



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CRIMINAL APPEAL 425 OF 2008

LEPINAH LEMESHELAA..... APPELLANT
VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

The appellant was charged jointly with two others with the offence of trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 in count one. In count two the appellant and one of his co-accused were charged with being unlawfully present in Kenya contrary to Section 13 (2) of the Immigration Act Cap. 172 Laws of Kenya. They all pleaded not guilty in respect of count one but in count two, the appellant and his co-accused pleaded guilty and were fined Kshs.3,000/= or in default to serve three months imprisonment.

After a full trial in respect of the first count the appellant's two co-accused were acquitted, while he was convicted and fined Kshs.100,000/= or serve five years imprisonment, and in addition to serve 10 years imprisonment.

This is an appeal against the said conviction and sentence. The appellant in this appeal is represented by Miss Odembo who raised several issues in the supplementary petition of appeal dated 24th October, 2011. Both counsel for the appellant and the Republic filed written submissions to address the appeal.

As the first appellate court it is my duty to go through the entire record, evaluate the evidence and come to an independent conclusion. This I have done. Notwithstanding the several grounds raised in the petition of appeal, I am concerned that the appellant did not receive a fair trial because he was not, on several occasions, afforded the benefit of an interpreter during the trial.

Section 77(2) (f) of the old Constitution of Kenya which was then applicable provided as follows:

“Every person who is charged with a criminal offence – (f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge.”

The learned trial magistrate on 12th September, 2007 when the appellant first appeared in court to take his plea, observed that the appellant did not seem to understand Kiswahili or English languages. The plea was deferred to the following day so that a Maasai interpreter could be found. On the following day, that is, 13th September, a Maasai Interpreter could not be found and the plea was deferred yet again to 14th September 2007, when it was taken. Thereafter, the hearing was scheduled and when it started on 16th October 2007, there was a Maasai Interpreter by the name Shadrack Mutenkere.

The record shows that on 23rd October, 2007 the Maasai interpreter was not available and the court recorded that the case could not proceed without a Maasai interpreter. On yet another date i.e. 14th December 2007 the court directed that the Maasai interpreter should be availed on the hearing date. The requirement of the Maasai Interpreter was essential in this matter as seen from the record and in particular on 24th December, 2007 when the prosecution itself appreciated that the accused persons required a Maasai interpreter.

That notwithstanding, on 11th February, 2008 when the court convened to hear PW2, the court did not record the presence of the interpreter and it would appear that none was available because the court did not record his presence. This was also the case on 12th February, 2008. It is important to note that there was a court clerk by the name Maxy who attended the magistrate during all these occasions. Maxy is not a Maasai interpreter. I say so because, on 10th October, 2007 the said clerk was in court when Mr. Sharack Mutenkere was called in to interpret Maasai from Kiswahili. The only logical conclusion is that on the occasions I have cited above, there was no interpretation for the appellant. This was also the case when PW6 and P.W 7 were called to give evidence. That being the case, it is clear that the services of a court interpreter were only availed to the appellant when PW1 gave evidence and thereafter none was available. This was a grave omission.

I have no doubt whatsoever that the appellant was denied a fair trial and considering that he was not represented by counsel. What then should be the order of this court? The omission was fatal and goes to the root of criminal law justice where a fair trial cannot be said to have been availed the appellant. I must, as I hereby do, declare it a nullity. I have considered whether or not to order a retrial in this matter. A retrial should be ordered where the ends of justice demand so, but especially where no prejudice shall be occasioned to the appellant.

The appellant was first arrested on 6th September 2007. He was presented to court on 12th September 2007. The record shows that he and his co-accused were granted bond of Kshs.100,000/= with one surety of like sum in default to be remanded in custody. The appellant did not meet the conditions of bond, and was therefore remanded in custody until he was sentenced on 13th May, 2008 which was a period of just about one year less a few months. From the date of arrest to date is a period of over 4 years. Also from the date of conviction to date is a period of over 3 years. I also consider that if a retrial were to be held the witnesses will have to be sought once again for that purpose. Significantly however, from the record, the court on 13th May, 2008 ordered that the exhibits in this case, the 8 bags of bhang, should be destroyed. What this means is that, if the trial were to start again, there would be no exhibits to be presented to the court. There is no likelihood of a conviction in that regard and therefore, I am of the considered view that a retrial shall not serve the ends of justice in this matter and to order one will be prejudicial to the appellant. I therefore decline to order one. Before I conclude, it should go on record that trial courts should not order the destruction of exhibits before the appellate jurisdiction has been exhausted to the end.

In this case, it was wrong for the learned trial magistrate to make such an order. The end result in this appeal is that the appellant's appeal hereby succeeds and therefore, I quash the conviction and set aside the sentence imposed by the learned trial magistrate. The appellant shall be set free forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of December 2011.

**A. MBOGHOLI MSAGHA
JUDGE**