**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 183 of 2002**

**MOHAMED GHANI TAIB ……..……..…….. APPELLANT**

**VERSUS**

**REPUBLIC …….RESPONDENT**

**CONSOLIDATED WITH**

**IDRIS YUSUF BWANA ……..……..…….APPELLANT**

**VERSUS**

**REPUBLIC……..……..……..RESPONDENT**

***(From the Original Conviction and Sentence in Criminal Case No. 1154 of 2003 of the Chief Magistrate's Court at Nairobi – B. Olao – C. M)***

**JUDGMENT**

***MOHAMED GHANI TAIB*** and ***IDRIS YUSUF BWANA***, hereinafter referred to as the 1st and 2nd Appellants respectively were jointly charged with seven others with two counts of trafficking in Narcotic Drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. of 4 of 1994. The particulars of the 1st count were that the nine:

*"….**On the 26th day of January, 2000 at Nyali Estate Bamburi in Mombasa District within Coast Province jointly with others not before Court trafficking by storing in a rental house 4,715 Kilogrammes of Cannabis Resin commonly known as Hashish in contravention of the said Act…..".***

As for the 2nd count the particular given were that the nine:

*"….**On the 15th day of March, 2000 at about 2 a.m. at Shanzu area of Mombasa District within the Coast Province jointly with others not before Court trafficked by storing in a residential house 1540 (one thousand five hundred forty) slabs of Cannabis Resin commonly known as hashish valued at Kshs.123,000,000/= (one hundred twenty three million) in contravention of the said Act……"***

Two of the Appellant's co-accused separately faced a charge of conspiracy to defeat justice contrary to Section 117(a) of the Penal Code. However that charge bears no significance to this Appeal.

At the conclusion of the Prosecution case the 2nd, 7th and 9th co-accused person were acquitted as they had no case to answer. The rest were put on their defences. At the conclusion of the trial the remaining Appellants co-accused were all acquitted on all the charges facing them whereas the 1st Appellant was convicted on both counts and the 2nd Appellant was convicted on 2nd count only. Upon conviction, the 1st Appellant was sentenced to 15 years imprisonment on each count respectively, the sentence being ordered to run concurrently. As for the 2nd Appellant he too was sentenced to serve 15 years imprisonment. The Learned Magistrate declined to impose the fine as provided for under the Act as the value of the drugs was not established by evidence. I think that the Learned Magistrate was right in ignoring the value of the drugs indicated in the charge sheet as no credible evidence was led by the Prosecution to establish the value of the drugs.

The Appellants were aggrieved by the conviction and sentence and they individually and separately lodged these Appeals to this Court. As the two Appeals arose from the same trial and for ease and convenience of hearing, I ordered for the same to be consolidated when they came up for hearing before me.

The 1st Appellant in his Petition of Appeal dated 21st day of February, 2002 and filed in Court on 22nd February, 2002 faults his conviction by the Learned Chief Magistrate on the following grounds:-

1. The Learned Chief Magistrate erred in law by admitting in evidence the retracted confession of the Appellant which was inadmissible in proving the charge and such evidence was prejudicial to the Appellant.

2. The Learned Chief Magistrate erred in law and fact in relying on the evidence of PW5 (Linus) and PW8 (Mwaniki) which evidence was scanty and discredited.

3. The Learned Chief Magistrate erred in law and fact in failing to take into account the Appellants position of a police informer which explain this knowledge about the details of the matters in question.

4. The Learned Chief Magistrate erred in law and fact by failing to take into account that the fact the Appellant had no financial capacity to transact a Kshs.500 Million drug deal.

5. The Learned Chief Magistrate erred in law and fact in failing to take into account the inconsistent testimonies of certain witnesses relating to the possession of the Nyali and Shanzu houses.

6. The Learned Chief Magistrate erred in law and fact by shifting the burden of proof from the prosecution to the Appellant.

7. The Learned Chief Magistrate erred in law and fact in finding that the evidence adduced was sufficient to sustain a conviction.

8. The Learned Chief Magistrate erred in law in awarding the sentence of 15 years on each count having regard to all sentencing principles and in particular the Appellants health.

9. The Learned Chief Magistrate erred in law and fact in ruling the evidence adduced was sufficient to sustain a conviction.

The 2nd Appellant on the other hand faulted his conviction and sentence on the following grounds:

1. The Learned Chief Magistrate erred in law in admitting evidence of PW5 and PW8 in proving the charge and such evidence was not credible and prejudicial to the Appellant.

2. The Chief Magistrate erred in law and fact by convicting the Appellant on the grounds that the Appellant had involved in the storing of Hashish whereas there was no such evidence.

3. The Learned Chief Magistrate erred in law and fact by concluding that there was a fall of alliances and that the Appellant was in the alliance

4. The Learned Chief Magistrate erred in law and fact by failing to take into account that there was no nexus between the Appellant and the house in Nyali and Shanzu where the Hashish was stored.

5. The Learned Chief Magistrate erred in law and fact by failing to consider under what circumstances the Appellant was arrested and a material witnesses one Mr. Nyaseda was never called and inference should be drawn that his evidence would have been useful to the Appellant.

6. The Learned Chief Magistrate erred in law and fact by failing to take into account that the conduct of the Appellant was inconsistent with drug trafficking.

7. The Learned Chief Magistrate erred in law and fact by failing to take into account that the Appellant's defence was unchallenged.

8. The Learned Chief Magistrate erred in law and fact by relying upon the scanty and discredited evidence to convict and sentence the Appellant.

The Prosecution case in so far as it relates to the Appellants was that PW4 owned a residential house at Shanzu. In or about March, 2000, the house was vacant. She was approached by a lady by the name Leila who was interested in renting the house together with her husband whose name she gave as Mohammed. Leila together with her husband later met PW4 and after discussions a rent of Kshs.14,000/= monthly was agreed upon and a tenancy agreement was drawn between PW4 and Leila's husband who turned out to be the first Appellant. Although the 1st Appellant ought to have paid Kshs.28,000/= being the two months rent agreed, he only paid Kshs.20,000/= leaving a balance of Kshs.8,000/=. Nonetheless he was given the keys to the house and they moved in. No receipt for the rent paid was however issued. Though the 1st Appellant took possession of the house. PW4 had employed PW5 and PW8 to take care of the house. In fact prior to meeting PW4, Leila and the 1st Appellant had first approached PW5 and PW8 expressing interest in the vacant house. It was then that PW8 and PW6 informed PW4 of the couples interest in the house.

Three days after renting the house the 1st Appellant came to the house and kept therein a suitcase and informed PW5 and PW8 who were still retained at the premises that he would come later to bring his other belongings. He came back again in the afternoon in a canter pick up with 4 other people and proceeded to remove some sacks from the motor vehicle and kept them in the house; in the bedroom and in the toilet. The 1st Appellant then locked the house and informed both PW5 and PW8 that he was going to Nairobi.

On 10th March, 2000, one Mr. Fuad went to the house with a pick up and proceeded to open the house and removed 15 of the sacks which had earlier been brought in the house by the 1st Appellant and left with them telling PW5 and PW8 that the 1st Appellant will bring them food. The following day the Appellant went to the house but could not open the door to the toilet where other sacks had been kept. He then left saying his wife would come to take measurements of the curtains.

On 15th March, 2000, the 2nd Appellant whom PW5 had identified earlier on as he came with Fuad in the earlier trip to the house, came to the house in the company of police officers who stationed themselves in the house saying they were looking for 1st Appellant. Soon thereafter the 1st Appellant appeared and when asked by the Police officers whether he was Mohammed, he positively responded. He was told to open the house and upon inspecting the same, the Police left with the 1st Appellant. Later that night, other Police officers came to the house and took photographs of the sacks. In the interim PW5 and PW8

recorded their statements and subsequent thereto attended an identification parade and positively identified the 1st Appellant.

After the scenes of crime had taken the photographs the police seized the sacks and some of the contents therein were taken to the Government analyst PW6 who conducted the tests and came to the conclusion that the contents were cannabis resin commonly known to as hashish which is a drug under the Narcotic Drugs and Psychotropic Substances Control Act. PW6 only analysed part of the sample. His report was produced as an exhibit. Another Government analyst PW7 analysed samples from other 107 sacks and came to the same conclusion. His report too was produced as an exhibit.

The arrest of the 1st Appellant was preceded by the information given to PW17, a Police officer, by the informer. On 14th March, 2000, while based at Urban Police Station, an informer approached PW17 saying that he had information to give PW17's boss. PW17 took the informer to the Deputy DCIO (PW16) and the informer told him that he knew of a house in Shanzu in which some hashish was stored. The informer further said that the hashish belonged to one Mohamed. PW16 then instructed three police officers – PW17 and PW18 to visit the said house which they did and thereat met two people (PW5 and PW8) who informed them that the house belonged to PW4 but that they did not know what was stored therein as they did not have the keys to the house. On trying to look into the house, PW17 was confronted with the smell of cannabis sativa which he claimed was familiar with. He also saw some yellow polythene bags inside so he decided to lay an ambush and at about 2.30 p.m. the 1st Appellant arrived driving a pick up. Since PW17 knew the 1st Appellant as a police informer, he decided to confront him and asked him what he was doing there. His response was that he was just looking at the house as he wanted to rent it. PW17 told him that there was hashish in the house whereupon the 1st Appellant told the witness that he would show the witness the owner of hashish. They proceeded to town and the 1st Appellant took him to his wife's bureau whereat he escaped and disappeared. Later on, PW17 received word from his informer that the 1st Appellant was due to meet the informer at Tudor Inn and he went there and laid an ambush and when the 1st Appellant appeared he was arrested. The informer was surprisingly the 2nd Appellant. So much for the Shanzu house

As for the Nyali house, it was the Prosecution case that PW9 an Estate agent was on some day in the first week of January, 2000 approached by 4th co-accused to let a house to a European friend of his in Nyali with a compound and wall fence. PW9 did not have such house immediately but knew of one, Mr. Njenga who had such house. Later in mid January, 2000 PW9 and the said Njenga showed the 4th co-accused the house which was situate on Links Road Nyali. The 4th co-accused promised to avail the European friend by the name Paul Lambert. The 4th co-accused later informed PW9 that the said Lambert had seen the house and had liked it. He was informed by PW9 that the rent would be Kshs.35,000/= per month plus the usual deposit. The 4th co-accused later met PW9 outside the Hard Rock restaurant in Mombasa and handed over Kshs.122,500/= and was issued with two receipts in the names of Paul Lambert and was given the keys the following day. Paul Lambert however never signed a lease agreement nor the letter of offer. PW10 who was an accounts clerk in the firm of Maina Chege and Company which had leased the premises to Paul Lambert, later on visited the house over unpaid bills and met a lady by the name Everlyn Albert Mwadawa (PW11) and when he asked her who stayed in the house, she answered that it was one Mohamed. She gave him Mohamed's telephone number and when PW10 telephoned the said Mohamed to inquire about bills, he told him that there was a European tenant in the house. Everlyn only gave the name Mohamed to PW10. Who was this Mohammed? According to the evidence of Everlyn (PW11) on 5th February, 2000 she was on her way from college when she met the 1st Appellant who invited her to join him in his house in Nyali. She acceded to the invitation and stayed with the 1st Appellant for one month before the police came one morning and arrested them. She said that during their stay in the Nyali house, they were only using one room though many people used to come into the house.

The arrest of the 1st Appellant with regard to the drugs in Nyali was on the basis of the information gathered by Sergeant Kado and Corporal Ndunda – 5th and 6th co-accused respectively who were Police

officers. It was alleged that whilst on duty on 24th January, 2000 the 1st Appellant approached them with information regarding some contraband goods alleged to have been stolen from the port. Those goods were stored in a house in Nyali area.

On 26th January, 2000, two days later, the duo in the company of the Appellant proceeded to the Nyali house in the car of the 1st Appellant. He point out the house to them. According to S.S.P. Chesemet (PW31) who was part of the investigating team, his investigations revealed that the Nyali house had been leased to a Frenchman called Alain Charles Jean who had paid Kshs.175,000/= and Kshs.5,000/= respectively towards rent through the late Ibrahim Akasha. Inside the house the police officers recovered some yellow substances in a bedroom and the 5th co-accused called the police headquarters and police officers arrived at the house and removed yellow sacks to Bamburi Police Station after the scenes of crime had taken photographs. At Bamburi Police Station they were counted again and put in a lorry which was then sealed. Subsequent thereto PW28 recorded a charge and caution statement from the 1st Appellant on 21st March, 2000 which was admitted in evidence.

Put on his defence, the 1st Appellant in sworn statement stated that he was a police informer and operated a garage in Mombasa. That on 24th January, 2000, one Mr. Fuad who was his customer informed him about a container belonging to the late Ibrahim Akasha which contained firearms which had been cleared at Mombasa port. The 1st Appellant then took the said Mr. Fuad to the flying squad offices and met Sergeant Kada – 5th co-accused to whom he passed the information. The 5th co-accused insisted that before he could act he needed more information. On 26th January 2000 Fuad showed the 1st Appellant a house in Nyali where he alleged the firearms had been kept. Thereafter they proceeded to meet 5th and 6th co-accused. The four then proceeded to the house at Nyali where they were able to recover some yellow sacks in a bedroom. The 5th co-accused then called the police who came and removed the yellow sacks to Bamburi Police Station and the 1st Appellant left for his house.

On 27th January, 2000, the 5th and 6th co-accused met the 1st Appellant and informed him that the Provincial Police Officer (PPO) wanted to see him since the sacks recovered in Nyali house contained drugs. They proceeded to the P.P.O.'s house. In the presence of the Deputy Provincial Criminal Investigations Officer, (PCIO) Mr. Chesemet (31), the P.P.O. demanded to know from the 1st Appellant where he was getting his information and requested him to assist them in investigating the case. On 31st January, 2000 the 6th co-accused again called the 1st Appellant and took him to the Deputy Commissioner of Police, Mr. Mwania who also questioned him and the following day flew him to Nairobi where he met the Commissioner of Police who questioned him as to whether he knew the owner of the drugs. The Appellant told him that the drugs belonged to Akasha. He was then taken to the office of the Director of Criminal Investigations (C.I.D.) where he met the 5th and 6th co-accused. He was again questioned about the source of his information about drugs and he told him that it was Mr. Fuad who gave it to him. The Director gave him Kshs.200,000/= of which Kshs.100,000/= was to be used to buy information and was instructed to use the nickname Aslam when talking to the police. He then returned to Mombasa the following day. In Mombasa he got his friend Everlyn (PW11) to stay in the house which the 4th co-accused had asked him to take care whilst in the house the 3rd co-accused whom he knew as a police officer came to the house with other officers and searched it but found nothing.

On 3rd March, 2000 the 5th co-accused called him to the P.P.O.'s headquarters, Mombasa and he met PW31 who asked him to get information regarding hashish that was circulating in town. The information he got was that the hashish was being supplied by a Somali lady by the name of Fatuma who was somehow related to Fuad. He trailed Fuad to Shanzu house. He decided to go into the house but while waiting at the gate he saw a vehicle driven by the 2nd Appellant arrive. The 2nd Appellant was accompanied by PW17 Sergeant Mugambi who asked him what he was doing there and he responded that he wanted to rent the house. PW17 then told him that there was hashish in the house and at that moment Faud and PC Limeh (PW19) emerged from the house and when PW17 asked Fuad who was the owner of the hashish, Fuad responded that it belonged to PW4. PW17 then confronted PW4's caretakers – PW5

and PW8 demanding to know how and when the yellow sacks got there. He was told that the sacks had been taken there in a canter pick-up on 12th March, 2000. PW17 accompanied with the 1st Appellant and the 8th co-accused proceeded to the offices of PW4 but found them closed. The 1st Appellant was then released but Fuad remained under arrest. On 14th March, 2000 the Appellant went to the house of PW23 and gave him the information about the drugs. Later they proceeded to the Shanzu house and he was photographed with the sacks. The Appellant states he was photographed as the informer before the sacks were removed to the Police Station. The P.C.I.O. then asked the 1st Appellant if he has a girlfriend living at Nyali and he positively responded that he had a girlfriend called Everlyn who was living in the house of one Lambert. The P.C.I.O. asked the 1st Appellant to lead other police officers to look for Fuad and PW4. They were successful in finding them. Taken back to PPO's offices the 1st Appellant found his girlfriend Everlyn was being interrogated and later that evening, the 1st Appellant and Everlyn were locked up at Makupa Police Station.

On 16th March, 2000, the 1st Appellant was taken for an identification parade at the Urban C.I.D. Headquarters and he was able to identify Fuad and Nuri Akasha Ibrahim. He was later asked to record a statement by P.C.I.O. which he did but the PCIO tore it after reading it. He thereafter instructed PW23 to make 1st Appellant sign another statement but he refused. He was taken back to Makupa Police Station. On 18th March, 2000, the 1st Appellant was taken back to the PCIO who told him to sign some papers or his wife would be arrested. Again the 1st Appellant refused and was taken back to Makupa Police Station. In the evening his brother told him about his wife's arrest and next morning upon being taken to the P.C.I.O. who told him to sign some papers if he wanted his wife to be released. The 1st Appellant capitulated and signed. Again on 20th March 2000 P.C.I.O. asked the 1st Appellant to record another statement in order to secure the release of her wife's partner. He did so and Everlyn Albert was released. He was then taken to Court on 23rd March, 2000.

The 2nd Appellant also gave sworn statement of defence. He stated that he was a representative of an NGO called FIDAK (Fighting Drug Abuse in Kenya). That on 14th March, 2000 he received a call from Mr. Khalid who wanted to see him urgently. Khalid came to his office accompanied by Fuad, his brother in law. Fuad informed the 2nd Appellant that there was hashish stored at a house in Shanzu. The 2nd Appellant asked him why he could not pass the information to the police and Fuad said he was afraid. Since he knew the hashish at Shanzu was part of that recovered earlier at Nyali, the 2nd Appellant asked them to show him the house. This was done whereupon he contacted PW23 who was in the office but was referred to his deputy Mr. Maweu. The Deputy D.C.I.O. then assigned to the 2nd Appellant, Sergeant Mugambi (PW17), PC Meza (PW18) and PC Limeli (PW19) to accompany him to the Shanzu house. The 2nd Appellant had been informed by Fuad that the hashish had been stored in a toilet in one of the bedrooms. At the house they peeped through the window and they saw some yellow sacks. PW17 interrogated one of the house keepers who said the house belonged to PW4 but had been rented to the 1st Appellant who would be arriving at the house anytime. They decided to wait and 2 hours later the 1st Appellant arrived in a pick up and was arrested by PW17. Upon interrogation, he denied ownership of the hashish but volunteered to show them the owner of the hashish who was in town. He took them to various places in town but he was just lying. At about 10 p.m. – PW17 and the 2nd Appellant drove to the residence of PW23 and briefed him. By then the 1st Appellant was in custody. The P.C.I.O. was then contacted and having picked up the 1st Appellant they all proceeded to the Shanzu house. At the house the PCIO ordered that the hashish be removed from the toilet and be counted after which it was loaded into vehicles and the 2nd Appellant accounted for them on behalf of his NGO. On 18th March, 2000, the PCIO called the Appellant and asked him to see him with Fuad. The two proceeded to PCIO'S office and Fuad went in first. 15 minutes later the 2nd Appellant was called in and questioned if he had knowledge about drugs being removed on 10th March, 2000 from the Shanzu house. He denied such knowledge. The PCIO maintained that he had information that he went to the house on 10th March, 2000 with Fuad and removed some hashish. He denied and the PCIO threatened to lock him up if he did not speak the truth. When he insisted on his innocence he was locked up on the orders of the PCIO until 24th March,

2000 when he was charged with the offences. The 2nd Appellant maintained that he was not at the Shanzu house on 10th March, 2000. However he was there on 14th March, 2000. He knew nothing about hashish at Nyali house.

In support of the grounds of appeal, Mr. Wandugi Learned Counsel for the Appellants who argued the grounds globally instead of ground by ground submitted that the judgment of the Court was not supported by the evidence on record. That the conviction of the 1st Appellant on counts I and II and that of the 2nd Appellant in count II were erroneous. The alleged hashish was recovered in two houses, one in Nyali on 26th January, 2000 and in Shanzu on 15th March, 2000. According to Counsel Nyali house where the first recovery was made had been leased to a Frenchman known as Allan Charles Jean. In this house police recovered 4,715 kg slabs of hashish whereas from the house in Shanzu 1540 slabs of hashish were recovered. On count I the charge stated that the 2 Appellants trafficked in 4,715 kgs of hashish. Counsel submitted that this was a gross misconstruction of the evidence. That the evidence tendered showed that what was recovered were slabs. The slabs were never weighed. Counsel maintained that the Court had no basis upon which it could convict the Appellants for trafficking with a substance which was not weighed. Counsel conceded however that count 2 did not have a similar problem. However he pointed out that the charge was specific that the 1st Appellant trafficked in Narcotics on 26th January, 2000. But according to Counsel no evidence was adduced to show that the 1st Appellant stored the substance in the house on 26/1/2000. Accordingly the charge ought to have failed. The house according to the evidence was leased by the late Akasha specifically for the use of Jean Charles. There was no evidence on record from several witnesses that the house was occupied on behalf of Charles Jeans. In cases of this nature Counsel submitted, it is necessary to show that the person charged either had possession or control of the premises where the drugs are found. To Counsel it was PW2 who took possession of the house on behalf of the Frenchman and remained therein continously during the material period. Counsel submitted that in his testimony PW2 alleged that some 2 Arab men some day came to house with a lady called Miriam. However PW2 did not identify the 1st Appellant as one of the 2 Arab men. PW2 was in the premises on 26th January, 2000, the date the 1st Appellant is alleged to have trafficked in the drugs by storing. The premises had earlier on 22nd and 24th January 2000 respectively been visited by persons claiming to be police officers but found no drugs in the house. PW1 was then abducted on 26th January, 2000 by 3 persons purporting to be police officers. This is the date according to the Learned Counsel that the drugs were introduced in the house. Throughout the evidence of Prosecution, there is no proof by the Prosecution that the 1st Appellant ever introduced the drugs in that premises. There is evidence by 2 police officers; Sergeant Kada and Corporal – 5th and 6th co-accused respectively from their defences that it was the 1st Appellant who tipped them of the presence of drugs in the house. They proceeded to the house and recovered the drugs. Other than the evidence of this co-accused there was no evidence as to who stored the drugs in the house and when. There was no evidence that the 1st Appellant had been to the house prior to his pointing out the house to the two co-accused police officers. Counsel submitted that if indeed he had stored the drugs, there is no way he would have informed the police officers the presence of the drugs in the house. Counsel further referred to the evidence Chesemet (PW31) who confirmed that the house was rented to Charles Jean. That this was a senior police officer who confirmed that the drugs had been stored in the house by the late Akasha which testimony was never controverted. To Counsel that in itself was sufficient to exonerate the 1st Appellant. Counsel submitted that even if the drugs had been stored in the house sometimes on 26th January 2000, PW2 the caretaker of the house was continuously in the house and does not mention the 1st Appellant as ever having come to the house prior to 26th January, 2000. Counsel further pointed out that that was the date the Appellant was with the police and could therefore not have introduced the drugs. To Counsel therefore the finding of the Lower Court that the 1st Appellant stored drugs on that date was factually wrong. The conviction of the 1st Appellant with regard to count I was therefore wrong and should be quashed.

With regard to count II Counsel submitted that both Appellants were convicted of storing 1,540 slabs of hashish. The offence was alleged to have been committed on 15th March, 2000 at 2 a.m. Counsel submitted that there is no evidence at all that the Appellants stored the drugs in the Shanzu house on the 15th March, 2000. The evidence led in Court clearly showed that the drugs were stored on 8th March,

2001, 6 days after the date of the charge. The Prosecution did not seek to amend or substitute the charge. Counsel maintained that the Appellants tendered their evidence targeting 15th March, 2000. Curative provisions of the Criminal Procedure Code are not available to the state at this stage, Counsel submitted.

Counsel conceded that the Shanzu house had at some point in time been rented by the 1st Appellant from PW4 which had 2 caretakers who all testified. To Counsel, the totality of their evidence was that the substances were brought to the house on 8th March, 2000. They did not say that any drugs were introduced or stored in the house on 15th March, 2000. Their testimony therefore exonerates the Appellants. Counsel also commented on the evidence of touching on one, Mr. Fuad. PW5 stated that on 10th March, 2000, Mr. Fuad went to the house and removed 15 sacks. To Counsel Fuad had access to the house. He was later arrested by police but mysteriously released despite the police being aware of the fact. This could have been the person who stored the drugs as according to PW8, the 1st Appellant went to the premises for the first time on 14th March, 2000 when he was arrested as the police had been laying in wait. Counsel then posed a rhetorical question – how could the 1st Appellant have trafficked in the drugs by storing whilst he was in custody. This aspect was overlooked by the lower Court. Counsel pointed out that Kamaldin Akasha co-accused 7 was released by the Court on the basis that he had been in police custody at the time of the alleged offence. To Counsel, the 1st Appellant ought too to have been given the same treatment.

With regard to the 2nd appellant, Counsel submitted that he was convicted on the 2nd count only. Counsel submitted that throughout the record it is clear that there was absolutely no evidence linking the 2nd Appellant to the storing of the drugs in the Shanzu house. He had not rented the house, neither did he have possession nor any control of it. Though PW5 mentioned having seen the 2nd Appellant with Fuad at the house, there was no evidence that he was there on 15th March 2000. He only went to the house with the Police officers. He was a police informer. He is the one who gave the information regarding the drugs and accompanied the police during the recovery. Counsel submitted that for the Prosecution to succeed on count II against both Appellants they had to show that the Appellants did store the drugs in the premises. Because the Prosecution charged the Appellants with storing drugs on a specific date and time, it was important that they showed the act of storing on the date time charged. Failure to do so was fatal to the Prosecution case. For this proposition Counsel relied on the case of ***WACHIRA VS REPUBLIC (1985) KLR 761.*** There was no evidence of storing. Counsel submitted that it defeats common sense for the Appellants to lead the police to the premises where they had stored the drugs if they intended to sell them.

Counsel then turned to the contradictions in the Prosecution case. He pointed out that although the Appellants were charged with trafficking in hashish, it would appear that the substance that the Court saw was heroin. Counsel submitted that the Court having supervised the sealing of heroin as opposed to hashish and PW23 having produced heroin as opposed to hashish and the State Counsel having confirmed as much, this Court should find that the record of the Lower Court is correct and not a slip of the pen. The mistake cannot be corrected as it contradicts the entire testimony. The Appellants should therefore have not been convicted.

On the question of a person authorized to conduct the exercise of recovery, Counsel submitted that Section 7 of Act No. 4 of 1994 provides that such persons if police officers must be authorized in writing by Commissioner of Police. All the police officers who went to both houses did not demonstrate that they had such written authority both written authority. Similarly under Section 72 a person purporting to conduct a search must also have such authority. Finally under Section 74 a person who recovered the drugs must make a seizure notice and serve it on the suspect. These mandatory provisions were not complied with according to the Learned Counsel. Accordingly the conviction of the Appellants was unsafe similarly Counsel pointed out that the Court erred in admitting the evidence of PW6 & PW7, Government analyst as they were not qualified under Section 67 of the Act. They were not gazetted by the minister. Counsel challenged their qualification during the trial and PW6 conceded as much. PW7 claimed to have been gazetted but could not produce or remember the gazette notice. However the Court went ahead to accept their evidence.

Finally on the question of the value of the drugs, Counsel submitted that it was wrong for the Court having found that the evidence of valuation was lacking to have convicted the Appellants. The Court should have held that the charges were not proved as valuation is one of the ingredients under Act No. 4.

In response, Mr. Oriri Onyango, Assistant Director of Public Prosecutions on behalf of the state opposed the Appeal. Counsel submitted that the evidence submitted by the Prosecution was sufficient to secure a conviction. That the Prosecution relied substantially on the evidence of PW4, PW5 and PW8. Counsel submitted that the evidence of these witnesses detailed how the Appellant and his wife by the name of Leila came to rent and possess the house at Shanzu in which the drugs were subsequently discovered. That the 1st Appellant and his wife rented the house from PW4 and paid rent of Kshs.20,000/= being rent for 2 months. Though there was a balance of Kshs.8000/=, the first Appellant nevertheless took possession of the house and moved in. Though no receipts for the money was issued, Counsel submitted that the 1st Appellant having moved into the house, he was in possession thereof. Counsel submitted that before the 1st Appellant was arrested by police 3 days after renting the house, he returned and opened the same and kept a suitcase in the house. In the afternoon he came back with 4 other people and removed some sacks from the pick up he had come with and kept them in the house according to the testimony of PW5 and PW8. Counsel submitted that PW5 and PW8 saw the 1st Appellant 3 times at the Shanzu house. That is why they were able to easily recognize him when he was arrested later by the police and had no problem identifying him as a tenant of the house. Counsel pointed out that after coming from Nairobi the 1st Appellant again came to the house and attempted to remove the other sacks from the toilet but was unsuccessful. Prior to that one Fuad had been to the house in a pick and removed 15 sacks that had earlier been stored thereat by the 1st Appellant. Circumstantially, Counsel submitted Fuad must have gone away with the key to the toilet.

According to Counsel, after the PW4 had put a padlock to the house on 15th March, 2000 the 2nd Appellant came to the house in the company of the police officers who laid an ambush for the 1st Appellant. Soon thereafter the 1st Appellant appeared and he was arrested. Counsel submitted that this evidence established the fact that the 1st Appellant was seen at various times entering the house and removing sacks and carrying them in a pick up to unknown destinations. PW8 being curious to find out the contents of the sacks, he asked 1st Appellant who answered that the sacks contained chocolates. Counsel submitted that the evidence of PW5 and PW8 corroborated each other in so far as the identification of the Appellants was concerned.

Upon seizure, the drugs were analysed by PW6 and PW7, Government analyst who in their reports confirmed that drugs were hashish. These sacks were removed from the Shanzu house that had been let by the 1st Appellant. This evidence point to the 1st Appellant as the owner of the drugs. Upon arrest the Appellant was subjected to an identification parade conducted by PW16 and was positively identified by PW5 and 8. Counsel further submitted that in so far as the house in Shanzu is concerned the Appellants had knowledge of the drugs discovered in the house. They had possession of the house and drugs to the exclusion of all other person. On the issue of possession Counsel relied on the case of ***HUSSEIN SALIM VS REPUBLIC (1980) KLR 139.*** Still on the Shanzu house, Counsel submitted that when the 1st Appellant was confronted by the police, he told them that he could take them to his wife's bureau and show them the owner of the hashish. On reaching the bureau, the 1st Appellant escaped from lawful custody of the police. Counsel therefore submitted that the conduct of the Appellant was anything but innocent. Accordingly this conduct corroborated the evidence of PW5 and PW8 that he had knowledge and possession of the drugs at the Shanzu house.

On Nyali house, counsel submitted that the evidence of PW9, PW10, PW13 and 4th co-accused is relevant and implicates the 1st Appellant. Though the house was rented by the 4th co-accused through PW9 for European friend by the name of Lambert when PW10 visited the premises he found a lady by the name Everlyn (PW11) who confirmed to him that he was staying in the house with her boyfriend by the name of Mohammed. That Everlyn and Mohamed stayed in the house for one month before the police raided the residence and arrested both of them. Counsel went on to submit that the evidence of PW10, PW11 and PW12 corroborated each other in so far as it concerned the ownership of the Nyali house by

the 1st Appellant.

Upon arrest the 1st Appellant recorded a charge and caution statement which was admitted in evidence. It was so detailed as to be true. The statement was further corroborated by statement hinder inquiry of 3rd and 5th co-accused.

As for the 2nd Appellant, Counsel submitted that he was implicated by the evidence of PW5 and PW8 who saw him at Shanzu house with the 1st Appellant. He was also seen in the same house by PW17 and PW18 both police officers. On the question of knowledge of presence of drugs Counsel cited the authority of ***ALI BIN ALI & ANOTHER VS REPUBLIC, CR. APP. NO. 107 OF 2001 (UNREPORTED).***

Counsel then concluded his submissions by stating that the evidence against the Appellants was overwhelming and they were therefore properly convicted. The Appeals therefore ought to be dismissed.

In brief reply to the submissions by Mr. Oriri Onyango, Mr. Wandugi stated that the response by Mr. Oriri was limited to possession and occupation of the two houses, and the conduct of the Appellants. That the 2nd Appellant was convicted on the 1st count only and it relates to storing of drugs at Nyali house. Neither PW5 nor PW8 connected the 2nd Appellant to the house at Shanzu. Indeed the evidence exonerates the 2nd Appellant with the goings on at the Shanzu house. That on the date that PW5 and PW8 allege to have seen the 2nd Appellant, they did not allege that he had placed anything in the house. Regarding the case of ***ALI BIN ALI*** relied on by the state on the question of knowledge, Counsel submitted that the same was distinguishable. That if indeed the 2nd Appellant had stored drugs in Shanzu house, could he have gone to the police and reported himself? Similarly the case of ***HUSSEIN ALI*** was distinguishable as it dealt with dangerous drugs Act. The provisions of the current Act were radically different.

As regards 1st Appellant Counsel maintained that the evidence of PW4, PW5 and PW8 upon which the conviction of the 1st Appellant was based, was clear that they never said that they saw the Appellant bring and store the drugs. Counsel further replied that PW17 went to the house on 14th and 15th. The Appellant could not have stored the drugs on 14th in the presence of the police. If the drugs were stored on the 15th then it was not by the 1st Appellant.

With regard to Nyali house, the Counsel stated that the state relied on the evidence of PW11. However PW23 testified that they went to the house but found no drugs. Regarding the conduct of the Appellants, Counsel submitted that they were police informers and led the police to the recovery of the drugs.

It is now well settled, that a trial Court has the duty to carefully examine and analyze the evidence adduced in a case before it and come to a conclusion only based on the evidence adduced and as analyzed. This is a duty no Court should shy away from or play down. In the same way, a Court hearing a first Appeal (i.e. first Appellate Court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial Court had the advantage of seeing the witnesses and observing their demeanor and so the first Appellate Court would give allowance for the same. There are now a myriad of case law on this but the well known case of ***OKENO VS REPUBLIC (1972) E.A. 32*** will suffice.

In this case, the conviction of the Appellant's proceeded on the premises of circumstantial evidence, possession of the Nyali and Shanzu houses as well as the 1st Appellant's charge and caution statement. The 1st Appellant as already stated was convicted on both counts whereas the 2nd Appellant was only convicted on count two. I will first deal with the issue of the 1st Appellant's charge and caution statement. I note that Mr. Wandugi did not at all address this issue in his submissions yet it was the furlcram upon which the 1st Appellant's conviction was hinged. Mr. Oriri only made reference to it in

passing. In the said statement, the 1st Appellant give details of his involvement in the whole transaction. He even gives the names of other persons who were involved in the transaction as well. He gives details as to the movement of the drugs from one house to another. The information in the statement is so detailed that it must have come from a person who was intrinsically and deeply involved in the transaction. The information in the confession can only be but true. The Appellant of course objected to the production of the statement at the trial and the Learned Magistrate quite correctly conducted a trial within a trial and came to the conclusion that the same was voluntarily given. The 1st Appellant had claimed that the said statement was obtained from him by duress. Having re-evaluated the evidence in this regard, I am satisfied just as was the trial Court that statement was voluntarily given. To my mind the statement is a clear confession upon which a conviction could have been founded. The Appellant having disowned the statement, the Learned Magistrate quite properly again treated it as a retracted statement and applied the principles set out in the celebrated case of ***THWAMOI VS UGANDA (1967) E.A. 84***. In this case, the Court of Appeal stated and I quote:-

"…… ***The present rule then as applied in East Africa in regard to a retracted confession is that, as a matter of practice and prudence the trial Court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular but that the Court might do so if it is fully satisfied in the circumstances of the case that the confession must be true ……..."***

Having admitted the confession in evidence the Learned Magistrate went out of his way to look for any other evidence to corroborate it. Such corroboration was found in the evidence of PW4, PW5, PW8, PW17 and PW19 according to the Learned Magistrate. On my assessment of the evidence I would agree that the evidence of these witnesses provided the necessary corroboration.

It is clear from the record that PW4 rented her house to the 1st Appellant. A lease agreement was drawn and though not executed by the 1st Appellant there is evidence that the 1st Appellant was given the keys to the house. There is also evidence that the 1st Appellant did partially pay the rent deposit. PW5 and PW8 were employees of PW4 at the house. They were caretakers whom the 1st Appellant first approached seeking to rent the house. They directed him to PW4. Subsequent thereto, the 1st Appellant was again seen by these witnesses when he came in a pick up with the keys to the house and proceeded to unload some yellow sacks from the pick up which were then stored in the house. These witnesses saw the Appellant on those occasions during the day so that the question of mistaken identity does not arise. As for PW17, PW18 and PW19, it was their testimony that acting on tip-off from an informer (2nd Appellant) they proceeded to a house in Shanzu where it was alleged that a consignment of hashish was stored. On checking the same PW17 detected the smell of cannabis. On further checking, he saw yellow sacks. The police officers decided to lay an ambush and within no time the 1st Appellant appeared and when confronted regarding the drugs, the 1st Appellant would appear admitted the presence of the drugs in the house and volunteered to lead the police officers to the owners of the drugs. However this was not to be as the 1st Appellant took the police to various places until eventually he escaped from police custody. He was however later apprehended. The evidence of these witnesses taken together with the 1st Appellant's own confession irresistibly point to the 1st Appellant in the involvement of the offences with which he is charged. If indeed the Appellant was an informer and therefore innocent of the charges preferred why did he escape from police custody? This is not a conduct of an innocent person more so from a person claiming to be a police officer. The charge sheet talks of specific dates when the drugs are alleged to have been stored by the 1st Appellant in the two houses. The Appellants has erased issued that he could not have stored drugs on those days for one reason or another. However my view is that the date on the charge sheet related to the date when the Appellant was arrested and drugs found. The storing from the evidence was done earlier and infact was a continuous process. The submissions by their Counsel that the storing must be limited to the dates in the charge is in my view sparrious.

Was the 1st Appellant ever in possession of the two houses – Nyali and Shanzu? With regard to the house at Nyali, the evidence of PW9, PW10 and PW13 is relevant. Further the 4th co-accused implicated

the Appellant. This house was rented by 4th co-accused for an alleged European friend by the name Paul Lambert. However when PW10 visited the house over unpaid bills he found a lady by the name Everlyn Albert Mwandawa (PW11) who told him that she stayed in the house with her boyfriend by the name Mohammed. That Mohammed as it turned out was the Appellant. This was indeed confirmed by the testimony of the said Everlyn herself. She claimed that she stayed with the 1st Appellant in the Nyali house for one month before the police raid in which both herself and the 1st Appellant were arrested. It was during this same period that the drugs were stored in the house. It was the evidence of this witness that they only used one room and not the others and a number of people used to come to the house. Why was it necessary to use only one room? Clearly the 1st Appellant was in possession of this house from the evidence on record. It matters not that the house had been initially rented by Akasha. In regard to the Shanzu house, the evidence of PW4, PW5 and PW8 clearly puts the Appellant in possession of the house. He was seen severally by PW5 and PW8 as he came in and out of the house. He had keys to the house.

He had his suitcase in the house. He offloaded sacks from a pick-up and stored them in the house. In totality the evidence on record does show that the 1st Appellant had possession of both houses at the time the drugs were recovered. That being the case, it can safely be concluded that the 1st Appellant did store the drugs therein. In the ***CASE OF HUSSEIN SALIM VS THE REPUBLIC (SUPRA).*** It was held by the Court of Appeal that:-

*"……. **To establish possession for the purposes of the Dangerous Drugs Act, Section 10(e), the accused must be shown to have such access to and physical control over the thing (or substance) that he is in a position to deal with it as an owner could, to the exclusion of strangers; but it is not necessary to prove that the accused has title nor that he has access to it to complete exclusion of all other persons……..**"*

There is no doubt at all that the 1st Appellant had possession of the drugs. He says as much in confession. He was also seen by PW5 and PW8 bringing in the drugs into the house at Shanzu in a pick up. Although at some point, a person, by the name, Fuad came and took away some of the drugs, it cannot be said that the 1st Appellant did not have access to the drugs in the circumstances. It is clear that he had access and control to the said drugs. Counsel for the Appellant sought to distinguish this authority on the basis that the authority dealt with Dangerous Drugs Act, whose provisions were radically different from the Narcotic Drugs and Psychotropic Substances Control Act. With respect I do not agree with that submission. Although the authority dealt with the Dangerous Drugs Act, the principle is enshrined therein is good law and is applicable to the circumstances of this case.

The 1st Appellant also took issue with the charges as framed. Counsel for the Appellant submitted that the charges were specific regarding date when the offence was committed. In count one it was stated that the offence was committed on 26th January, 2000 whereas in count two, the offence was committed on 15th March, 2000. Counsel submitted that the 1st Appellant proceeded with the hearing on the basis that the offences were committed on the dates alleged and not any other date; with regard to count two, Counsel submitted that the 1st Appellant was arrested on 14th March, 2000 yet the charge talks of the 1st Appellant having trafficked in the drugs on 15th of March, 2000. To Counsel, how could the 1st Appellant have trafficked in the drugs whilst in custody. That despite this glaring anomaly the prosecution did not seek to amend the charge. I think that this submission is without merit. Yes the Appellant may have been arrested on 14th March, 2000 and that he could not have trafficked in the drugs on 15th March, 2000. However there is evidence of PW5 and PW8 that the trafficking commenced in or about 8th March, 2000 when the 1st Appellant together with one, Fuad came to the Shanzu house in pick up loaded with the drugs which they proceeded to unload and store the house. Though it would have been prudent for the prosecution to amend the charge as appropriate to reflect the period that the drugs were stored I do not think that failure to do so prejudiced the 1st Appellant in anyway. The 1st Appellant in his confession is very clear as to when, where and how he trafficked in the drugs by storing. In any event, I think this omission is curable by virtue of Section 382 of the Criminal Procedure Code. The

omission did not at all occasion a failure of justice. I note further that the objection could have been raised during the trial but was not.

With regard to count one, Counsel queried whether the 1st Appellant trafficked in the drugs on 26th January, 2000. The evidence suggests that the house at Nyali was actually rented by the late Akasha. However, the 1st Appellant's confession tells it all.

Having carefully evaluated the evidence on record I am satisfied just as was the trial Magistrate that the evidence connecting the Appellant to the crime was overwhelming.

With regard to the 2nd Appellant the evidence implicating him with count two was given by PW5, and PW8 who claimed to have seen him at the Shanzu house earlier. PW17 evidence also tends to implicate the 2nd Appellant. However, in my view the evidence is tenious. These witnesses merely talk of having seen the 2nd Appellant at the house. They do not say unlike the 1st Appellant that they saw him storing anything in that house. The closest they came to in associating the 2nd Appellant with the crime is that they had seen him take part of the consignment. However the charge facing the 2nd Appellant was clear and specific. It is that he is alleged to have trafficked in the drugs by storing in a residential house (Shanzu) the 1540 slabs of cannabis resin commonly known as hashish. The charge was not about ferrying the hashish. The Prosecution having been unable to prove and or establish any act of storage on the part of the 2nd Appellant, the charge was doomed to fail. The Prosecution made no effort at all to proof by evidence that the 2nd Appellant had possession of the drugs and that he had kept and or stored them in the house that he had exclusive possession of. In the case of ***WACHIRA VS REPUBLIC (SUPRA),*** commenting on similar issue the Court of Appeal held:

"……***There was no evidence that the Appellant kept or hid the bhang in the roof so as to make it his possession. It was incumbent upon the Prosecution to demonstrate by evidence that the Appellant could reasonably be deemed to be in possession in terms of section 4 of the Penal Code ……..***"

This case is on all fours with the instant Appeal. I do not think in the premises therefore that the 2nd Appellant's conviction on the 2nd count was safe. The defence advanced by the 2nd Appellant appears to be plausible taken in totality with the evidence on record and ought not to have been rejected outright by the Learned Magistrate.

The Appellants also faulted their conviction on the basis that there were contradictions in the Prosecution case. One of the contradictions was that although the Appellants were charged with trafficking hashish, it would appear that the substance that the Court viewed was actually heroin. This is no contradiction at all. I am of the considered view that it was a slip of the pen for the Learned Magistrate to have occasionally referred to the substance as heroin instead of hashish. I am fortified in this holding by the fact that two Government analyst report confirm that the sample of drugs sent to them for analysis from the seized drugs were hashish and not heroin. In any event, what prejudice did the Appellants suffer by this alleged contradiction. Nothing in my view. The Appellants clearly knew the case they were meeting.

Finally on the technical aspects of Act Number 4 of 1994 contained in Sections 71, 72 and 74 as to who should conduct recovery, power to search person or premises and seizures of Narcotic drugs, I can only say that the issue was not canvassed during the trial. Although these Sections talk of such persons involved in the recovery, search and seizure should be authorized in writing by the Commissioner of Police, the director of medical services or any person authorized by him, it is not on record that these witnesses who were involved in the search and recovery of the hashish were not so authorized. Counsel for the Appellants want this Court to assume and or speculate that they must have not been authorized. This is a Court of law. A Court of law does not act on speculation and suppositions. It acts on the evidence as presented before it. In any event what prejudice would they have suffered even if those witnesses had no such authority from the Commissioner of Police? None whatsoever in my view. Although Counsel submitted that the provisions were couched in mandatory terms and must be complied

with, I am however of the view that the provisions are merely directive.

The Appellant also faulted the evidence of the Government analyst PW6 and PW7. The said evidence should have been rejected by the learned Magistrate and not acted upon according to Counsel. This is because there was no evidence that they were gazetted in terms of Section 67 of the Narcotic Drugs and Psychotropic Substance (Control) Act. This criticism is unmerited. Section 67 specifically provides: -

"……..***67(1) The Minister may, from time to time, by notice in the Gazette designate any duly qualified analyst for the purposes of this Act (2) in any prosecution or other proceedings under this Act a certificate signed or purported to be signed by an analyst, designated under Subsection (1), stating that he has analysed or examined any substance and the result of his analysis or examination, shall be admissible in evidence and shall be prima facie evidence of the statements contained in the certificate and of the authority of the person giving or making the same, without any proof of appointment or designation or signature ……..***"

So there it is. An analyst does not require to parade in Court the Gazette Notice of his appointment. Neither does he need to prove his appointment or designation. Indeed Section 68 of the same Act places the burden of proof in respect of such matters to the person questioning the appointment. The Section provides that:-

"…….***In any proceedings against any person for an offence under this Act, it shall not be necessary for the Prosecution to negative by evidence any licence, authority, or other matter of exception or defence, and the burden of proving any such matter shall be on the person seeking to avail himself thereof ……..***"

It was therefore up to the Appellants to bring evidence to show that the two Government analyst were not appointed and gazetted by the Minister. This burden they were unable to discharge.

In the end then I make these orders in this Appeal: -

(1) The Appeal by the first Appellant is dismissed and the sentences imposed confirmed.

(2) The Appeal by the second Appellant is allowed conviction quashed and the sentence imposed set aside.

(3) If the second Appellant be in prison custody, he should forthwith be released unless held for any other lawful purpose.

Orders accordingly.

Dated at Nairobi this 5th day of January, 2007.

…….

**MAKHANDIA**

**JUDGE**

Judgment read, signed and delivered in the presence of:-

Appellant

Mrs. Kagiri for State

Mr. Githinji for Appellant

Erick/Tabitha Court clerks

…….

**MAKHANDIA**

**JUDGE**