



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. 100 and 101 OF 2010 (CONSOLIDATED)**

*(From original sentence and conviction in Criminal Case No. 683 of 2009 the Chief Magistrate’s Court*

*at Malindi before Hon. L. W. Gitari - CM)*

**KADZO KAHINDI KALUME**

**REHEMA KAHINDI KALUME.....APPELLANT**

**=VERSUS=**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

Rehema Kahindi Kalume (1<sup>st</sup> appellant) and Kadzo Kahindi Kalume (2<sup>nd</sup> appellant) were jointly charged with the offence of trafficking in narcotic drugs under the Narcotic and Pscychotropic Substances (Control) Act No. 4 of 1994. The prosecution case was that on 9<sup>th</sup> day of May 2009 at about 0900 Hrs at Mtangani area in Malindi Location within Malindi District of the Coast Province, were jointly found trafficking eleven sachets of HEROIN and 30 tablets of ROPHYPNOL (FLUNITRAZEHAM) valued at Kshs. 2000/- by storing the same. Both appellants denied the charge, and after due trial in which four prosecution witnesses testified appellants were the only defence witnesses, they were convicted and sentenced to pay a fine of Kshs. 1,000,000/- in addition to life imprisonment.

**APC JAIRUS KINONI (PW1)** was assigned duties on 9<sup>th</sup> May 2009, at about 9.00am, to accompany community policing members to a house where narcotics were sold. The house was in Mtangani area according to a tip off they had received. The community police group led APC Jairus and APC ALI MZARA (PW2) to a permanent building on a plot which had a sitting room and bedroom. They found some women seated outside the house and upon enquiring who was the owner of the house, learnt that two women lived in that house. The police officers introduced themselves and requested to carry out a search in the said house. The officers found a metal box under a jerrican at the corridor of the house, having entered inside the said house in the company of the two women. Inside the box was a matchbox containing sachets of what they suspected to be heroin – PW1 stated they were eleven sachets of a brownish powdery substance. The two women declined to enter one of the rooms for a search, so the officers called a lady police officer who came and accompanied the group into the bedroom – inside that

bedroom was recovered 30 Rophynol tablets in a plastic paper, placed under a cupboard.

The two women (who are the appellants) were then arrested. On cross-examination by the 1<sup>st</sup> appellant PW1 stated:

***“One woman was said to be away and was said to be the owner of the house. I learnt you were the child of the owner of the house...”***

**APC MZARA (PW2)** confirmed being in the company of PW1 during the search and recovery. His testimony corroborated that of PW1 regarding the recovery. His evidence was that the two appellants lived in that house Cpl. WELLINGTON WAMBUA (PW3) formerly of CID Headquarters Malindi was directed by the deputy OCPD to take over the investigations in the matter. He recorded statements from the two police officers and received the recovered substances which he submitted to the Government Chemist for analysis and examination. The same were examined by the Government Analyst JOHN NJENGA (PW4) who found that the tablets were FLUNITRAZEPAM (commonly known as ROPHYNOL) and the brownish powder was found to be DIZETYL MORPHINE (commonly called HEROIN) and both were narcotic drugs under the Narcotic Drugs and Psychotropic Substances (Control) Act. He produced his report as exhibit.

Both appellants gave unsworn testimony in which 1<sup>st</sup> appellant stated that she is employed in the home of someone who lives in Mtangani and she was at home with her employer's children, when at 9.00pm the 2<sup>nd</sup> accused opened the door and eight people walked in. They were ordered to get up, as they had gone to sleep. Those people searched the house but made no recovery. The group returned the next day at 9.00am and demanded for the lady owner of the house and when they said she had not returned, they were beaten and told to produce their mother, then they were arrested and charged.

2<sup>nd</sup> appellant gave similar testimony to that of 1<sup>st</sup> appellant, saying that she too was an employee in that home and that the police demanded to know the whereabouts of the lady of the house.

The trial magistrate in her judgment noted that the nature of the recovered drugs was not disputed. She also took into account the evidence that search and recovery was done in the presence of the two appellants and she found no reason to doubt the evidence by PW1 and PW2 which she described as well corroborated. She considered the defence by the appellants and found the same to be a mere denial and observed further that the information given to the police was that narcotic drugs were being sold from that house, NOT that the owner of the house was selling drugs. This information was confirmed by the recovery of the drugs from that house.

She pointed out that appellants did not deny that they lived in that house and the drugs were found stored in the very house where the two appellants lived.

The claim that they were employees was dismissed by the learned trial magistrate who stated that the purported employer was an imaginary person who did not seem to even have a name. The trial magistrate held that the evidence dislodged the defence of the appellants and proved the charge.

The findings were challenged on the following;

- (a) The charge was defective.
- (b) The charge was not proved beyond reasonable doubt.
- (c) The prosecution did not demonstrate that appellants had exclusive possession and control of the premises where the drugs were recovered from.
- (d) The prosecution evidence was grounded on hearsay as the other persons found sitting outside the house with appellants' did not testify as witnesses and failure to call them can only be construed to mean that were such witnesses to have testified that their testimony would have been adverse to prosecution and

would have exonerated appellants from the offence.

Mr. Macharia Counsel for the appellant sought to rely on two decisions i.e **AMISI V. UGANDA (1970) EA 662 and AHMED SLAIM AND ANOR V R C.A (Msa) Criminal Appeal No. 38 of 1997.**

(e) The trial magistrate erred by expecting appellants to mention names of the employer and that in so holding, the trial magistrate shifted the burden of proof onto the appellants yet there was no evidence offered by prosecution to disconnect the existence of the absent woman who was said to be the owner of the house and that the recovered drugs may have been under the control of another person other than the appellants.

(f) The investigation was shoddy and the trial magistrate erred by seeking to review the orders made earlier by another magistrate regarding recalling of witnesses.

The second appellant's grounds were more or less along the same lines as 1<sup>st</sup> appellants.

At the hearing of the appeal, Mr. S. M. Kimani appeared for 1<sup>st</sup> appellant while Miss Chepkwony appeared for the 2<sup>nd</sup> appellant. It was Mr. Kimani's submission that the particulars of the charge were insufficient and vague to support a charge under section 4 of the Act. It was his argument that while section 2 of the Act defines trafficking to include storing, a charge framed under section 4 must ordinarily particularize the element. He referred to **CRIMINAL APPEAL NO. 38 OF 1997 AHMED SALIM & ANOR V R** where drugs were found in a house appellants had visited. The owner of the house and another person were arrested alongside the suspects. It is Mr. Kimani's contention that all the evidence tendered by prosecution is whittled down by section 119 as prosecution deliberately avoided calling members of the community police as witnesses. It was also his argument that the fact that appellants did not deny living in the house from where the drugs were recovered did not prove they had control of the things inside the house, and the court acted on mere presumption. Miss Chepkwony adopted these arguments in toto.

To this Mr. Kemo (on behalf of the State) opposed the appeal both on conviction and sentence and submitted that there was no defect in the charge because all that a charge should do is to avail to an accused person the facts and particulars of the offence – which is the guiding factor. He pointed out that, the charge sheet had sufficient particulars to enable appellants know the offence they were facing and prepare their defence.

Section 137 (a) (ii) of the Criminal Procedure Code sets out rules of the framing of charges and information, and all that is required is for the charge to describe the offence shortly in ordinary language without necessarily stating all the essential elements of the offence and if the offence charged is one created by an enactment, shall contain a reference to the section of the enactment creating the offence. The charge of trafficking constitutes different specified elements as defined under section 2 of the Narcotic Drugs and Psychotropic Substances Act and it is with this in mind that the particulars of the charge specified the nature of the trafficking as storing. I therefore find that the charge has complied with what is contemplated by section 137 (a) (ii) of the Criminal Procedure Code and there is no defect whatsoever – my view is that the charge contained sufficient information to enable the appellants fully understand what they were being accused of and prepare their defences. That limb of the appeal has no basis.

With regard to the charge not being proved on account of failing to establish the actual owner of the house, Mr. Kemo submits that the charge was indeed proved by police officers who acting on information received from the community policing members went to the house accompanied by members of the group and recovery of the drugs was made from the different rooms. Further there was evidence that the substances were stored in a metal box, and also under a cupboard which evidence by PW1 and PW2 was consistent and corroborated. My own evaluation of the evidence before the trial court is that the evidence as regards recovery of the drugs is watertight and the trial magistrate cannot be faulted in her finding on that aspect.

Closely linked to this is the question of whether the evidence proved that appellants had stored the drugs inside the house. It is the submission of appellants' Counsel that the court ought to have taken into account the appellants' defences of being employees and their reference of an employer ought to have set the prosecution to get the owner of the house by carrying out a search at the Lands Office to confirm ownership. He urged this court to consider the decision in **AMBER V MAY**.

It was also the appellant's position that their defence of being employees meant they did not live in those premises.

In response, Mr. Kemo submitted that prosecution's case was that the appellants OCCUPIED the premises and that **Criminal Appeal Case No. 30 of 1997** is distinguishable from the present case, as the appellants in that case were arrested together with the owner of the house who was released under very unclear circumstances, while in the present case police arrested the occupants of the house from which the recovery was made, and indeed the appellants defences confirmed that they occupied the premises – since police even visited the same on two different occasions and found them there – they had even slept there, so the question of non occupation does not arise!!

I concur with Mr. Kemo on this and indeed from the defences of the appellants, taking into account the two visits they refer to, then the only logical legal inference one can make is that the appellants were the single lawful occupants.

Did the trial magistrate shift the burden of proof as argued by the defence because the trial magistrate observed in her judgment that appellants did not disclose the name of their employer, thus making her an imaginary person? Mr. Kemo's response to this is that there was no shifting of the burden of proof at all, because the nature of the offence was one where issues of possession required explanation from suspects – surely if one says this item or this house belongs to X who is known to me – isn't it only reasonable that X be named? Otherwise X remains a fictitious being – all that the trial magistrate did was to find out whether there was a reasonable explanation as regards what prosecution had adduced – in fact such offer by defence would then have dislodged the evidence offered by prosecution – on the absence of that, the “code of silence” by defence only militated against the appellants and my finding is that there was no shifting of the burden of proof whatsoever.

Mr. Kimani also argues that the entire trial was a nullity because on 29-10-09, the trial court complied with the provisions of section 200 (3) Criminal Procedure Code and 1<sup>st</sup> appellant opted to recall PW1, PW2 and PW3 on 3<sup>rd</sup> June 2010. Hearing proceeded with calling of PW4 and prosecution case was closed. On 29-06-10, the court revisited its order of 29-10-09 and said it was no longer necessary to recall the witnesses. It is Mr. Kimani's contention that this was a miscarriage of justice as it washed away the effect of the need to comply with provisions of section 200 (3) of the Criminal Procedure Code. Further that prosecution did not reopen its case and the wrong question was asked whether the appellants still wanted to recall the witnesses. He submits that it was improper for the court to review its order of 29-10-09 without occasioning prejudice and section 150 of the Criminal Procedure Code does not offer any refuge. He also cites the decision in **REX –V AHMED DIN s/o MOHAMMED – Law Reports Of Kenya Vo. XXII Part II 1947**, saying that section 150 must be interpreted and enforced with a lot of restraint and be demonstrated to serve the interest of justice.

To this, Mr. Kemo's response is that the trial was not a nullity nor did the trial court review any orders it made rather it only revisited an issue which it had failed to address due to an oversight so the **Ahmed Din Case** supports the prosecution's position that it is only in special/exceptional circumstances that the court will allow recall of witnesses and there is a wide latitude. Further, it was not the prosecution seeking to recall witnesses, rather it was the court ensuring the appellants' rights were protected by having the same observed and the record clearly shows this inquiry was done before the court made its ruling and appellants elected not to recall any witnesses. This matter must be put in proper perspective – it begun before Hon. B T. Jaden (Senior Principal Magistrate) who heard three witnesses and was then transferred from Malindi Law Courts to Machakos Law Courts. The matter was then taken over by L. W. Gitari (Chief Magistrate) on 29-10-09 and she duly informed the appellants of their rights under section 200 (3) of the Criminal procedure Code. 1<sup>st</sup> appellant then told the court as follows:

***“The case to proceed from where it has reached. The witness be recalled”***

2<sup>nd</sup> appellant stated the same and the trial magistrate ordered for a recall of all the witnesses who had testified.

However on 3-6-10 when the matter eventually proceeded, the fourth prosecution witness testified and prosecution closed its case. There was no reference to the recall of witnesses, but before delivering her ruling, the trial magistrate realized the omission and took steps to ensure the appellants were not prejudiced by stating as follows;

***“It has come to my notice that accused had applied that the witnesses, PW1, PW2 and PW3 who had testified before Hon. Jaden be recalled. The accuseds can confirm whether they want them recalled.”***

Both appellants’ response was that they did not wish to have the witnesses recalled – surely isn’t this the protection of the rights Mr. Kimani submits on, isn’t this the interest of justice that the trial magistrate was so diligent to ensure it prevailed – how then can she be faulted in taking such a corrective step at the earliest opportunity before writing her ruling to ensure that the appellants were not prejudiced? I think, (with the greatest of respect to appellant’s counsel), that line of argument is misplaced. My finding is that the trial magistrate did not interfere with or wash away the recalling of witnesses, it was an oversight which was redeemed by offering the appellants a chance to indicate whether they still wished to have the witnesses recalled – this was not a recall under section 150, but under section 200(3) and the appellants opted to waive that right.

As to the failure to call the persons said to have been members of the community police – it is not argued by Mr. Kemo that these were informers who are protected by law and police were under no obligation to call them. Mr. Kimani however protests to this saying these were not persons whose identities were protected as they had in fact accompanied the police in their search and recovery, and so should not be equated with the traditional police informers – I agree. Having said that then, has it been demonstrated that if any of the members of the community police were called to testify they would have given evidence adverse to prosecution - I think not – the search and manner and place of recovery, and the nature of substances recovered has never been contested – and these are the material issues – even the person occupying the premises ceased to be an issue with the confirmation from appellants in their defences. It then follows that failure to call the other persons named as witnesses occasioned no prejudice to either prosecution case or defence case.

The upshot then is that the conviction was safe and I uphold it. The sentence as provided by section 4(a) and confirmed by the Court of Appeal decision in **KINGSLEY CHUKWU V R Criminal appeal No. 251 of 2007** is legal and I confirm it.  
The appeal is thus dismissed.

Delivered and dated this 10th day of **June 2011** at Malindi.

**H. A. Omondi**  
**JUDGE**