



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

Criminal Appeal 70 of 2006

KADIMALA ANZWENI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged before the District Magistrate II at Mombasa with the offences of being in possession and trafficking in narcotic drugs contrary to sections 3(1) as read with section 2(a) and 4(a) as read with section 2(a) respectively of the Narcotic Drugs and Psychotropic Substances Control Act No. 4/94. He pleaded not guilty but after trial he was convicted and sentenced to Sh. 10,000/= fined or in default to serve 3 months imprisonment and fine of Sh. 20,000/= or in default 6 months imprisonment on those offences respectively. He has appealed against both the convictions and sentences.

Mr. Magolo, counsel for the Appellant submitted that both the offences were not proved to the required standard. On the count of being in possession he submitted that the Appellant shared her house with her husband. The husband was not charged or called as a witness. He said that with that omission it cannot be conclusively said that the drugs were the Appellant's. They could have been the husband's.

On the count of trafficking he submitted that the charge was defective as it did not specify which act of trafficking the Appellant committed.

Mr. Monda, learned State Counsel concurred with those submissions and conceded this appeal.

I agree with Mr. Magolo and the learned State Counsel that the charges were not proved to the required standard. On the count of being in possession of narcotic drugs found in a house, the prosecution has to prove that the accused was in possession of those drugs to the exclusion of any of the occupants or anyone who might have had access to that house. That was not done in this case.

On the count of trafficking the act of trafficking was not stated. The definition of trafficking has several acts, one or two or all of which amount to trafficking. The Narcotic Drugs and Psychotropic Substances Control Act defines trafficking to mean:

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

or making any offer in respect thereof.”

In this case the charge simply read:

**“Trafficking in Narcotic Drugs Contrary to Section 4(a)
of the Narcotic Drugs and Psychotropic Substances Control
Act No. 4/94 as read with section 2(a) of the same Act.”**

The particulars were that:

**“KADIMALA ANZWENI: On the 24th day of October
2005 at about 9.00 a.m. at Kadzonzo Village Mishomoroni
area in Mombasa District within Coast Province, was found
trafficking in narcotic drugs to wit 60 rolls of cannabis
valued at Sh. 60,000/= in contravention of the said Act.”**

Without specifying the particular act of trafficking this charge was fatally defective. The Appellant should not have been tried leave alone convicted on such charge.

In the circumstances I allow this appeal, quash the conviction and set aside the sentence. The Appellant if he is in prison shall be set free forthwith unless otherwise lawfully held. If he paid the fine the same should be refunded to him.

DATED and delivered this 2nd day of May 2006.

D. K. MARAGA

JUDGE