



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(NAIROBI LAW COURTS)
Criminal Appeal 607 of 2004

(From Original Conviction and Sentence in Criminal Case No.9220 of 2002 of the Chief

Magistrate’s Court at Kibera – Ms Mwangi SPM.)

MIAN AQEEL ASHRAF
.....APPELLANT

VERSUS

REPUBLIC.....
....RESPONDENT

JUDGMENT

The Appellant **MIAN AQEEL ASHRAF** was charged with one count of Trafficking in Narcotic Drugs contrary to Section 4 (a) of the Narcotic Drugs and Psychotropic substances (Control) Act No. 4 of 1994. The particulars of the charge were that **MIAN AQEEL ASHRAF** on the 20th day of December, 2003 at Jomo Kenyatta International Airport in Nairobi within Nairobi Area trafficked in 1.77 Kilogrammes of Narcotic Drugs namely Diacetylmorphine commonly known as heroin with a street value of Kshs.1,700,000/= in contravention of the said Act. The Appellant also faced a 2nd count of concealing proceeds of Drugs Trafficking contrary to Section 49 (1) (a) as read with 49 (6) of the Narcotic Drugs and Psychotropic substances (Control) Act No. 4 of 1994. The particulars being that at the same place as in count one, the Appellant concealed the nature of US Dollars 2017, Uganda Shillings 2,016,000/= Dubai Dirhams 10, Pakistan Rupees 1370 and Kenya Shillings 50/- which were proceeds of Drug Trafficking for the purpose of avoiding Prosecution for the specified offence of money laundering in contravention of the said Act.

The Appellant duly went through the motions of a trial and at the conclusion thereof was found guilty of the offences charged and convicted accordingly. Upon conviction he was sentenced to serve 8 years imprisonment and to a fine of Kshs.3,000,000/= in default to serve a further 3 years imprisonment. In respect of Court 2, the Appellant was sentenced to serve 4 years imprisonment and the money was forfeited to the state. The terms of imprisonment were ordered to run concurrently.

The Appellant was aggrieved by the conviction and sentence aforesaid. He therefore lodged the instant Appeal setting out 6 grounds in his petition of Appeal. However it is not necessary to reproduce the said grounds of Appeal for purposes of this Judgment.

When the Appeal came up before me for hearing, Miss Nyamosi Learned State Counsel conceded to the same on two grounds; one, failure by the Prosecution to specify the mode of trafficking in the charge sheet and secondly, failure by the trial Court to comply with the mandatory provisions of Section 200 (3) of the Criminal Procedure Code.

In support of the first ground, the Learned State Counsel submitted that on basis of the holding in **CR. APPEAL. NO 1113 OF 2002, SAMUEL MAINA MWAI VS REPUBLIC (UNREPORTED)** and **WANJIKU VS REPUBLIC (2002) KLR 825**, the State was constrained to concede to the Appeal. The mode of trafficking had not been specifically stated in the charge sheet which omission was fatal. In support of the second ground, Counsel submitted that initially the case was presided over by Mrs. Wendo, Chief Magistrate as she then was before it was taken over by Mrs. Mwangi, Senior Principle Magistrate. In taking over the case, the latter Learned Magistrate did not comply with the mandatory provisions of Section 200 of the Criminal Procedure Code which omission rendered the proceedings a nullity.

As regards retrial, the Learned State Counsel informed the Court that the State was not seeking a retrial as to do so will enable the State to correct the mistake.

Mr. Gathenji, Learned Counsel for the Appellant welcomed State's gesture. He however urged the Court in the event to allow the Appeal, quash the conviction and set aside the sentence. On retrial, Counsel was of the opinion that such an order will not serve any purpose as the drugs, the subject matter of the case had been destroyed. Finally, Counsel prayed that the Appellant's money forfeited to the State in respect of count 2 to be refunded to the Appellant.

I have carefully considered the submissions of the Learned Counsels as well as the proceedings and Judgment of the subordinate Court. In the course of writing this Judgment, the Court noted that part of the sentence imposed particularly in respect of count 1 would appear to be illegal. The act specifically provides in Section 4 that:-

“...Any person who traffics in any Narcotic Drugs or Psychotropic substance or any substance represented or held out by him to be a narcotic Drug or Psychotropic substance shall be guilty of an offence and is liable:-

(a). In respect of any Narcotic Drug or Psychotropic Substance to a fine of one Million shillings or three times the market value of the Narcotic Drug or Psychotropic Substance, whichever is the greater, and, in addition to imprisonment for life; or

(b).....”

The alleged value of the Narcotic Drugs in the charge sheet was put Kshs.1,770,000/= . In terms of the aforesaid provision, the fine which ought to have been imposed should have been Kshs.5,310,000/= and not Ksh.3,000,000 that was imposed by the Learned trial Magistrate. The default sentence was also illegal. In terms of Section 28 of the Penal Code, the default sentence ought to have been 1 year and not three years.

With regard to the charge sheet, it has been held that the mode of trafficking must be specified in the charge sheet. It is not enough to merely say that so and so trafficked in such and such amount of Narcotic Drugs as in the instant case. In the case of **WANJIKU VS REPUBLIC (SUPRA)** Justice Onyancha, whose reasoning I entirely agree with and endorse held:-

“.....The definition of trafficking in the Act embraced several kinds of Acts including importation, exportation, manufacture buying, sale, supplying, storing, administering, conveying or distributing. It is logical and indeed sensible that a charge of “trafficking” should clearly specify the exact kind of trafficking to enable not only the Prosecution to know what evidence to lead to prove the charge but even more important to enable the accused to know the actual elements of the charge the Prosecution is sought to prove by the evidence it will be adducing.

An accused person has a full right to know the charge he is facing to enable him to fully prepare his defence. Failure to specify which one or more of the specific “trafficking” charged is likely to embarrass or even confuse the accused in the preparation of his defence to the charge. The charge as drawn in the lower court was erroneous in so far as it failed to specify activity or act (as defined under the relevant Act) that the prosecution embarked to prove and the accused purported to

defend.....”

And in the case of SAMUEL MAINA MWAI VS REPUBLIC (SUPRA) which is my own decision I had these to say:-

“.....In my view this charge is amorphous and ambiguous having regard to the definition of trafficking in the Act. Trafficking as defined in the Act includes importation, exportation, manufacture, buying, sale, supplying, storing, administering, conveying or distribution. This being the case it is only fair that in charging a person under the Act, care be taken to specifically state in the charge sheet the mode of trafficking that the accused person is suspected to have undertaken. It is not enough to merely state in the charge sheet as in the instant case that the accused person: -

“.....Trafficked in 1.9 pellets of Narcotic drugs.....”

The person preparing the charge must go further and state whether the mode of trafficking was my importation, exportation, manufacture, buying, sale, supplying, storing, administering, conveying or distributing. This way the accused person would know the case confronting him and adequately prepare his defence.....”

These two cases are on all fours with the instant case with regard to the 1st count. The counts in the aforesaid authorities were framed in the same manner and style as in the instant case. In so far as the mode of trafficking was not specifically stated, the charge in my view was incurably and fatally defective and the Appellant ought not to have been convicted on the same. The Learned State Counsel was therefore right in conceding to the Appeal on that basis.

As regards non-compliance with the mandatory provisions of Section 200 of the Criminal Procedure Code, I note from the record that the case was first presided over by Mrs. Karanja, Chief Magistrate. She took the evidence of PW1. The case was then taken over by Mrs. Wendoh Chief Magistrate. She presided over the evidence of PW2. Thereafter the case was again taken over by Ms. Mwangi, Senior Principle Magistrate who heard the remaining witnesses, the defence and delivered the Judgement. Section 200 of the Criminal Procedure Code deals with situations where a matter which previously had been handled by another Magistrate is taken over by another Magistrate. Under Section 200 (3) an accused person is entitled to demand that any witnesses be re-summoned and re-heard and a duty is imposed on the succeeding Magistrate to inform the accused person of such right. The duty imposed on the Magistrate is cast in mandatory terms. In the instant case the appellant was not, according to the record informed by the two incoming Magistrates of his right to demand that any witnesses are re-summoned or heard. That failure in my view was fatal to the Prosecution case and rendered the proceedings a nullity.

In a similar scenario, the Court in KARIUKI VS REPUBLIC (1985) KLR 504, had this to say:-

“..... In the circumstances, the Appellant having a right to re-summon and rehear the witnesses, of which right he was not informed, though a duty was imposed on the succeeding Magistrate to inform the Appellants of such right, we think that the assumption of jurisdiction by the said succeeding Magistrate without informing the Appellant of his right, was clearly wrong and the trial by the succeeding Magistrate was a nullity....”

Yet again in the case of RAPHAEL VS REPUBLIC (1969) EA 544, the Court observed:-

“....It is prerequisite to the second Magistrate’s exercising jurisdiction that he should appraise the accused of his right to demand that the witnesses of any of them be re-summoned and heard...If the second Magistrate has not complied with this prerequisite it is fatal, he has no jurisdiction and the trial is a nullity.”

There was clear breach of this mandatory provision of the law by the two in-coming Magistrates. That omission rendered the proceedings a nullity and I so hold. Again, the Leaned Magistrate was right to

concede to this Appeal on this ground as well.

That being my view of the matter, I will allow the Appeal, quash the conviction and set aside the sentence.

Should I order a retrial? I do not think so. It has been held that a retrial should only be ordered where the Court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction may result. Each case must depend on its own particular facts and circumstances but an order for retrial should only be made where the interest of justice require it and should not be where it is likely to cause an injustice to an accused person. Finally such an order should not be made if it will accord the Prosecution opportunity to right their wrong. See generally PASCAL CLEMENT BRAGANZA VS REPUBLIC (1957) EA 152, AHMED SUMAR (1964) EA 481 and FATEHALI MAJI VS REPUBLIC (1966)EA13.

In my view, having carefully considered various aspects of the case including the charge, the fact that the drugs have been destroyed and the period the Appellant has stayed under confinement prior to and after conviction, I am persuaded that it would not be in the interest of justice to order a retrial and I decline to do so. Infact if such an order was to be made it would accord the Prosecution and the Court to correct their mistakes.

In respect of count 2, there was absolutely no evidence upon which the conviction could have been founded and sustained. There was absolutely no nexus at all between the money that the Appellant had in his possession and the drugs. It would appear that the Court assumed merely because the money was found on the person of the Appellant, and he was also allegedly found with drugs, it must be drug money. Courts of Law do not act on assumptions. They act on hard evidence. In the circumstances of this case there was no such evidence. After all the Appellant was enroute to Uganda from Pakistan. In the end then I order that the money belonging to the Appellant and which was forfeited to the State be refunded to the Appellant. In summary the orders of these Court are that:-

- (i). The Appeal is allowed, conviction on both counts quashed and sentences set aside.
- (ii). There shall be no retrial.
- (iii). the money forfeited to the state shall be refunded to the Appellant.
- (iv). The Appellant is set free unless otherwise lawfully held.

Dated at Nairobi this 31st day of July, 2006.

.....

MAKHANDIA

JUDGE