



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL APPEAL 103 OF 2010

HUSSEIN AHMED ATHMAN.....APPELLANT

- Versus -

REPUBLIC.....RESPONDENT

J U D G M E N T

1. HUSSEIN AHMED ATHMAN, the appellant herein was charged in the Lower Court with the offence of Trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances (control) Act (NDPS). It was alleged that on 26th January, 2010 the appellant trafficked in 32 sachets of heroin. The appellant denied the charges. Following a full trial, he was found guilty, convicted and sentenced to life imprisonment.
2. He now appeals to this court against both conviction and sentence. He filed various grounds at different times. The grounds are variously described as “memorandum grounds of appeal, amended grounds and supplementary grounds”. The appellant also filed two sets of written submissions.
3. The substance of these grounds and submissions can be briefly stated as follows:
 1. The charge sheet was defective for including the words “by selling” and bearing an irregularly amended date of the offence.
 2. The prosecution evidence was insufficient
 3. The value of the drug was not certified and the sentence is invalid. The State, through Mr. Kemo opposed the appeal and asserted the strength of the prosecution evidence while dismissing the alleged technical irregularities.
4. As a first court of appeal, I have gone through the evidence tendered in the Lower Court in order to appraise it for myself and form my own conclusions (**see OKENO VS R 1972 EA 322**). Three witnesses testified for the Prosecution. The gist of their evidence can be summarized as follows: Cpl Tobias Mwita (PW1), Pc Asha Woor (PW2), were police officers attached to the Anti-Narcotic Unit Malindi. They were on routine patrols within Mbuyu wa Kusema, an area notorious for drug-related offences. The time was 5.00pm. When they reached a field known for drug abuse, they met with a lady whom they stopped and searched but found nothing offensive on her.

5. On proceeding further, they saw a group of young men who fled upon spotting the officers. The appellant was one of them. He was chased, caught by PW1 and searched. 32 sachets of what was later confirmed by the Government Chemist (PW3) to be heroin were recovered from him, packed in a cigarette wrappings inside a matchbox.

6. In his sworn defence, the appellant dismissed the prosecution's evidence as a fabrication asserting that he was arrested on 26th January, 2010 while walking to his home at Mtangani area. He said a woman who was among those arrested with him was later released. He denied that he had any drugs on his person and reiterated submissions he had made at the close of the prosecution case as to the weaknesses in the prosecution's evidence.

7. Taking the latter issue first, the versions given by PW1 and PW2 were consistent in the main details, namely, the general area and time of arrest as well as the recovery of the drugs and the quantity thereof. The appellant has raised as he did in the trial the alleged mis-description of the area (whether fenced field or not) as well as the drugs. The former in my view is not material as the witnesses referred to the same field and general location. At any rate the covering report, the witnesses explained was a mere summary of the arrest hence would not contain every detail. Equally, that PW2's statement did not mention that the sachets of drugs were in a matchbox does not detract from her evidence in chief and that of PW1 to the effect that the 32 sachets were retrieved from the appellant's trouser. Such a minor discrepancy would not amount to mis-description of the drug.

8. Both PW1 and PW2 described in similar detail the number of sachets, wrapping, place recovered from, as well as the various denominations of money also found on the appellant. I do agree with the finding of the Lower Court that the versions of these witnesses corroborated each other in material particulars. I also accept the court's argument that there was no reason for the two witnesses to frame up a total stranger, as the appellant alleged to have happened. Moreover, there was no indication that any of the drug was recovered from the woman who was allegedly released.

9. On the issue of the charge sheet being defective, it is true that there was no requirement for including the words "by selling" in the particulars therein. However, the inclusion does not render the charge defective, rather, it adds more detail, to the appellant's benefit. Under section 134 of the Criminal Procedure Code the charge is "sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as really be necessary for giving reasonable information as to the nature of the offence charged". The proceedings of the Lower Court indicate that the appellant not only understood the charge facing him but also put up a robust defence by way of cross-examining witnesses, making oral submissions and giving a sworn defence.

10. The recovery of monies in different denominations from the appellant within the field in question goes to suggest that indeed he had the drugs for purposes of engaging in the sale of the same. With regard to the date of the offence being wrongly stated in the charge sheet in the space provided for the OB number, nothing turns on the issue. The matter was put to PW1 during cross-examination and he gave a reasonable explanation. I agree with Mr. Kemo's submission that the error in the citation of the OB number in the charge sheet is not an irregularity of any consequence as the actual particulars cited the correct date.

11. The weight and value of the drug may not have been certified, but the number of sachets was clearly established. To fit in a matchbox, they must have been small sachets. Be that as it may, the custodial sentence meted out on the Appellant is the mandatory one provided for the offence while the fine is the minimum prescribed. On the authority of **CHUKWU VS REPUBLIC [2010]e KLR**, the sentence is proper and cannot be faulted on grounds of the absence of certification.

12. In conclusion, I am satisfied that the evidence tendered in the Lower Court formed a sound basis for a safe conviction and that the consequent sentence is proper. I dismiss this appeal in its entirety as it has no merit.

Dated and delivered at Malindi this 25th day of **May, 2012** in the presence of: Mr. Kemo for the State, appellant present. Cc: Evans

C. W. MEOLI
JUDGE