



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL REVISION NO. 10 OF 2011

REPUBLIC.....APPLICANT/APPLICANT

VERSUS

**OMAR ALI ABDALLA
& OTHERS.....ACCUSED**

PERSONS/APPLICANTS

RULING

This file has been placed before me on the strength of a letter dated 23rd December 2010 by the Chief Magistrate Miss L.W.Gitari. She states that the 1st accused Omar Ali Abdallah was convicted on his own plea of guilty, on a charge of Trafficking Narcotic Drugs and Psychotropic substances control Act. He was fined Kshs.100, 000/- in default to serve 2 years imprisonment. It is pointed out that the sentence is illegal and the file is placed before this court for revision orders.

The particulars of the charge stated that on 20th November 2010 at around 10.00am at Maweni Estate, Malindi, the accused was found trafficking in narcotic drugs to wit 14 sachets of heroin valued @ Kshs.1400/- by storing it in contravention to the said Act.

The facts were that on 20/11/10 at about 10.00am, three police officers attached to the Anti-Narcotics Unit (ANU) Malindi, went to a certain house in Maweni. They had information that there were people dealing in drugs. In the house, they found five people, among them was the accused. They introduced themselves and searched the house. On the body of the accused nothing was recovered, but inside the house was recovered a packet of Rooster with 14 sachets of brownish powder which was suspected to be heroine. The same was escorted to Government Analyst Mombasa where they were analysed and found to be heroine as per the Government Analyst`s Report produced as exhibit.

The accused confirmed that the facts were correct. Those facts confirm the offence contemplated under the Act to as;-

“Trafficking” as defined by section 2, and whose penalty is provided under section 4 (a) to this effect;-

“Any person who trafficks in any narcotic drug or psychotropic substance or any substance represented as held out by to be a narcotic drug or psychotropic substance, shall be guilty of an offence and liable;-

(a) In respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is greater AND and, addition, to imprisonment for life”

It is true that in the past, nearly all the lower courts, and even the High Court in the country had construed this to mean that the sentence had the fine as an option and that the courts had discretion to impose a fine upto one million shillings or 3 times value of the drug, with a default sentence. However this position was knocked out by the Court of Appeal decision in Kingsley Chukwu V R which held that the fine was a sentence to be meted in addition to the imprisonment term. A reading of the penalty indicates the use of the words **AND IN ADDITION**, meaning, alongside with the fine, comes the life imprisonment. Of course my perception had always been that the life imprisonment was the maximum sentence and that a court could exercise its discretion in determining what period an individual was to serve.

The rationale behind this thinking is that it would be in vain to order an individual to pay a fine of one million shillings or at all when despite that payment he will still be sentenced to serve life imprisonment. The court of Appeal in Kingsley Chukwu V R C A 257 of 2007 held that it was erroneous to give a custodial sentence as a default to the fine – the Act does not provide that, and that custodial life imprisonment is an additional sentence.

I am bound by the decision of the Court of Appeal, although I will respectfully state that I find it difficult to then reconcile the first position of the provision on fine, with the additional sentence for life. However I am bound by the decision of the Court of Appeal and to that extent shall interfere with the sentence to the state that in addition to the fine, the accused shall be sentenced to life imprisonment.

Dated and delivered this 15th day of February 2011

**H.A.OMONDI
JUDGE**