alternative remedy provided under section 3(2)(b) that of payment of fine while exercising her discretion and/or should have considered the pre-sentence report where appellant was recommended for community service. The court was urged to re-sentence the appellant to appropriate sentence.
15. The respondents filed their submissions on June 21, 2022 and didn't deny that the trial court failed to explain to the appellant that he had right to legal representation.
16. It is admitted that the trial magistrate at page 11 line 2 observed that the appellant was not represented in the matter throughout the prosecution's case. At line 7 of page 11 the trial magistrate allowed the appellant to instruct counsel as he was entitled to one.
17. The respondent argued that even after the appellant had been afforded an opportunity to get an advocate he failed to engage one she proceeded to give unsworn statement on his own in absence of an advocate.
18. The respondent submitted that the prosecution proved exhibits recovered from the appellant was analyzed by Government Chemist and confirmed to be heroin.
19. The prosecution did however concede that mens rea was not proved and that appeal should be allowed.
20. In consideration of the respondent conceding to appeal this court will not engage in academic exercise as to whether sentence was harsh and excessive or whether or not the appellant was accorded fair hearing as far as article 50 (2)(g) as to legal representation is concerned.
21. The appeal is allowed, conviction quashed and sentence set aside. The appellant to be set at liberty forth with unless lawfully detained.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 26TH DAY OF JULY 2022.**

**HON LADY JUSTICE A. ONGINJO**

**JUDGE**

**In the presence of: -**

Mr. Kofa Advocate for the Appellant

Mr. Ngiri for the DPP

Court Assistant – Mr. Ogwel

**Hon. Lady Justice A. Ongi'injo**

**Judge**

