



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 279 OF 2010

(From Original Conviction and Sentence in Criminal Case No. 1477 of 2010 of the Chief Magistrate’s Court at Mombasa: L.N. Mutende – S.P.M.)

CHUBA ABDALLA MBWANA APPELLANT

=VERSUS=

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant **CHUBA ABDALLA MBWANA** has filed this appeal challenging his conviction and sentence by the learned Senior Principal Magistrate sitting at Mombasa Law Courts on a charge of **TRAFFICKING IN NARCOTIC DRUGS CONTRARY TO SECTION 4(a) OF THE NARCOTIC ACT**. The Appellant pleaded guilty to the charge on 12th May 2010. The facts were thereafter read out to the Appellant on 13th May 2005. The Appellant maintained his plea of guilty and was duly convicted of the charge. After listening to his mitigation the trial magistrate sentenced the Appellant to a fine of Kshs.6,000/- in default three (3) months imprisonment and in addition the Appellant was also sentenced to serve a term of fifteen (15) years imprisonment. Being aggrieved the Appellant filed this appeal. **MR. MAGOLO** Advocate appeared for the Appellant.

MR. ONSERIO, State Counsel conceded this appeal and having listened to his submissions I am inclined to agree. The Appellant faced a charge of trafficking. The facts as per the charge sheet were as follows:

“On the 10th day of May 2010 at old Kilindini road in Mombasa District within the Coast Province was found trafficking in narcotic drugs by conveying 5 satchets of heroin with a street value of Kshs.2000/- in contravention of the said Act” [my emphasis]

The particulars talk of conveying. However in the facts as read out by the court prosecutor states:

“They [the police] conducted a quick search against the accused. In the left pocket of his pair of long trousers they recovered five (5) satchets wrapped on [sic]white paper of what they suspected to be heroin ...”

The police ‘**came across**’ the Appellant, stopped him and searched him. The element of conveying is not

brought out. To prove trafficking by conveying it must be alleged (and proved) that the Appellant was found in the act of **conveying** the narcotics from point A to point B. In this case the facts merely indicate that the police '**came across**' the Appellant. What the Appellant was doing when the police '**came across**' him is not divulged. Was he standing somewhere? Was he walking and if so from where to which destination? The facts as read out raise more questions than answers and do not support the charge. In the case of **EDWARD KAZUNGUNAGEGO –VS- REPUBLIC CRIM. APPEAL 316 of 1992** Hon. Justice RSC Omolo (as he then was) held that:

“A plea of guilty, even if it is genuine, which is based on facts which do not disclose an offence is really an equivocal plea, just as one based on a misunderstanding of facts which disclose an offence”

This is precisely the position that obtains here. The facts as read out do not disclose the offence of trafficking by conveyancing. The facts are at variance with the particulars of the charge and disclosed a totally different offence to the one with which the Appellant was charged. The facts in fact disclose the offence of possession of narcotics contrary to S. 3(1) of the Narcotics Act. The Appellant did not face a charge of possession. The charge is therefore invalid and cannot stand. In the circumstances the learned trial magistrate ought not to have convicted the Appellant.

Aside from the nullity of the charge I note that on 12th May 2010 when the Appellant first appeared in court the charges were read out to him. After he entered a plea of guilty the reading of the facts were postponed to the next day in order to enable the prosecution avail the required exhibits in court. On 13th May 2005 when the matter came up the charges were not read out again to the Appellant. The prosecutor merely proceeded to read out the facts. The proper procedure would have been for the charges to be read out afresh to enable the Appellant confirm his plea of guilty. To merely read out the facts without a charge attached thereto is a fallacy and is unprocedural. This in my view is also a reason to fault the Appellant's conviction.

Based on the foregoing my finding is that the conviction of this Appellant was not sound and I do hereby quash the same. The subsequent sentence is also set aside. The accused is to be set at liberty unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 20th day of June 2011.

M. ODERO
JUDGE

In the presence of:
Mr. Magolo for Appellant
Mr. Onserio for Respondent