



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 191 of 2005

**(CONSOLIDATED WITH APPEAL NOS: 190, 192, 193, 196, 197, 199, 200, 201,
254, 255 OF 2005)**

GEORGE MBITHUKA APPELLANT
- Versus -
REPUBLIC RESPONDENT

Corum: Before Hon. Justice Mwera
Monda for State
Magolo, Mutua for appellants
Court clerk – Kinyua

J U D G M E N T

The appellants were all charged for trafficking in narcotic drugs on 11/10/2005 contrary to section 4(a) of Act No. 4/1994.

After consolidating all the appeals herein, which arose from one lower court case, proceedings were conducted on HC CR.A 191/2005 GEORGE MBITHUKA VS REPUBLIC. He was the fourth accused in the lower court. In all, there were twenty nine (29) accused persons. For no recorded reason the pleas against the 2nd accused Elvis Tomasic and 3rd accused Spela Hribar were not taken along with the rest. Neither Mr. Monda the learned State Counsel nor Mr. Magolo for the appellants could give explanation. But be that as it may, however the Hon. The Attorney General should do well to find out why these two had their pleas taken later that day before Mr. Opolu, Senior Resident Magistrate. The rest of the accused pleaded “True” to the charge.

Accused nos. 1, 15, 17, 21 pleaded “not true” and they were released each on a bond of Sh. 100,000/= with one surety.

The facts reproduced by the prosecutor were:

“On the 11th day of October 2005, at a round 4 p.m. police officers from Chagamwe Police Station received information concerning a group of people who work in a certain go-down in Bokole area who were packing cannabis sativa. Upon getting this information they rushed to the scene and gained entry through a small door. Inside the go-down, they found a group of people numbering 29. Among them was a lady who, after interrogation helped them conduct a search.

They managed to recover 85 kg. of bhang escorted (sic) to Changamwe Police Station and later they were charged with this offence. The exhibits are kept at the police station. That is all.

Signed 17/10/2005”

The facts were put to those who pleaded guilty and they admitted them as being true.

The learned trial magistrate convicted the appellants on their own pleas of guilty and the prosecutor told the learned trial magistrate that they had no previous criminal records. After that each appellant was heard in mitigation and the court in its ruling, made the remarks suiting the charge and the subjects, and ordered each to serve 3 years imprisonment.

In all the files there were applications for bail/bond pending the filed appeals. Mr. Magolo and Mr. Mutua (for the appellants) and Mr. Monda agreed to argue the appeals themselves.

Mr. Magolo submitted that the appellants did not understand and therefore properly plead to the charge as laid. That it was one of trafficking under section 4 of the Narcotics Act whose definition under section 2(1) of that Act sets out a large number of acts that constitute trafficking. The cases of JERIM OUMA NIMROD VS MBA CR.A NO. 89/1992 and WANJIKU VS REPUBLIC [2002] 1 KLR 825 were cited to the effect that a charge should specify which ingredient of trafficking an accused was engaged in to enable him to properly and precisely plead.

Mr. Mutua who was appearing in Cr.A 200/2005 herein ANOLD MBELE & OTHERS VS REPUBLIC concurred with Mr. Magolo. Mr. Magolo had added that the substance found had not been analysed and certified by the government chemist as cannabis sativa. That if a retrial is ordered the State will seek to rectify the 2 defects above to the prejudice of the appellants.

The learned State Counsel, though conceding the appeals on the ground of the defective charge, and therefore the pleas not being unequivocal, said that the charge was very serious and the appellants had pleaded guilty to it i.e. trafficking in bhang. They knew that was what they were doing and so a retrial will not prejudice them. And that the Republic was not going to plug any loopholes if a new trial was ordered.

Mr. Mutua responded that no retrial should be based on a defective charge.

Nothing can be remedied.

The charge laid against the appellants read:

“TRAFFICKING IN NARCOTIC DRUGS CONTRARY TO SECTION 4 (A) OF THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES (CONTROL) ACT NO. 4 OF 1994.

PARTICULARS OF OFFENCE: ACCUSED NO 1 – 29

On the 11th day of October 2005 at Mwangosi village, Changamwe, in Mombasa District within the Coast Province, jointly with others not before court trafficked in narcotic drugs to wit 85 kilo grammes of cannabis (sativa) with street value of Ksh. 127,500/= in contravention of the said Act.”

The definition of trafficking drugs under this set has various actions to it in section 2 (1):

“importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug ... or

making any offer in respect thereof.”

With the foregoing, it is imperative that for a proper charge to be presented the prosecution should specify which one or more of these actions the accused was engaged in to commit the offence of trafficking drugs. With such specificity the accused has it clear from the beginning and can even put up a defence without being embarrassed or prejudiced because he cannot figure out what exact offensive act he was engaged in. It is vital and central that a charge is so clear that the accused does not remain in doubt of it because of vagueness or any element of uncertainty. In the way the charge was laid here i.e. without specifying the particular unlawful act or acts each or all the appellants were engaged in, it did prejudice them. The mode of laying the charge was wholly erroneous and in the end invalid. So the pleas taken on it were not unequivocal. This court has no other course to take than to quash the convictions, set aside the sentences and order that the appellants be set at liberty unless otherwise lawfully held.

This court will not order a retrial. If that is done, no doubt the prosecution will endeavour to bring proper charges by correcting the defective charge. A defective charge at this point cannot be a basis of another trial with probability of a conviction.

In sum the appeals are allowed as ordered above. And in the interest of justice the accused persons who did not appeal may also be set free. Judgment accordingly.

Delivered on 4/1/2006.

J.W. MWERAA

JUDGE