REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLANT SIDE
CRIMINAL APPEAL NO. 353 OF 2002
(From Original Conviction and Sentence in Criminal Case No. 321 of the Chief magistrate's Court at Mombasa – L.N. Mbatia – SRM).

JOSEPH SUDAI TSUMA……..APPELLANT

-VERSUS

REPUBLIC…….....……RESPONDENT

J U D G E M E N T

The appellant, a first offender, pleaded guilty to a charge of three counts. The first count relates to a charge of being in possession of narcotic drugs contrary to section 3(1) as read with Section 2(a) of the Narcotic Drugs and Psychotropic substances Control Act No. 4 of 1994. The particulars of the charge were that on the 24th day of September 2001 at 11.30 p.m. at Lunga Lunga Trading Centre in Kwale District of the Coast Province, was found being in possession of cannabis sativa (bhang) to wit 20 cigarettes and one stone in contravention of the aforesaid Act.

The second count relates to the offence of escaping from lawful custody contrary to section 123 of the Penal Code. The particulars of the charge were that on the 24th day of September 2001 at 11.45 p.m. at Lunga Lunga Trading Centre in Kwale District of the Coast Province, being in a lawful custody of CPL. Johnes Bore and P.C. Suleiman Maneno, after being arrested for the offence of being in possession of Narcotic drugs, escaped from such lawful custody.

The third count concerns the offence of being unlawfully present in Kenya contrary to Section 13(2) (c) of the immigration Act Cap. 172 Laws of Kenya. The particulars relating to this charge were that on the 24th day of September 2001 at 11.30 P.M. at Lunga Lunga Trading Centre in Kwale District of the Coast Province being a Tanzanian National was found being in Kenya unlawfully.

When the appellant appeared before the trial court, he pleaded guilty to the charges before the court and was fined Ksh.30,000/= in default 2 years imprisonment and 10,000/= in default 2 years imprisonment in the first count and the third count respectively. The appellant was also sentenced to 18 months imprisonment in count 2.

The appellant now appeals against both the sentence and conviction and the grounds of appeal may be summarized as follows:-

First is that the sentence is manifestly excessive. Secondly that the appellant's mitigation was not considered by the trial court.

The appellant argued his appeal in person. He beseeched this court for leniency and that the sentence imposed against him was harsh.

The Respondent was represented by Miss Kwena who pointed out the fact that the trial court did not pronounce whether the sentences would run concurrently or consecutively. She further stated that it would appear that the appellant was serving a sentence of 5 ½ years. She also pointed out that the offence on count 3 was not proved and therefore she did not support the conviction and sentence in the said count. However she supported the convictions and sentences in count 1 and 2.

The appellant was charged in count 1 with the offence of being in possession of Narcotic drugs contrary to section 3(1) as read with section 2(a) of the Narcotic Drugs and Psychotropic substances Control Act No. 4 of 1994. It is important to note here that section 2(a) does not exist in Act No. 4 of 1994. This is a fundamental error of law in that the accused was charged with a non-existent offence and the same is not curable under Section 382 of the Criminal Procedure Code. I am persuaded by the decision of the late Sir Udo Udoma Chief Justice of Uganda as he then was in the case of ***Uganda -Vs- Keneri Opidi [1965) E.A. P.61***4 in which

The accused pleaded guilty firstly for failing to display an 'L' plate and secondly for being a learner driver, driving while not accompanied by a competent driver. The first count was laid under "S.9(b) 123 of the Traffic Ordinance" and the second under "S.9(a) and 12 of the Traffic Ordinance 1951." It was contended in support of a revisional order against conviction and sentence that the counts were manifestly wrong in law in that the first should have been laid under S. 9 of the Traffic Regulations and that the second failed to indicate the law under which the charge was laid. It was submitted by the Director of Public Prosecutions that the accused was prejudiced in no way by the counts being laid under the Traffic Ordinance instead of the Traffic Regulations and that it was probable that the framers of the charge meant S.9(b) of the Traffic Regulations. It was held ***inter alia*** that:-

> (i) the error was a fundamental one of law in that the accused was charged with a non-existent offence and was not curable by section 347 of Criminal Procedure Code (the Equivalent of S. 382)
>
> (ii) It was not competent for the court to speculate on the intention of the framers of the charge but must be guided in determining such intention by the expressions contained in the recorded proceedings. That having been persuaded by this decision I would therefore proceed to set aside the conviction and sentence on count 1.

Having failed to lay a proper charge before the trial count, it is difficult to prove that the appellant was under lawful custody. I find therefore that the appellant was unlawfully held and hence the conviction and sentence in count 2 cannot stand. The decision of this court is therefore to quash the conviction and set aside the sentence in count 2. The State Counsel properly submitted that the prosecution at the trial court did not prove by way of evidence the offence in count 3. I concur with the learned State Counsel and proceed to quash the conviction and set aside the sentence.

The State Counsel also pointed out that the trial court did not exercise its discretion to pronounce whether the sentences would run concurrently or consecutively. I share the view expressed in the case of ***Ondiek – Vs- Republic 1981 K.L.R.P. 430***

In which the appellant was convicted of six counts and was sentenced to nine months imprisonment. It was not specified to which count the nine months' imprisonment related and whether the sentences were concurrent or consecutive. It was held ***inter alia*** that:-

> (i) The sentence of nine months for each count was enough but if the nine months were to run consecutively that would make it three years which is manifestly excessive.
>
> (ii) The practice is that if a person commits more than one offence at the same time in the same transaction save in exceptional circumstances the sentences imposed should run concurrently.

In the case of ***Ng'ang'a –vs- Republic 1981 K.L.R. 530*** the appellant was convicted of housebreaking and theft committed in one criminal transaction. The trial magistrate awarded consecutive sentences, citing the accused's bad record as a reason for doing so. This appeal was against sentence, with the appellant

contending that they should have run consecutively. It was held by this court of a bench of two Judges inter alia that concurrent sentences should be awarded for offences committed in one criminal transaction. The fact that the accused had a bad record is no excuse to alter the rule.

From the above two cases I am persuaded and convinced that the trial court in this appeal should have clearly exercised its discretion by pronouncing a concurrent sentence. I would have ordered the same to be so but both the convictions and sentences in this appeal have been quashed. From the submissions of both the appellant and the State Counsel it is clear that I have been invited to look at the legality of both the sentence and the conviction. From the foregoing I have come to the conclusion that the conviction and sentence in all the counts be quashed and set aside respectively. The appellant is therefore set free forthwith unless lawfully held.

Read and Delivered in open Court this 19th day of February, 2003.

J.K. SERGON

J U D G E