



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.21 OF 2010

IRENE MUSEMBI AVEDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An Appeal from original conviction and sentence in Nakuru C.M.CR.C.NO.3635/2009 by Hon W. Juma Chief Magistrate, dated 22nd & 26th January 2010]

JUDGMENT

The appellant, Irene Musembi Avedi faced the following charges before the court below:

- 1. Count I – being in possession of Psychotropic Substance contrary to section 3 (1) and section 3(2) (b) of the Narcotic and psychotropic Substances Control Act No.4 of 1994 (the Act).**
- 2. Count II – being in possession of utensils used in connection with smoking, inhaling or sniffing or any utensil used in connection with preparation of any narcotic drugs or psychotropic substance contrary to section 5(d) of the Act.**
- 3. Count III – dealing with poisonous substances in negligent manner contrary to section 245 of the Penal Code.**
- 4. Count IV – being in possession of Part 1 poisons without license contrary to section 26 of the Pharmacy and Poisons Act and**
- 5. Count V – being in possession of suspected stolen property contrary to section 323 of the Penal Code.**

It was the prosecution case that on 10th (erroneously indicated in count 1 as 9th) July, 2009 police officers acting on information that narcotic drugs were being sold in a certain house at Bondeni area, Nakuru, laid an ambush and raided the house in question. Inside the house, they found the appellant knitting a sweater. She informed the officers that she lived in that house with her husband who was not at home during the raid.

After introducing themselves, the police officers conducted a search and found seven (7) plastic containers in the wardrobe. In the containers were assortment of tablets and capsules. Apart from these, there were 62 tablets and capsules, two syringes containing some liquid and rizzla rolling paper (100 booklets). The following items which were suspected to have been stolen were also found in the house:

- a Samsung TV set – 24”.
- a Sony radio cassette with 2 speakers.
- an LG compact player.
- a JVC TV set – 14”.
- a Sakina Camera.

Photographs of the room and the exhibits were taken. The first set of items suspected to be drugs were submitted to the Government Chemist. **P.W.1 Catherine Sera Murambi** a Government Analyst confirmed upon examination of the tablets and capsules that:

- i) 28 (see the report itself) yellow tablets contained diazepam, a psychotropic substance
- ii) The liquid in the 2 syringes contained decazine, a tranquilizer which falls under part 1 poisons list
- iii) 10 pink/black capsules – contained ampicillin, an antibiotic which also falls under part 1 poisons list

Following these results, the appellant was charged as aforesaid.

In her defence, the appellant recalled how on the night of 8th July, 2009, she met a man at Three Ways Bar. The man asked her to accompany him to his house for the night for a consideration of Kshs.300/=. The next morning, the man left to get change to pay her. When he was away, the police came, found the exhibits and she was arrested.

After a full trial, the learned magistrate found her guilty of all the charges, except the charges in count III which the learned trial magistrate found to be a duplication of the charges in counts 1 and IV. Upon conviction in the rest of the charges, the appellant was sentenced as follows:

- Count 1 – a fine of Kshs.630,000 in default three years imprisonment;
- Count II – a fine of Kshs.30,000/=, in default 6 months imprisonment;
- Count IV – a fine of Kshs.50,000/=, in default one year imprisonment
- Count V – a fine of Kshs.40,000/=, in default six months imprisonment.

The appellant was aggrieved and preferred this appeal on the grounds that are largely mitigating factors, apart from the ground that her defence was not considered.

Being the first appellate court, it is imperative that the evidence on record be re-evaluated afresh in order for this court to arrive at its own independent conclusion, always bearing in mind its disadvantaged position of not having seen or heard the witnesses.

It is common ground that all the exhibits in this case were found in the house where the appellant was. Whereas it is the prosecution case that the appellant was in possession of psychotropic substances, the utensils as described in count II, Part I poisons list and all the other exhibits, the appellant’s defence was that she was only a guest in the house where the exhibits were recovered, having spend the night with the owner who disappeared.

Considering the prosecution evidence that is confirmed by the appellant that the exhibit were found in the house where the appellant was, and weighing the appellant’s defence that the house was not hers, can it be said in respect of counts 1, II and IV that she was in possession of psychotropic substance, the utensils and Part I poisons

list?

Both the Act and the Pharmacy and Poisons Act do not define what constitutes “*possession*”. However the courts have adopted the definition of that word as described in **Stephen’s Digest of Criminal**

Law. For instance the Court of Appeal relying on Page 304 of the 9th Edition of the Digest defined possession in the case of **Hussein Salim Vs. Republic** (1980) KLR 139 which related to **section 10(e) of Dangerous Drugs Act** (repealed) as follows:

“To establish possession for the purpose of the Dangerous Drug Act, section 10(e), the accused must be shown to have such access to and physical control over the thing (or substance) that he is in a position to deal with it as an owner could, to the exclusion of strangers, but it is not necessary to prove that the accused had title nor that he has access to it to the complete exclusion of all other persons.”

The appellant was not found in actual possession of the exhibits. The officers found the exhibits in the cupboard after conducting a search in the house. Can it be said the appellant was in constructive possession? First, the prosecution witnesses confirmed that when the police got near the house, there were people outside the house. But when they saw the police, they ran away. The witnesses also testified that the house belonged to the appellant and her husband. That they are still looking for the appellant’s husband. It is apparent that the appellant was arrested only for being found in the house where the exhibits were and also on allegation that she told the police that she occupies that house with her husband.

Occupation of premises or vessel where drugs are found *per se* cannot constitute possession of the drugs. It must be shown that the appellant was aware of the existence of the drugs in that house; that she had access to and physical control of them; that she was in a position to deal with them as the owner to the exclusion of strangers. It was incumbent upon the prosecution to prove the ownership or tenancy of the house. Secondly, there was no evidence that the man at large was in fact the husband of the appellant.

Without evidence of the ownership of the house and in view of the appellant’s defence that she had only gone to the house the previous night with the owner, the learned trial magistrate ought to have resolved the conflicting evidence in favour of the appellant.

For the reasons stated, the appeal succeeds and is allowed, conviction quashed and sentence in each count set aside. The appellant shall be set at liberty forthwith.

Dated, Delivered and Signed at Nakuru this 8th day of March, 2011.

**W. OUKO
JUDGE**