REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO.6 OF 2012

ATHUMAN MOHAMMED…..…..…. APPELLANT

VERSUS

REPUBLIC……..…….....…RESPONDENT

(From original Conviction and Sentence in Criminal Case No. 1291 of 2011 of the Chief Magistrate's Court at Mombasa – **HON. R. KIRUI - PM**)

JUDGMENT

The Appellant **ATHUMAN MOHAMMED** was charged with another not before the Court 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 being that on the 20th day of April 2011 at Majengo area in Mombasa District County, the two were jointly found trafficking in narcotic drugs by conveying heroin to wit 200 satchets with a a street value of Kshs. 60,000/= in contravention of the said Act.

The The appellant upon conviction was sentenced to ten (10) years imprisonment and in addition a fine of Kshs. 1 Million. The Magistrate observed that the law does not state what happens in default thereof.

The brief facts of the case are that on the 20th day of April, 2011 police officers P.C. Geoffrey Mathenge PW1 and PC Charles Juma PW 2 all from Mombasa Central Police station and in the company of community police proceeded to a house at Majengo knocked and pushed it open and found two men accused and another seated on a mattress and preparing 200 satches of some substance which they suspected to be heroin. They arrested the two and took the exhibits to police station for further investigations. The 2nd accused later died while in prison custody and his case was later withdrawn under section 87(a) of the Criminal Procedure Code. The case proceeded against the Appellant in this case.

The grounds of appeal are that the members of Community Police and the informers were not called as Witnesses.

Secondly, that the case was not proved beyond reasonable doubt and the trial magistrate did not consider his defence.

In his judgment the learned trial magistrate did consider that the appellant did not contest that the substance in question was Heroin and the point for determination was whether the appellants were

trafficking in it or not. The trial magistrate did observe that the accused person had been charged with conveying but he found that they were storing it but decided not to interfere with the charge and proceeded to convict the accused for trafficking and conveying and storing and subsets for trafficking. Section 2 of the Narcotic Drugs and Psychotropic substances Control Act defines trafficking to mean,

> ***"the importation, exportation, manufacture, buying sale-giving supplying, storing, and ministering conveyance, delivery or distributor by any person of a Narcotic drug or psychotropic substance or any substance represented or held out by such person to be a Narcotic drug or substance, or making an offer in respect thereof.***"

In the present case, the accused persons were found preparing satchets of heroin. They were clearly not conveying as alleged in the charge sheet and nor were they storing. They were found in possession.

The investigating officer (PW3) did testify to have been given 200 satchets of heroin. She prepared an exhibit memo and took them to the government chemist for analysis. The government chemist confirmed them as heroin. She produced the satchets and the report as exhibits. Section 74A of the Narcotic drugs and psychotropic substances Act provides,

" where any Narcotic drugs or psychotropic substances has been seized and is to be used in evidence, the commissioner of police and the Director of Medical Services or a police officer or a medical officer respectively authorised in writing by either of them for the purposes of this Act (hereinafter 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.

(b) A designated analyst

(c) The Advocate

> **(d) The analyst of any appointed by the accused person 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 purpose of analysing and identifying the same. After analysis and identification of the samples taken under subsection (1), the same shall be returned to the authorised officers together with the designated analysts certificates for production at the trial of the accused person."**

In the present case there is no indication as to whether any weighing was done.

The regulations to the Act found in Legal Notice Number 16 of 10th March, 2006 at part II – **General procedures at and immediately after seizure** provide and in particular Section 3(1) (a) All material evidence relating to the seizure is collected and processed:

(b) the original condition of the whole amount of the seized substance at the scene is documented.

(c) the seized substance is marked for identification and inventory thereof made

(d) the seized substance is weighed displayed photographed video taped or otherwise recorded to depict it as originally packed.

These procedures were not followed by the prosecution witnesses. Before the analyst report was produced as an exhibit by the investigating officer and not the analyst himself. The accused was not asked whether he had any objection to its production. Such failure greatly prejudiced his defence.

The Narcotic Drugs and Psychotropic substance (control) Act No. 4 of 1994 provides for severe

punishments and there is need for police to comply with its provisions.

I find that this appeal has merit. The Conviction is quashed and the Sentence set aside. He is set at liberty unless otherwise lawfully held.

Judgment delivered dated and signed this **27th** day of **February, 2014.**

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M. MUYA

JUDGE

27TH FEBRUARY 2014

In the presence of:-

Learned State Counsel Miss Fundi

The appellant present in person

Court clerk Musundi