



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL APPEAL 252 OF 2005

ADIJA ALI SALIM APPELLANT

- Versus -

REPUBLIC RESPONDENT

Corum: Before Hon. Justice Mwera

Magolo for Appellant

Monda for Respondent

Court clerk – Kinyua

J U D G M E N T

The appellant herein was charged under section 3(1) as read with section 2(b) of the now popularly known as the “Narcotics Act” (Act No. 4/2004) that on 1/12/2005 at Kisauni village Mombasa she was found in possession of six (6) satchets of heroin with a street value of Ksh. 1,200/= in contravention of the said Act.

On 2/12/2005 a plea was taken by R.N. Makungu, Resident Magistrate and it reads partly thus:

“Interpretation: English/Swahili

Charge read and explained to the accused who replies:

Accused: True.

Court: Plea of guilty entered, facts and sentencing in court 10 –

Signed”

On the same day the appellant was presented to T.M. Gesora, Resident Magistrate, and the record there omits the language of the court and it does not show that the charge was read afresh and a plea taken before the facts were reproduced:

“Prosecutor: On 1/12/2005 at 7.30 p.m. police officers from Anti-Narcotic Unit went to Kisauni village Mombasa to the accused’s house on information that the accused was dealing in narcotic drugs; they went to the house and found 6 satchets of heroin (in) the house. They arrested the accused with the drugs and took her to the station where she was charged with the offence.

Court: Are the facts correct?

Accused: The facts are correct.

Court: Accused convicted on her own plea of guilty and sentenced to serve 2 years in jail.

Right of appeal within 14 days.

Signed

2/12/2005”

On 19/12/2005 Mr. Magolo filed an application for bail pending appeal. Prior to that on 6/12/2005 a petition of appeal with seven (7) grounds had been filed. On presenting the application for bail/bond the court observed and Mr. Magolo accepted to serve a complete record of appeal on the Attorney General with a view to be heard instead. Mr. Monda, the learned State Counsel on being served with the appeal record acceded to that course and the appeal was heard.

Mr. Magolo focused on to point that the plea of guilty was not unequivocal. That when the appellant went from Ms. Makungu, Resident Magistrate to Mr. Gesora, Resident Magistrate for facts and sentence, no fresh plea was taken. That the movement of the case between the two judicial officers, (both Resident Magistrates) was unlawful and in any case there was no interpretation of the proceedings before the latter court. That the fiasco that went on before these two courts should not be remedied by ordering a retrial because the prosecution may use that to plug any loop holes, or to correct lapses and the defects. He added that there was no government chemist’s certificate either, to state that the 6 satchets were heroin.

The learned State Counsel while conceding that the plea of guilty was flawed even with the provisions of section 200 Criminal Procedure Rules (when one magistrate takes over a case started by another, having the duty to explain to the accused his rights), he pressed this court to order a retrial under section 200 (4) Criminal Procedure Code in that where the accused is materially prejudiced in a trial this court may order a retrial. That the proceedings here materially prejudiced the appellant but having pleaded guilty, and not too long ago, a retrial would not prejudice her and that the State will not use that retrial to plug the loop holes in its case.

In this court’s opinion the plea of guilty here was wholly untenable. Ms Makungu (RM) took the first part of it then with no reason as provided by the Criminal Procedure Rules (on transfer of cases between magistrates), she passed it on to Mr. Gesora, RM. The latter officer did not take afresh plea, as he ought to have done, but went on to hear the facts reproduced by the prosecutor. The language of the court was not noted either. That court seemed to have done its bit but it did not ask the prosecutor to produce past records of the appellant if any or hear the appellant in mitigation before handing down the 2 years imprisonment. So in the light of section 207 Criminal Procedure Code (as propounded with case of ADAN VS REPUBLIC [1973] ER 445) the plea of guilty was again invalid. Then the question of the government chemist’s certificate is said to have been overlooked. The court was told that authorities abound to the effect that even where there is a plea of guilty in drugs cases, production of such certificate is a must. Even without benefit of such authorities, that position may be accepted. Otherwise this court holds the view that once an accused person properly pleads guilty to a charge, then no evidence needs be adduced to support that. A government chemists’ certificate is evidence. But be that as it may.

The learned State Counsel pressed for a retrial under section 200 (4) Criminal Procedure Code. Section 200 Criminal Procedure Code caters for situations where one magistrate hears a case to a point then ceases to exercise jurisdiction in that case and is succeeded by another. This provision of law sets out what the in coming magistrate should do. Sub section 4 reads:

“(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused was materially prejudiced thereby, set aside the conviction and may order a new trial.”

In the present case Ms. Makungu, Resident Magistrate did not cease to exercise jurisdiction after taking the appellant's plea in the morning so that Mr. Gesora, Resident Magistrate would take over and complete the rest of the proceedings. The way the whole proceeding was conducted and particularly that the plea of guilty was not unequivocal leaves this court of the strong mind that the appeal be and is hereby allowed. The conviction is quashed and the sentence set aside. The trial a new is refused. The appellant to be set free forthwith unless otherwise lawfully held.

Judgment accordingly.

Delivered on 4/1/2006.

J.W. MWERA

JUDGE