



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NANYUKI
CRIMINAL APPEAL NO. 25 OF 2016

DAVID KOOME KAISA APPLICANT

Versus

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. W. J. GICHIMU – PRINCIPAL MAGISTRATE dated 19th October 2015 in Nanyuki Chief Magistrate’s Court Criminal Case No. 709 of 2015)

JUDGMENT

1. **DAVID KOOME KAISA (Koome)** was charged and convicted on his plea of guilt to the **offence of being in possession narcotic drug contrary to section 3(1) as read with section 3(2) of the Narcotic Drug and Psychotropic substance Control Act No. 4 of 1994 herein after referred to as the Act.** On pleading guilty prosecution set out the facts as follows:-

“On 14/7/2016 at 7.30 p.m. officer from Kariokor Police Post station were on patrol when they received information that there was a miraa seller at Soweto area who was also selling bhang. They went to his kiosk where they found him. They identified themselves. They requested to search his kiosk. Upon a thorough search they recovered 128 rolls of cannabis sativa placed at the door frame. They also recovered some other 10 gms of cannabis sativa (bhang). Accused had no permit to in (sic) possession of the bhang. He was arrested together with the bhang. He was taken to Kariokor police post and later to Narumoru Police Station at (sic) where he was charged. This is the bahang P-Exhibit 1.”

2. Koome was convicted by the trial court after confirming that those facts were correct. He was sentenced to 3 years imprisonment. He filed an appeal before this court against his sentence. Even though his appeal is only restricted to his sentence this court is duty bound to consider whether indeed his plea was unequivocal.

3. To begin with it is important to reproduce the particulars of the offence that Koome pleaded guilty to. The particulars are as follows:-

*“**DAVID KOOME KAISA:** On the 14th day of July 2015 at Soweto Trading Centre, Kiamathaga Location in Nyeri County was found being possession of narcotic drug to wit 128 rolls (195 gms) and twenty (20 gms) of which was not in its medicinal preparation form.”*

4. It will be noted from those particulars of the offence that the particular narcotic drug Koome was said to have possession of was not stated. Section 2 of the Act defines Narcotic drug as:-

“Means any substance specified in the first schedule or anything that contains any substance specified in that schedule.”

5. When one goes to the first schedule of the Act there is a very long list of Narcotic drugs. It therefore begs the question which of the narcotic drugs listed in the first schedule was Koome charged as possessing. Is it Cannabis, Cocaine, Heroin or what out of the long list of narcotic drugs listed in the first schedule. It is clear that looking at the particulars of the charge that the charge to which Koome pleaded guilty was defective. It follows that Koome’s pleaded guilty to a defective charge. The particulars of the charge simply did not disclose an offence for failing to specify which drug listed in the first schedule of the Act Koome possessed.

6. Additionally the prosecution only produced to the trial court the alleged cannabis sativa allegedly recovered from Koome and nothing more. Section 74 A of the Act sets out an elaborate procedure to be followed once narcotic drug is seized. I will reproduce that section 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 Director 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 authorised 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.

7. **Subsection 3 of section 74A** makes it clear that the purpose of following the seizure procedure is to determine that what is seized is narcotic drug within the meaning of the Act and to enable the magistrate order immediate destruction of that narcotic drug. It follows that without the certificate mentioned in Section 74 A the accused and also the court cannot be sure that what the prosecution produces is narcotic drug.

8. This court recently had occasion to deal with an appeal which was the same as the one now before the court in the case **NANYUKI HIGH COURT CRIMINAL APPEAL NO. 11 OF 2016 PETER NJOROGE MUNGAI VS REPUBLIC**. This court stated:-

“In this court’s view that pleas were not unequivocal because section 74A of the Narcotic Act was not complied with. This is the section that sets out the procedure that has to be followed on seizure of narcotic drug. That section provides that on seizure of narcotic drug the police, and a medical service person in the presence of the person to be charged and his advocate, if any, weigh the seized narcotic drug and take one or more samples for the purpose of analysing and identifying the same. On carrying out analysis an analysis certificate shall be issued. The production before the trial court of the samples of the drug and analyst certificate “shall be conclusive proof as to the nature quantity of the narcotic drug” substance concerned.”

9. This court in the case **PETER NJOROGE MUNGAI V REPUBLIC** (Supra) relied on a Court of Appeal decision, the case **MOSES BANDA DANIEL V REPUBLIC (2016)eKLR**, where the Court of Appeal stated thus:-

“..... Regarding the application of section 74A it is of utmost importance that procedure contained in the substantive provisions of the law be observed and followed with extreme diligence and scrupulous care. Although complex as we have noted, the procedure laid down in section 74 A must be strictly followed

After the seizure, expert opinion must be obtained to ascertain the nature and the weight of the drugs.”

10. Bearing in mind that the procedure set out in section 74 A was not followed one then wonders how the prosecution determined that what they seized from Koome was indeed cannabis sativa.

11. All the above discussion leads only to one conclusion, that is Koome’s plea of guilty was equivocal and according should not have led to his conviction. **It is on that basis that the conviction of DAVID KOOME KAISA is quashed and his sentence is hereby set aside. It is ordered that David Koome Kaisa be set free from custody unless he is otherwise lawfully held.**

DATED AND DELIVERED THIS 31ST DAY OF MAY 2017.

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue

Appellant: David Koome Kaisa

For the State:

Language:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE