REPUBLIC OF KENYA

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

Criminal Appeal 399 of 2005

BASHORA HAMISI KOMORA…………………..…………APPELLANT

VERSUS

REPUBLIC…………………………….....……………….RESPONDENT

(From original conviction and sentence in Criminal Case No. 527 of 21005 of the Senior Principal Magistrate's Court at Garissa)

JUGDMENT

BASHORA HAMISI KOMORA, the appellant was charged before the subordinate court with the offence of being in possession of narcotic drugs contrary to section 3(1) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 as read with sub-section 2(b) of the same Act. The particulars of the offence were that on 14th June 2004 at around 17.45 hours at Madogo Police barrier in Madogo Division of Tana – River District within the Coast Province while traveling in a bus registration number KAQ 976 B Nissan diesel belonging to Buscar company was found in session of cannabis sativa (bhang) to wit hundred and eighty (180) stones not in medical preparation. After a full trial, he was convicted and sentenced to serve 10 years imprisonment.

Being dissatisfied with the decision of the trial court, he has appealed to this court against both the conviction and sentence. He also filed written submissions, which he relied on at the hearing of the appeal.

Learned State Counsel Mr. Makura, conceded to the appeal. Counsel contended that the language of the court and the language used by the prosecution witnesses in the proceedings was not indicated counsel contended that the omission contravened the provisions of section 77 of the Constitution and section 198 of the Criminal Procedure Code (Cap. 75). The trial was therefore a nullity.

Counsel however asked me to order a retrial. It was counsel's contention that there was overwhelming evidence on record. The evidence of PW1 was corroborated by that of the Government Analysist PW3. Counsel contended that there was also the evidence of PW2 who made the exhibits records. Counsel also contended that the appellant was sentenced to ten (10) years imprisonment in 2005 and therefore would not suffer prejudice, if a retrial was ordered.

I have perused the proceedings. Indeed, the language of the court and the language used by prosecution witnesses in the proceedings is not indicated. That was an error, as it amounted to a contravention of section 77(2) (b) and (f) of the Constitution, as well as section 198 of the Criminal Procedure Code (Cap 75). I agree with learned State Counsel that the proceedings were a nullity and I will quash the conviction and set aside the sentence imposed by the learned trial magistrate – **SWAHIBU SIMUYU &**

ANOTHER –vs- REPUBLIC – Criminal Appeal No. 245 of 2005 (KSM) CA unreported followed.

Learned State Counsel has asked to order a retrial. The principles upon which a retrial may be ordered by the court are now well settled. In **AHMED SUMAR –vs- REPUBLIC [1964] EA** 481, at page 483, the Court of Appeal for East Africa stated –

"**It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered".**

The court further observed on the same page –

"**We are also referred to the judgment in PASCAL CLEMENT BRAGANZA –VS- REPUBLIC [1957] EA 152. In this judgment the court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person".**

The offence for which the appellant was tried was a serious offence. More importantly, he was sentenced to serve 10 years imprisonment in July 2005, which means that he has served about 2 years imprisonment. Stat counsel has not informed this court whether witnesses are readily available. He has also not told this court whether the exhibits, that is the alleged 189 stones of cannabis sativa, are available and was not destroyed.

Each case depends on its own merits. I note that the trial took more than one year to be completed and the appellant has been in custody from June 2004. He does not appear to have been able to raise the bond required of him by the court. The appellant therefore has been in custody for three (3) years now. A retrial could as well take another year to complete.

Taking into account all the facts of this case, I consider that a retrial will not be in the best interests of justice. I am of the view that it will cause an injustice to the appellant. I therefore decline to order a retrial.

Consequently, I allow the appeal, quash the conviction and set aside the sentence imposed by the subordinate court. I decline to order a retrial. Instead, I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated at Nairobi this 11th July 2007.

George Dulu

Judge

In the presence of –

Appellant

Ms. Gateru

Eric - court clerk