



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 230 of 2007

JUSTUS OKELLO OKINGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant Justus Okello Okingo was charged with the offence of Trafficking in a Narcotic Drug contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substance (Control) Act No. 4 of 1994. The particulars of the offence stated that on the 24th day of October 2007 at Salgaa road block along Eldoret-Nakuru road in Nakuru District of the Rift Valley Province, the appellant trafficked in 15.5 kilogrammes of *cannabis sativa* with a street value of Kshs 15,500/= by transporting it in a motor vehicle registration No. KAW 574V Scania bus in contravention of the said Act. The appellant was convicted on his own plea of guilty was sentenced to 8 years imprisonment and a second sentence of a fine of Kshs 46,500/=.

Being dissatisfied with the conviction and sentence the appellant appealed and several issues were raised in the original petition of appeal and the supplementary petition filed on 14th December 2007. Counsel for the appellant faulted the learned trial magistrate for convicting the appellant without the evidence of the Government Chemist as provided for under Section 74(a) of the Narcotic Drugs and Psychotropic Substance (Control) Act No. 4 of 1994. The plea as recorded by the learned trial magistrate was also faulted as the language of the court was not indicated. The facts given by the prosecution in support of the charge showed that the appellant was not present when the arresting officer weighed the *cannabis sativa* allegedly seized from the appellant. Counsel also took issue with the sentence where the appellant was sentenced to eight years imprisonment was also fined Kshs 46,500/= and in default twelve (12) months imprisonment. It was counsel's submission that the sentence was illegal and breached the rule of double jeopardy and the appeal should be allowed.

The learned State Counsel Mr. Mugambi conceded to this appeal and rightly so for reasons that the plea as recorded was not unequivocal although the charge was read and explained to the accused person in English/Swahili it is not possible to know whether the court spoke in English or Kiswahili. This is fundamental as the law requires that the charge be read and interpreted to the accused person in the language that he understands. As it was held in the case of Swahibu Simbauni Simiyu & Anor. vs. Republic CA Criminal Appeal No. 243 of 2005 (Kisumu) where the Court of Appeal reiterated the fundamental principles contained in the Constitution of Kenya Section 77(2) and Section 198(1) of the Criminal Procedure Code. Moreover in the celebrated case of Adan vs. Republic [1973] E.A. 445 where the Court of Appeal held as follows:

“(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

(ii) The accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded;

(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

(iv) If the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered;

(v) If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused’s reply should be recorded.”

On the other ground of appeal that the analyst certificate was not produced I am of the opinion that since the appellant admitted the charge it was not necessary to avail the analyst certificate. My reading of Section 74(a) (2) & (3) the analyst certificate become compulsory if the offence is denied that is when the prosecution need to produce the analyst certificate to prove the offence. Similarly on the ground that the appellant was not present when the samples were weighed and taken to the analyst; this is also not mandatory as the law provides that the appellant be present where practicable. However considering that the plea was not taken in accordance with the laid down principles this appeal is allowed. The sentence imposed by the trial court is set aside. The appellant is to be set at liberty forthwith unless otherwise lawfully held.

Judgment read and signed on 15th day of May, 2008

M. KOOME

JUDGE