

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL APPEAL NO.25 OF 2015

(From original CM CC no.286 of 2013 at Malindi)

YASIN ALI APPELLANT/APPLICANT

V

REPUBLIC..... RESPONDENT

JUDGMENT

The appellant was charged with four other accused persons 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. The particulars were that the appellant and others on the 30/4/2013 at Gede ruins Village of Watamu Location within Kilifi county were found trafficking in narcotic drugs to wit 14 sachets of heroin of a street value Ksh.1,400/= by storing in contravention of the said Act.

He was convicted and sentenced to serve four (4) years imprisonment. The grounds of appeal are that the evidence on record does not support the charge, that his arrest had nothing to do with the charge, that the prosecution did not prove the case beyond reasonable doubt and that his defence was not considered. Appellant filed written submissions and argued all the grounds together. He contends that he had sent to the house of his co-accused and being found in the premises where the drugs were recovered did not connect him with the offence. No drugs were recovered from him. It is further submitted that he was not aware that there were drugs in the house.

Miss Mathangani, prosecution counsel opposed the appeal. Counsel contends that drugs were recovered from the appellant's co-accused's house. The appellant was found with some Ksh.1,500/= being proceeds from drugs. The drugs were examined by the government analyst and found to be heroine. Counsel urged the court to enhance the sentence.

The record of the trial court shows that four witnesses testified for the prosecution. Three were police officers whose evidence is similar. PW1 P. C. Simon Mutunga was stationed at Watamu Police Station. They got a tip off that someone was selling drugs at Gede area. This was on 30/4/2013. Together with PW2 and PW4, they went to the house of the 1st accused before the trial court who died while the proceedings were on-going. There were two men and a woman. The men being the deceased and the appellant, PW1 and his colleagues found Ksh.700/= on the table. They also recovered a matchbox with 14 sachets of some powder which they suspected to be drugs. They searched the appellant and recovered Ksh.1,500/= from his wallet. Two other accused persons were arrested hiding in some of the rooms. PW2 P. C. Dismas Mutua was also based at Watamu Police Station and his evidence is similar to that of PW2. Similarly, PW4 Inspector Roy Mwaura proceeded to the scene with other officers including PW1 and PW2. They recovered the drugs from the appellant's co-accused's house. The appellant was found with Ksh.1,500/= in his wallet. PW3, John Njenga is a government analyst based in Mombasa. He received the 14 sachets containing brownish powder. He analysed the powder and found it to be heroine.

In his sworn defence, the appellant testified that on 30/4/2013 he was sent by his sister to the first accused's home. He found police officers at the home. The police searched him but nothing was recovered from him. He was arrested and later charged with the offence.

The evidence on record shows that police officers raided the home of the 1st accused before the trial court. It is also established that upon searching the house, the police recovered 14 satchets of heroin with a street value of Ksh.1,400/=. The appellant was not the owner of the house but was within the premises. His defence evidence indicate that he had been sent to the house by his sister and found the police already in the house.

There were several police officers. According to PW1, PW2 and PW4, they divided themselves into two groups. One group entered through the front door while the other one used the back door. It is their evidence that the appellant was seated in the house and money was on the table. The defence evidence does not show that the appellant was arrested in a place different from where the prosecution evidence stated. The appellant did not testify that he was arrested outside the 1st accused's house.

The evidence proves that drugs were recovered from the home of the 1st accused. It is also proved that the appellant was inside the house where the drugs were recovered. He was therefore aware that there were drugs in the house. It is possible that the Ksh.1,500/= the appellant had was his own money but the fact that the police got a tip off that drugs were being sold in the 1st accused's house and indeed recovered the drugs proves that the appellant was aware of the drug business. I do find that the conviction was proper.

The appellant was sentenced to serve 4 years imprisonment. He is a first offender. The value of the drugs was Ksh.1,400/- The trial magistrate took into account the period the appellant had stayed in remand. I do find that the sentence is excessive. Being a first offender, the accused ought to have been given an alternative to the prison sentence. I do set aside the 4 year imprisonment and replace it with a fine of Ksh.10,000/= and in default the appellant to serve eight (8) months in prison.

In the end, the appeal on conviction is disallowed. The sentence of 4 years imprisonment is set aside and replaced with a fine of Ksh.10,000/= and in default to serve eight (8) months imprisonment from the date of conviction.

Dated, signed and delivered at Malindi this 23rd day of July, 2015.

SAID J. CHITEMBWE

JUDGE