



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CRIMINAL APPEAL 72 OF 2007

MOHAMMED ALI MWINYI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From Original Conviction and sentence in Criminal case no. 1133 of 2005 Sentence of the SRM's Court at Kilifi Before C. Obulutsa Esq - SRM)

J U D G M E N T

The appellant, **Mohammed Ali Mwinyi**, was charged in count 1 of Trafficking in Narcotic Drugs Contrary to Section 4(1) of the Narcotic Drugs and Psychotropic Substances Act No. 4 of 1994.

The particulars in count 1 are that on the 18th day of November 2005 at Kwa Chokwe Village in Kilifi District within the Coast province jointly trafficked in Narcotic drugs by storing 257 sachets of heroine with a street value of Kshs. 25,700/= in contravention of the said Act.

He was equally charged in count 2 of being in possession of Narcotic Drugs Contrary to Section 3(1) as read with subsection 2(A) of the Narcotic Drugs and Psychotropic substances Control Act No. 4 of 1994.

The particulars in Count 2 are that on the 18th day of November at Kwa Chokwe Village, Tezo in Kilifi District within the Coast Province was jointly found in possession of Narcotic drugs, to wit, 10 grams of cannabis with a street value of Kshs. 100/= in contravention of the said Act.

He was convicted on both counts and sentenced to pay a fine of shs. 1million and in default one year imprisonment and in addition thereto three years' imprisonment consecutively under Section 4(a) and in respect of Count 2 to serve two years imprisonment which shall run concurrently with count 1.

It is significant to note that he was jointly charged with two others. They brought separate appeals which were inadvertently not consolidated at the time of the hearing, to wit, Malindi High Court Criminal Appeal No. 133 of 2006, Malindi High Court Criminal Appeal No. 134 of 2006 and the subject appeal herein.

The appeal is against conviction and sentence.

No. 219043 Chief Inspector Thoya (PW1) was on duty on 18th March 2005 at Kilifi CID offices. He received a call that there were drug suspects at Tezo. In company of PC Diyo (PW2) and PC Gatimu (PW6) they rushed to Kwa Chokwe area and at Tezo they were directed to some two (2) houses. The first one was empty. In the second one, they found three accused. One of them was the second accused and now appellant herein. They found, spread on a bed, 257 sachets and stubs of cigarettes of bhang which they suspected were drugs.

No. 49795 PC Diyo (PW2) was in the company of Chief Inspector Thoya (PW1). They went to Kwa Chokwe area and at Tezo, in a house, they recovered sachets of bhang and a powder in the process of being packed. He participated in the arrest of the appellant, together with two others, and recovery of the exhibits.

John K Njuga (PW3), a Government Chemist at Mombasa received several exhibits which included 10 sachets in an envelope and powder pale in colour, on 5th December 2005, from Cpl Langat (PW4). The powder and plant material were wrapped separately. He analysed the same and came to a conclusion that the plant material was cannabis sativa and the powder heroin.

Cpl Langat (PW4) investigated the case. He was handed over the exhibits and prepared the exhibit memo and certificate of recovery form. He took the exhibits to the Government Chemist for analysis. He produced the same as exhibits.

Fatuma Brasi (PW5), the owner of the farm where the appellant and others were arrested testified that she does not stay at the farm. However she had workers housed in the farm. The appellant was not one of them. She had no idea how the appellant happened to be at the farm.

P C Gatimu (PW6) was one of the arresting officers. He confirmed that the appellant and three others were caught in the act of parking sachets of bhang and heroin. He identified the exhibits recovered in court.

At the close of the case for the prosecution, the learned trial magistrate found that there was a case to answer.

The appellant herein, **Mohammed Ali Mwinyi**, testified in his defence that he was employed as a driver. He was commissioned by **Victor Karim Werikhe**, to transport coconuts on 28th November 2005.

He loaded the coconuts in Kilifi and passed by Tezo when suddenly they were rounded up and arrested by the police. The person found with the exhibit was from another house separate from the one they loaded coconut. This person was mysteriously released by the police. The following day they were charged jointly with **Victor Karim Warikhe** and **Kassim Ebrahim Mohammed**. He denied the charge.

The said conviction and sentence thus provoked this appeal.

The learned counsel for the appellant referred me to page 22 of the record where the learned trial magistrate said *inter-alia* that the exhibits were being prepared for distribution. He complained that preparation for distribution and sale is a term unknown to the Act. This was a grave error apparent on the face of the record.

He also took issue with the fact that there is no indication that the charge was read over and explained to the accused at the stage of compliance with Section 211 of the Criminal Procedure Code.

Last but not least, counsel complained that the judgment does not contain the points for determination, the decision thereon and the reasons for the decision as enjoined by the mandatory provisions of Section 169 of the Criminal Procedure Code.

Mr Ogoti, for the state, conceded the appeal on the ground that the judgment did not conform with the provisions of Section 169 of the Criminal Procedure Code.

Equally, Mr Ogoti conceded that the conviction was not based on charges preferred. He contended that the appellant was charged on count 1 with the offence of trafficking narcotic drugs and in count 2 with being in possession of narcotic drugs. Yet the learned trial magistrate convicted appellant of the offence of distribution also with which he was not charged. Counsel conceded that that was a grave error in law as preparation for distribution and sale is a term unknown to the Act.

Section 169 of the Criminal Procedure Code Provides:

“1. every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

2. in the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced.....”

It is clear to me, from the proceedings, that the judgment does not comply with the mandatory provisions of Section 169 of the Criminal Procedure Code in that it does not contain the point or points for determination, the decision thereon and the reasons for the decision. Furthermore, the conviction is partly based on a charge of distribution and sale which the appellant was not charged with. In any event preparation for distribution and sale is unknown offence under the Act.

Both the appellant advocate and the state counsel are of the view that a retrial would serve the ends of justice.

In FATEHALDI NANJI – VS – REPUBLIC (1966) EA 345 the Court of Appeal for Eastern Africa held that:

“In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial, even where the conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not necessarily follow that a retrial should be ordered. Each case must depend on its peculiar facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause any injustice to the accused person”

In respect of this case, I find and hold that, the original trial was defective in that the appellant was convicted *inter-alia* with distribution and sale, an offence he was not charged with. Equally, an offence unknown to the law. In addition thereto the trial does not conform with Section 169 of the Criminal Procedure Code.

Accordingly, I quash the conviction, set aside the sentence and order that the matter do proceed for retrial before the Principal Magistrate, Malindi, or any other magistrate in Malindi with competent jurisdiction.

A certified copy of this order to be served upon the Senior Resident Magistrate Kilifi.

DATED and delivered at Malindi this 21st day of February 2007

N.R.O. OMBIJA

JUDGE