



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 37 OF 2017

FAUZ ABDALLA MZEE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

(From the original conviction and sentence in the Principal Magistrate Court at Lamu Criminal Case 144 of 2017, Hon. Njeri Thuku (PM) dated 28th August 2017)

1. The Appellant was charged with being in possession of narcotic drugs contrary to Section 3(1) as read with section 3(2)(b) of the Narcotic and Psychotropic Substance (Control) Act No. 4 of 1994 (NPSCA). The particulars of the offence were that on 2nd June 2017 at Faza village in Lamu East Sub-County within Lamu County, the Appellant was found in possession of narcotic drugs namely heroin to wit 2 grams of estimated value of Ksh. 6,000/- without any medical prescription in contravention of the said Act.
2. The accused person pleaded not guilty and the matter went to full trial. The prosecution called three witness in support of its case. PW1 Yahya Hamisi was the government chemist, gazetted officer G.N 6934. He stated that on 14th June 2017 he received an exhibit memo form and a khaki envelope containing 2 grams of a brownish substance from Emmanuel Njeru from the DCIO Lamu East. That he analyzed the brownish substance which he found to be heroin, He marked it as GCK-304/177 YHM and prepared his report dated 14th June 2017 which he produced as P.Exh1.
3. PW2 PC Yudah Agagwa who was attached to Faza police post, Lamu East DCIO, told the court that on 2nd June 2017 at 9:00am Corporal Mohamed (PW3) instructed him to meet PW3 at the post office as there was drug trafficker travelling from Faza to Tchundwa. That they set up an ambush and hid at the boda boda shed. At around 10am, they saw the Appellant walking alone and ambushed him as he approached them. They arrested and handcuffed him before escorting him to the police station. That their informer had informed them that the Appellant had hidden the drugs in his private parts. At the police station, PW1 thoroughly searched the appellant. He wore surgical gloves, and retrieved a sachet from the Appellant's anus.
4. PW3 Corporal Mohamed then a detective with the DCIO Lamu East at Faza was the investigating officer. He told the court that on 2nd June 2017 at around 9:30am he received a tip off from an informer that a drug dealer by the name Fauz alias Teja was travelling to Tchundwa from Faza. That together with PW2 they went and set an ambush at Faza boda boda bus stop. At around 10:20am they spotted the Appellant and arrested him. He said that they were informed that the Appellant had hidden the drugs in his buttocks so they took him to the police post for a search.
5. PW3 further stated that they undressed the Appellant at the police post and PW2 conducted a search. That PW2 wore surgical gloves (P.Exh4) and retrieved a polythene bag from the Appellant's anus. That the polythene paper wrapped another polythene paper with a brown substance inside. He prepared an inventory list (P.Exh6) which the Appellant and himself signed. He placed the exhibit in a khaki envelope (P.Exh2) and he prepared an exhibit memo from (P.Exh5) which were escorted by P.C. Njeru to the government analyst. That the government analyst report indicated that the substance was heroin (P.Exh 3) with an estimated value of Ksh.6,000/-. He told the court that he knew the Appellant as they had raided his house on several occasions but never recovered anything. He stated that he did not have a grudge with the Appellant.
6. At the close of the prosecution case, the trial court found that the prosecution had established a *prima facie* case and put the Appellant on his defence.
7. The Appellant elected to give a sworn statement. He told the court that he was a coconut farmer. That on 2nd June 2017 he was on his way home from the farm with coconuts when he met two people at the bus stop near Faza bridge who stopped and searched him. Afterwards

they took him to the police station where he said PW3 threatened him. He alleged that he was placed in the cells without being informed of the charges and was later charged in court with the present offence which he denied.

8. At the end of the trial, the learned magistrate found the Appellant guilty and sentenced him to 10 years imprisonment.

9. The Appellant being aggrieved by the conviction and sentence lodged his appeal on the following amended grounds reproduced verbatim as follows:

(i) That the learned trial Magistrate erred in law and fact by failing to consider that there was no lawful court order obtained or consent from the Appellant to allow the arresting officers to retrieve the narcotic drugs from the Appellant's private parts (anus) hence the right to privacy was infringed in violation of Article 31(a) of the Constitution of Kenya 2010 and thereby subjecting the Appellant to psychological and physical torture in breach of Article 29(d)(f) of the Constitution of Kenya 2010.

(ii) The learned magistrate erred in law and fact by failing to consider that the trial was a nullity for failure by the prosecution to comply to the provisions of section 74A and 74(4) of the Narcotics Drugs Act (non-compliance by the respondent)

(iii) The learned magistrate erred in law and fact by failing to consider that the prosecution witness failed to prove the case beyond reasonable cause c/sec 109 and 110 of the Evidence Act.

10. The Appellant filled his written submissions on the 30th September 2019 which he relied on during the hearing. His submissions were to the effect that the actions by the police officers to strip him naked and insert their fingers into his anus without his consent or a court order violated his right to privacy and his right against torture and inhuman treatment under Article 31(a) and Article 29(d) and (f) respectively of the Constitution. It was his submission that the evidence was obtained in violation of his rights and was therefore inadmissible as provided for under Article 50(4) of the Constitution. He relied on **Amos Karaga Karathi vs Rep (2006) eKLR** and **Albanus Mwasia Mutua vs Rep (2006) eLKR**.

11. It was the Appellant's submission that the prosecution did not comply with the stringent procedure of seizure of narcotic drugs in accordance with section 74A of the Narcotic and Psychotropic Substance (Control) Act No. 4 of 1994 which are mandatory. He urged that failure to comply with the mandatory provisions of section 74A was fatal to the prosecution's case thereby vitiating both the conviction and sentence. He relied on the case of **Jane Atieno Odera vs Republic (2012) eKLR**. He contended that the prosecution's failure to comply with the above provision amounted to an allegation without proof that the drugs were seized from the Appellant and therefore the standard of proof was not met.

12. The Respondent filed written submissions dated 5th November 2019 in opposition of the appeal. At the hearing Mr. Mwangi, learned counsel for the Respondent, highlighted the submissions which were to wit that the search was conducted by two male officers in accordance with section 25 of the Criminal Procedure Code and there was no violation of the Appellant's rights. He also submitted that not all the requirements under section 74 of the NPSCA were mandatory.

13. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32**, **Eric Onyango Odeng' v R [2014] eKLR**.

14. I have considered the grounds of appeal, the record and submission of the parties. The issues for determination are whether the Appellant's rights were infringed; whether the provision of section 74A of the NPSCA was complied with and whether the prosecution proved the case beyond reasonable doubt.

15. The Appellant contends that the search on his body violated his rights to privacy and dignity under Article 31 and 28 of the Constitution and that the search occasioned him psychological and physical torture in breach of Article 29 of the Constitution.

16. Article 31 of the Constitution provides that:-

Every person has the right to privacy, which includes the right not to have—

(a) their person, home or property searched;

17. The right to privacy has been interpreted to include a person's right not to be unlawfully searched and it is closely linked to the right to dignity. See **COI & another v Chief Magistrate Ukunda Law Courts & 4 others [2018] eKLR**. However, it has been held that the right to privacy can be limited as was held in **COI & another v Chief Magistrate Ukunda Law Courts & 4 others** where the Court of Appeal pronounced itself thus:-

“Did the examination of the appellants infringe on their rights? It is common ground that the rights and freedoms under the Bill of Rights, subject to Article 25, can be limited under Article 24. Of course, by written law and to the extent that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”

18. In the case of **E M W K & Another v Attorney General & 3 others [2017] eKLR**, Mativo J stated that:-

“85. A strip search constitutes an interference with the privacy of the individual concerned. It is recognized that common law recognizes the right to privacy as an independent personality right. Privacy is therefore, a valuable aspect of one's personality. The right to privacy is protected in terms of both common law and the Constitution of Kenya. The right is however not absolute as there are competing factors such as maintaining law and order that can bear a significant limitation on the right.”

19. The CPC under section 25 permits the police officer who has made an arrest to search a person. Similarly section 72 of the NPSCA provides for search of a person by a police officer and that force may be used where necessary, it states that:-

(1) Any police officer, or any other person authorized in writing by the Commissioner of Police for the purposes of this section, who has reasonable cause to suspect that any person is in possession of, or is removing, any narcotic drug or psychotropic substance in contravention of this Act may—

(a) stop and search that person and any conveyance in which he is and any package in his possession or under his control;

...

...

(3) A police officer or authorized person referred to in subsection (1) or (2) may use such assistance and such force as may be reasonable for carrying out his functions under those subsections.

20. In the present case, PW3 told the court the Appellant was a suspected drug trafficker and that he had raided his house severally but never found anything. That an informer had tipped him off that the Appellant would be travelling from Faza to Tchungwa and that he had hidden drugs in his anus. Based on the information, PW2 and PW3 set up an ambush and arrested the Appellant. PW3 told the court that for privacy reasons they took the Appellant to the police station. At the police station, the Appellant was stripped and PW2 used surgical gloves (P.Exh4) to retrieve a sachet from the anus.

21. Based on the evidence, it is apparent that PW3 considered the privacy of the Appellant when he directed that he was to be searched at the police station. In addition it was only PW2 and PW3, both male officers, who were present when the Appellant was searched. There is no evidence that the search was meant to embarrass or humiliate the Appellant. Furthermore, the police in this instance did not require the consent or an order of the court to conduct a search on the Appellant. In the circumstances I find that the Appellant's rights were not infringed.

22. The Appellant also complained that Section 74A of the NPSCA was not complied with. The Section states as follows:-

“(1) Where any narcotic drug or psychotropic substance has been seized and is to be used in evidence, the Commissioner of police and the Directors of Medical Services or a police or a medical officer respectively authorized in writing by either of them for the purposes of this Act (herein referred to as “the authorized officers”) shall, in the presence of, where practicable –

(a) the person intended to be charged in relation to the drugs (in this section referred to as “the accused person”);

(b) a designated analyst;

(c) the advocate (if any) representing the accused person; and

(d) the analyst, if any, appointed by the accused person (in this section referred to as “the other analyst”), weigh the whole amount seized, and thereafter the designated analyst shall take and weigh one or more samples of such narcotic drug or psychotropic substance and take away such sample or samples for the purpose of analysing and identifying the same.”

2. After analysis and identification of the sample or samples taken under subsection (1), the same shall be returned to the authorized officers together with the designated analysts' certificates for production at the trial of the accused person.

3...

4. The destruction of drugs and psychotropic substances ordered under subsection (3) shall be carried out by the authorised officers in the presence of the Magistrate and the accused person, where practicable, and his advocate (if any) and thereafter the magistrate shall sign a certificate in the prescribed form relating to such destruction.

23. A reading of the above section shows the procedure to be followed when narcotic drugs are seized. The section requires that the drugs or substance be weighed by an authorized officer in the presence of the accused person, his advocate, if any, an analyst, if any appointed by the accused person and the designated analyst before samples are released to the government (designated) analyst.

24. In the current case, it was the evidence of PW2 and PW3 that the Appellant was arrested and taken to the police station where he was searched and a sachet (Pexh 3) was discovered in his anus. PW3 stated that he prepared an inventory list (Pexh 6), which he signed together the Appellant. That the inventory list indicated that the weight of the sachet was 2 grams. PW3 also prepared the exhibit memo (Pexh 5) and sent the drugs to with P.C Njeru to Mombasa for analysis.

25. PW1 the government analyst testified that on 14th June 2016, he received the exhibit memo together with a khaki envelope containing 2 grams of a brown substance. He weighed and analyzed the brown substance and found it to be heroin and prepared his report (P.exh 1).

26. From the evidence adduced it is clear that PW3 weighed the drugs in the presence of the Appellant as proved by the inventory list (Pexh 6), which shows that a whitish creamish substance wrapped in a white polythene paper was found to weigh 2grammes. Samples of the drugs were then taken to the PW1 for analysis. From the proceedings there was no evidence tendered that PW3 was an authorized officer as envisaged in the section. See **Patrick Odoyo Jabuya v Republic [2014] eKLR**. Further, after analysis the drugs were not destroyed as provided in section 74(A)(4) but were returned to the police who produced it in court.

27. The question that arises is whether failure to strictly comply with the proviso of section 74A of the Act would vitiate the proceedings. There is ample authority on the interpretation of Section 74A which is to the effect that the proviso is not mandatory but where practical and that the test to be applied is if failure to comply prejudiced the accused.

28. In **Moses Banda Daniel v Republic criminal appeal no. 62 OF 2015 [2016] eKLR** the Court of Appeal stated as follows:

“After the seizure, an expert opinion must be obtained to ascertain the nature and the weight of the drugs. This is to be done, where practicable, in the presence of the accused person, his advocate, if any, an analyst, if any appointed by the accused person and the designated analyst. The use, in the section, of phrases like “Where practicable” and “if any” convey the meaning that the procedure is not mandatory but directory and the use of the word “shall” must be so interpreted. A procedural provision would be regarded as not being mandatory if no prejudice is likely to be caused to the other party or if there is substantial compliance with the procedure.”

29. The Court of Appeal further looked at the purpose of section 74A of the Act as intended by the legislators and made a reference to the **Hansard record of Parliament of 6th December 2000** where The Attorney-General, Amos Wako (as he then was) moved a motion for the amendment of the Act. The Court of Appeal went on to hold that:-

“Clearly the intention of Parliament was to ensure that the drugs or substance once recovered are not interfered with before the trial. That is why after ascertaining the nature and weight of the drug and obtaining the certificate of the analyst the rest of the drugs are to be destroyed immediately and only a sample and a certificate are presented as exhibits at the trial. The provision, in our view will be more relevant where a large haul of drugs is concerned. It is more in such situations, due to the value that strong temptations and the urge to interfere would be irresistible.”

30. This position was further reiterated in **Joshua Atula & Another v Republic [2016] eKLR** where the Court of Appeal pronounced itself as thus:-

“Accordingly, the objective of this provision 74A was to deal with instances where the exhibits disappeared. However, in the present case, the offence related to trafficking in 2200 stones of cannabis sativa. This was confirmed by the government analyst through the exhibits produced before the court. The 2200 stones were availed as exhibit and the appellant raised no complaint as to tampering. There was no prejudice occasioned to the second appellant in the circumstances.”

31. Guided by the above authorities it is clear that there was substantial compliance with the said provision when the drugs were weighed in front of the Appellant and samples taken for testing to PW1. Further, there was no prejudice suffered by the Appellant as the drug seized were produced in court as Pexh 3. Additionally, the quantity of the drugs seized was 2grammes which is not considered a large haul to invoke strict compliance with the said section. In the premise, I find that the provisions of section 74A of the NPSCA were substantially complied with and that the non-compliance with some procedural aspects did not prejudice the Appellant in any way.

32. On whether the prosecution proved its case beyond reasonable doubt, section 4 of the Penal Code defines possession as:-

“(a) be in possession of” or “have in possession” includes not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;

33. In this case, it was the evidence of both PW2 and PW3 that a sachet containing a whitish cream substance was recovered from the Appellant’s anus. The substance was forwarded to PW1 who analyzed the substance and found it to be heroin. In the circumstances, I find that the prosecution proved its case beyond reasonable doubt.

34. In the final analysis, I uphold the conviction.

35. On sentence however, I have taken into consideration the Judiciary Sentencing policy Guidelines, 2016 and the mitigating circumstances. I have taken into consideration the circumstances of this case. The Appellant is a first time offender, the quantity of drugs was 2grammes with an estimated street value of Ksh.6,000/-. These are mitigating circumstances. The maximum sentence provided by section 3(2)(b) of the NPSCA is 20 years imprisonment.

36. I would in the circumstances of this case reduce the sentence to 3 years imprisonment. I further observe that the Appellant was in pre-trial custody and has after conviction served 2 ½ years making a total of 3 years. I consider the period served sufficient. The Appellant is set at liberty forthwith unless otherwise lawfully held.

37. Orders accordingly

Judgment dated delivered and signed at Garsen on this 26th day of February, 2020.

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R. LAGAT KORIR

JUDGE

In the presence of:

S. Pacho Court Assistant

The Appellant in person

Mr. Mwangi For Respondent