



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT SIAYA
CRIMINAL APPEAL NO. E007 OF 2021
CORAM: HON. R.E. ABURILI, J
BEATRICE ATIENO.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(Being an Appeal arising from the Judgment, conviction and sentence in Cr. Case No. 331 of 2019 at Ukwala Senior Resident Magistrate's Court on 16.8.2021 by Hon. C.I. Agutu, Senior Resident Magistrate)

JUDGMENT

1. The appellant herein is Beatrice Atieno. She was sentenced on 16.8.2021 after a full trial in Ukwala PM Cr. No. 331 of 2019 upon being found guilty of the offence of trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic drugs and Psychotropic Substances Control Act No. 4 of 94.
2. The appellant and her co accused Elly Odongo were sentenced to serve three years imprisonment without an option of a fine. The narcotics subject of the charge were 800 brooms of cannabis sativa of the street value of Kshs. 400,000/= in a motor vehicle Registration No. 384P Toyota Corolla white in colour, in contravention of the Act.
3. Aggrieved by the judgment, findings of guilty and sentence imposed by Hon. C.I. Agutu, SRM, the appellant herein who was the 2nd accused filed this appeal on 1.9.2021 setting out 7 grounds of Appeal.
4. Primarily, the appeal challenges the conviction of the appellant when the prosecution did not prove its case against her beyond reasonable doubt; for failure to follow the procedure upon seizure of suspected narcotics; that the appellant was a mere passenger in the motor vehicle suspected of transporting narcotics; that she was convicted on mere suspicion; and that the judgment was contrary to Section 169 of the Criminal Procedure Code as it was not dated hence invalid.
5. The appellant through her counsel Mr. Otongo urged the court to set aside the conviction and sentence imposed on her and acquit her of the offence. Prior to canvassing the appeal, the appellant had filed an application dated 30/8/2021 under Certificate of Urgency during the recess seeking to be admitted to bail pending appeal.
6. The file was transmitted to Kakamega High Court for consideration. The Learned duty Judge, Hon. Farah Amin gave directions for service of the application upon the Respondent State and that a response be filed within 7 days. She also gave a mention date of 16/9/2021 which was the first day of the term and further directed that the County Children's Officer for Siaya County attend the appellant's home and provide care for any children found abandoned there, and to attend court on 16/9/2021 to inform the court of his findings.
7. The matter was then placed before me on 16/9/2021 for mention. The Children's Officer Mr. Onguka attended court and requested for one week to finalize a detailed report on issue of children allegedly abandoned. On 16/9/2021, the appellant's counsel was prevailed upon to abandon the application for bail which was taking a different angle of matters children in need of care and protection yet the appeal is clearly brought by their mother challenging the criminal proceedings and sentence imposed on her.
8. Mr. Otongo advocate abandoned - withdrew the application for bail pending appeal dated 30/8/2021 and this court called for the submission of the lower court record to the High court forthwith for expeditious admission of the appeal to hearing. I set the mention for 21/9/2021.
9. On 16/9/2021, during my station supervisory visit to Ukwala Law Courts, the Deputy Registrar submitted to Ukwala Law Courts a list of

files pending submission of lower court records to the High Court and among them was Cr. Case No. 331/2021 and requested the court to avail the file to the High court expeditiously as this appeal was due for mention on 21/9/2021 interpartes.

10. As I write this judgment, the file in question has not been availed despite the appellant's counsel having obtained all the proceedings and judgment from the lower court and having filed and served a record of appeal on 20/9/2021. On 21/9/2021 when the appeal came up for mention, Mr. Okoth Otongo advocate delayed appearing and when the matter was called out, Mr. Kakoi Senior Principal Prosecution counsel addressed the court that there was no conviction in the case in the lower court hence the trial of the appellant collapses. He prayed for a retrial to be considered by this court.

11. That is the basis of this judgment which is being delivered without the lower court file being availed to date, yet all certified proceedings and judgment were issued (supplied to the appellant's counsel by the time he was filing the appeal on 30/8/2021.

DETERMINATION

12. I have considered the proceedings, judgment, grounds of appeal and the submission by Mr. Kakoi, Senior Principal Prosecution counsel.

13. I observe that the appellant was charged with a serious offence of trafficking in narcotics drugs and the amount/quantity of narcotics drugs involved was quite substantial - 800 brooms with a street value of Kshs 400,000. A motor vehicle was used in the trafficking and it was forfeited to the State.

14. One of the roles of this court is the power and authority to supervise subordinate courts and to review proceedings of the subordinate courts especially where such proceedings are said to be irregularly conducted see Sections 362 - 364 of the Criminal Procedure Code.

15. The supervisory jurisdiction of this court as espoused in Article 165(6) and (7) of the Constitution over subordinate courts extends to calling for the record of any proceedings before any subordinate court or person, body or authority referred to in Clause (6) and making any order are giving any direction the court considers appropriate to ensure the fair administration of justice.

16. In the instant appeal, this court did, as usual, call for the trial court record which is complete but no such record has been availed and no reasons are advanced for the failure to submit the lower court file to this court.

17. Nonetheless, all the proceedings, judgment and sentence are contained in the record of appeal filed by the appellant's counsel on 20/9/2021. The said record of proceedings and judgment were duly certified by the trial magistrate court on 26/8/2021. This court therefore does not understand or appreciate why the trial court has declined to submit to this court the original trial court record to enable this court consider this appeal on its merits.

18. That notwithstanding, the prosecution have raised a serious issue with the judgment of the trial Magistrate Hon. C.I. Agutu. Albeit the Hon. Magistrate found the appellant and her co-accused guilty of the offence of trafficking in narcotic drugs as charged, she did not convict them as required under Section 215 of the Criminal Procedure Code. She proceeded to sentence each of the two the accused persons to serve three years imprisonment without an option of a fine without any conviction being entered against them.

19. The question is, what is the effect of a judgment and sentence that is not based on any conviction by the trial court? Off course, this is not the first time this court has encountered such a scenario from the same, same trial court and has in several decisions given directions to the same trial magistrate to try and be meticulous in her conduct of criminal proceedings but all that effort by this court appears not to make any legal or factual sense.

20. As a consequence, more and more of such proceedings keep coming up in this court from the said court either as appeals or revisions over the same issues of failure to convict accused persons who are found guilty of offences, and serious offences at that.

21. Section 215 of the Criminal Procedure Code provides that:

“Decision:

The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to the law or shall acquit him.”

22. Thus, upon a finding of guilt, the trial magistrate is mandated to convict an accused person before meting out appropriate sentence which sentence can be imposed instant or the court may, under Section 216 of the Criminal Procedure Code, receive other evidence (mostly a Probation Officer's pre-sentence report) in order to inform itself as to the sentence or order properly to be passed or made against the accused person.

23. Section 217 of the Criminal Procedure Code then requires that after such conviction, a conviction order is drawn up and signed by the court making the conviction order.

24. In the instant case, there was a finding of guilty of both accused persons but no conviction was entered as required under Section 215 of the Criminal Procedure Code. It follows that no conviction order could be drawn under Section 217 of Criminal Procedure Code as a conviction order can only be extracted from the conviction under Section 215 of the Criminal Procedure Code.

25. Under Section 362 of the Criminal Procedure Code:

“The High court may call for and examine the records of any criminal proceedings before any subordinate court for the purposes of satisfying itself as to the corrections, legality or propriety of the any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.”

26. Under Section 364(1)(b) of the Criminal Procedure:

“In the case of proceedings in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High court may.....in the case of any other order other than an order of acquittal alter or reverse the order. ”

27. This court’s attention was drawn to a failure to convict by the trial magistrate. In **Mohammed Gohad Mohammed Vs Republic [1992]eKLR**, the court stated, and I agree entirely:

“.....I wish to first of all to point out that no conviction was entered against the appellant. The record does not shows that the appellant was convicted of the offence charged whether or not on his own Plea of guilty. No punishment can be imposed on an accused person by a court of law unless such person is found guilty of an offence and duly convicted. Where there is no record of any such conviction having been entered, as is the case here, then such sentence is improperly imposed and the whole proceedings become a nullity.”

28. Similarly in **Simon Mutisya Mutiso Vs Republic [2018]eKLR**, it was held thus:

“The circumstances of this case are that the accused pleaded guilty to the charge. He appears to have understood the allegations against him and opted to admit having committed the offence. The only remaining procedure after the accused pleaded guilty was for a conviction and for the accused to mitigate. From the record the accused made a statement in mitigation but no conviction was recorded by the court. Both counsel are in agreement that the proceedings are, irregular, the sentence illegal and should be set aside. I take the position that the plea of the accused was not unequivocal. I find that the proceedings in the trial court against the accused were irregular and not in accordance with the Criminal Procedure Code. As a result, the orders made must be set aside due to the aforesaid irregularities.”

29. The same position above was taken by Olga Sewe J in Eldoret High Court **Cr. Revision Case No, E017 of 2021 Newton Kimutai Vs Republic[2021]eKLR** in a judgment delivered on 27/5/2021. In the Eldoret case, the accused had been charged with the offence of stealing contrary to Section 268 as read with Section 275 of the Penal Code. The Learned Judge nullified the proceedings and judgment and set the applicant at liberty for want of conviction by the trial court.

30. In **Mombasa HCRA No. 40 of 2018 Emmanuel Chacha Vs Republic [2019]eKLR** where the appellant had been charged with the offence of trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic substances Control Act No. 4 of 1994, same offence as the one facing the appellant herein, the quantity of the narcotic drugs was 155 big rolls of cannabis sativa whose street value was Kshs. 23,250 in contravention of the Act, the learned Judge, quashed the conviction of the appellant on an equivocal plea and set aside life imprisonment imposed and ordered for retrial of the appellant before another magistrate other than the convicting magistrate who had all along used abbreviations such as “PGE” instead of “Plea of Guilty entered”, finding that there was no proper proceedings and conviction of the appellant.

31. In this case, based on the certified proceedings and judgment supplied to this court by the appellant’s counsel, I am satisfied that the sentence imposed on the appellant and her co-accused ELLY ODONGO were irregular as they were not convicted at all by the trial magistrate which renders the entire proceedings a nullity. I therefore proceed and declare the proceedings before Ukwala SRM’s court in Cr. Case No. 331 of 2019 a nullity and I quash the said proceedings and set aside the sentence of three (3) years imprisonment imposed on the appellant.

32. Regarding the appellant’s co-accused Elly Odongo who was accused Number 1 and who has not appealed, or filed for revision, having regard to the provisions of Section 362 and 364 of the Criminal Procedure Code which give power to this court to call for records of subordinate’s court for examination to satisfy itself as to the correctness, legality or propriety of any findings, sentence or order recorded for or passed and as to the regularity of any proceedings of such subordinate court, and having examined the record of certified court proceedings in Ukwala SRM Cr. 331/2019 and satisfied myself that the said proceedings and judgment and sentence passed were irregular, in that there was no conviction of the two accused persons therein Elly Odongo and Beatrice Atieno, I hereby proceed and quash the said proceedings and judgment passed and set aside the sentence of three years imposed on the 1st accused Elly Odongo. I further set aside the order of forfeiture of motor vehicle registration No. KAM 384P Make, Toyota Corolla white in colour as the order of forfeiture thereof was made in consequence of a presumed conviction of the accused persons having been found guilty of trafficking narcotic drugs using the vessel being the subject motor vehicle.

33. Having quashed the proceedings and judgment in Ukwala SRM Cr. 331 of 2019 and set aside the sentence of 3 years imprisonment imposed on the two accused persons therein and further set aside the order of forfeiture of motor vehicle registration No. KM 384P Toyota corolla white in colour, the other question is what other orders should this court make?

34. Mr. Kakoi Senior Principal Prosecution Counsel urged this court to consider a re trial of the appellant and by extension (as per my consequential finding, the 1st accused Elly Odongo).

35. In **Wahuni Ngugi Vs Republic [2012]eKLR**, the Court of Appeal stated as follows on the issue of retrial:

“The law as regards what the court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Samar Vs Republic [1964]EA 483, the predecessor of this court stated as concerns the issue of retrial in criminal cases as follows:

“it is true where a conviction is vitiated by a gap in the evidence or other defect of which the prosecution is to blame, the court will order a retrial.

But where a conviction is vitiated, by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.....a retrial should not be ordered unless the court was of the opinion that on consideration of admissible or potentially admissible evidence a conviction might result.

Each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person.”

36. In the instant case, I note that the accused persons were charged in court on 14/8/2019. They pleaded not guilty and were each granted bond terms of one million with surety of similar amount or deposit cash bail of Ksh. 500,000/= owing to the seriousness of the offence of trafficking of narcotic drugs.

37. On 21/8/2019, the appellant herein Beatrice Atieno was released on bond after her surety, Pastor Thomas Mboya Kibwaye was approved upon depositing into court title deed for his land. The matter was first handled by Hon. C. Sindani who recused himself on 20/9/2019 and reallocated it to Hon. C.I. Agutu for hearing and final determination.

38. The 2nd accused was represented by Mr. Otongo advocate whereas the 1st accused was in person and from the certified record of proceedings, he did not manage to raise surety or cash bail for him to be released on bail pending trial. He remained in prison remand and from the court record of proceedings, some hearing and mentions that took place during the covid-19 pandemic outbreak in the country were via Skype (see proceedings of 19/8/2020).

39. I have also examined the statement in defence and sworn testimony by the 1st accused Elly Odongo, which was not challenged on cross examination. I have equally perused the sworn testimony of the appellant in her defence and that of her witness. Without delving into the merits of the appeal herein, it is clear that the 1st accused carried luggage for the appellant herein and according to him, he did not know its content until they were arrested, with the 2nd accused allegedly bribing police officers who let her go until the 1st accused spilled the beans of how she had been let go before she was sought and arrested and charged with the offence. Whether that is what happened or not, it is clear that the 1st accused has been in remand custody for two years prior to his sentencing which sentence did not even take into account the period spent in remand custody as espoused in Section 333(2) of the Criminal Procedure Code.

40. What that means that ordering for a retrial while he is in prison because he cannot raise or post bail in court, which trial might take another two or so years is not in the interest of justice. It would cause, in my humble view, an injustice to the accused person because he will serve a prison term exceeding the lenient sentence which the trial court had in its discretion handed him, without convicting him.

41. For the above reasons, albeit a retrial would have been ideal, but the circumstances of the 1st accused call for bringing this matter to a close, with a very stern warning to both accused persons to desist from such illegal activities or business ventures which are not productive and are dangerous to the society.

42. Accordingly, having quashed the proceedings and judgment in Ukwala SRM Cr. 331 of 2019, and set aside the sentence of three years' imprisonment imposed on Elly Odongo and Beatrice Atieno on 16/8/2021; and having vacated and set aside the order of forfeiture of motor vehicle registration No. KAM 384P Toyota corolla white in colour; I hereby order that unless otherwise lawfully held, the appellant herein Beatrice Atieno and her co-accused Elly Odongo in Ukwala SRM Cr. Case No. 331 of 2019 shall forthwith be released from the respective prison custodies where they are serving the irregular three year prison sentences forthwith.

43. Motor vehicle registration No. KAM 384P Toyota Corolla white in colour which was forfeited to the State shall be released to the owner upon proof of ownership thereof to the court at Ukwala, forthwith.

44. This judgment shall be served upon the Head of Station, Ukwala Law Courts and to the trial magistrate Hon. C.I. Agutu for noting.

45. This judgment and release order shall also be served upon Siaya G.K. Prisons where the 1st accused person Elly Odongo is likely to be serving his prison term, for compliance.

46. File closed.

47. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 27TH DAY OF SEPTEMBER 2021

R.E. ABURILI

JUDGE