



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
APPELLATE SIDE  
CRIMINAL APPEAL NO.322 OF 2002**

**DANIEL OTIENO.....APPELLANT**

**=V E R S U S=**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The State is not opposing this appeal.

The charges against the Appellant trafficking in Narcotic Drugs and permitting premises to be used for the purpose of sale or distribution of Narcotic Drugs contrary to the provisions of Narcotic Drugs and Psychotropic Substances (Control) Act No.4 of 1994.

Count 1 on trafficking was not proved and the court acquitted the same. The Appellant was therefore found guilty and convicted of Count 2 namely permitting premises to be used for purposes of store of the drugs.

The ownership of the premises is not disputed. However Appellant denied having any knowledge that the premises were so used. He said his plot has a Swahili type of building within which are several rooms occupied by different tenants as their houses. He had 3 tenants at material time who said they dealt with an agent of the Appellant in matters of letting the premises and the collection of rent was paid directly to the agent. The Appellant testified that he did not reside in the premises and he used to visit very infrequently. This was confirmed by the witness who said they resided in the building (PW.2). There was evidence the room in which drugs were found was usually locked. The prosecution did not call the agent to verify whether the room was occupied or not. The Appellant denied being in possession of the same and even having the key to the door. It is not clear where the Trial Magistrate got evidence that the Appellant must have had knowledge of what was stored in the room. That a room was locked most of the time does not mean that the same was not let. It should have been important to investigate the occupant of the room. The Appellant mentioned the occupant of the room who was later arrested in very suspicious circumstances. PW.1 said he was shown receipts indicating rent had been paid upto October. No effort was made to investigate further. Independent evidence was given only by PW.2, a tenant who had resided in the building for a year. This evidence which was in favour of Appellant was ignored by Trial Magistrate. All the other evidence was by Police Officers who received information secondhand.

The most important element in the offence charged is that the offender must have knowledge that the premises were being used for the offending purpose. In this case the Appellant was not occupying the premises. He had no key to the same and he says he did not know what was stored inside. There is evidence that he had left the management of his property to his agents who collected rent and let the premises. The room was usually locked and the Appellant did not visit the property often. It was said he visited like once a month.

In the circumstances, I do not find evidence to prove the case beyond reasonable doubt. The Trial Magistrate erred in basing conviction on insufficient evidence.

As the State is not supporting this conviction and sentence I allow the appeal and order that the Appellant shall be set free forthwith unless otherwise lawfully detained.

**Dated at Mombasa this 28th day of January, 2004.**

**JOYCE KHAMINWA**

**J U D G E**

**28/1/2004**

**Judgment read in open court in presence of Appellant and State Counsel Ms Kwena.**

**JOYCE KHAMINWA**

**J U D G E**