REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Appeal 147 of 2005

IRENE ADHIAMBO OLIECH :::::::::::::::::::::::::::::::: APPELLANT

V E R S U S

REPUBLIC ::: RESPONDENT

J U D G E M E N T

The appellant was convicted on her own plea of guilty, for 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.

The learned trial magistrate then sentenced her to imprisonment for a period of 10 years together with a fine of KShs.1,000,000/=. The trial court ordered that if the appellant failed to pay the fine of KShs.1,000,000/=, she would serve a sentence of one more year of imprisonment.

In her petition of appeal, the appellant asserted that her plea had not been unequivocal. She also contended that the facts set out by the prosecutor did not disclose the offence for which she was convicted.

Thirdly, it was her contention that the charge was defective. She also asserted that the charge and the particulars thereof were not read out to her in a language which she understood.

Finally, the appellant said that the sentence handed down to her was excessive in the circumstances prevailing.

When the appeal came up for hearing, the learned senior state counsel, Mr. Daniel Karuri informed the court that he was conceding the appeal. He did so because in his view the plea was not unequivocal, and also because the facts did not disclose the offence.

Notwithstanding the concession by the state, this court was obliged to give due consideration to the issues raised before it.

The particulars set out in the charge sheet were to the effect that the appellant was found trafficking 42 kilogrammes of bhang, along the Nairobi-Bungoma Road, within the Webuye Municipality.

After the charge was read out, the appellant said that particulars were true.

Subsequently, the prosecutor set out the facts giving rise to the offence. He said that the police received information that a vehicle registration No. KAR 693 P had carried luggage from KAQ 866T by the name of “Special System.”

The vehicle was stopped and then it was escorted to the Webuye Police Station, where a search was conducted. The search yielded 42 kilogrammes of greenish plant material, which the Government Chemist later verified to be bhang.

After those facts were read out, the appellant told the court that the same were all true. And it is on that basis that the appellant was then convicted, on her own plea of guilty.

Unfortunately, however, the facts did not link the appellant to the 42 kilogrammes of bhang. Therefore although there is no doubt that bhang was being ferried in that vehicle, there was no basis for convicting the appellant in relation thereto because at no time did the prosecutor say that the bhang was recovered from the appellant's luggage.

Secondly, the court records do not indicate the language in which the plea was taken. But, in my considered view, although that is a shortcoming, when the appellant says that the charge and the particulars thereof were not read out in a language which she understood, I would expect the appellant to tell the appellate court the language which was used, and which she did not understand.

I believe that there is a distinction between a case in which the accused understands neither English nor Kiswahili; and one in which he understands one of those two languages. I say so because the language of the Magistrate's courts is either English or Kiswahili. Therefore, if an accused person understands neither of those languages, it is his duty to let the court know that fact. Of course, I am not suggesting that the court is not under a duty to ask the accused about the language which he understands.

If the accused person says that he understands a vernacular language such as "*Kiluhya"*, the court would be obliged to obtain an interpreter for the particular dialect which the accused understands. If the court failed to get an appropriate interpreter, but went ahead with the case, the accused person would be justified to complain that he did not understand the language in which the case was conducted.

On the other hand, there are instances in which the court conducts proceedings in either Kiswahili or English, but fails to indicate in the proceedings, the language used. Surely, if at the appellate stage, the appellant displayed a clear understanding of either of those languages, and confirms to the appellate court that the proceedings before the trial court were in either Kiswahili or English, that omission by the trial court ought not to invalidate the trial.

It is for that reason that I believe that it is incumbent on an appellant to tell the appellate court which language was used in the magistrate's court, which he did not understand.

In this case, I did not ask the appellant the language which she allegedly failed to understand when she was on trial. The only reason I did not deem it necessary to do so is that I had already noted that the facts did not disclose the offence for which the appellant had been convicted. In the event, the appeal is allowed. The conviction is quashed, and the sentence is set aside. The appellant should be set at liberty forthwith unless she is otherwise lawfully held.

Dated, Signed and Delivered at Kakamega, this 29th day of January 2009

FRED A OCHIENG

J U D G E