



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
APPELLATE SIDE  
CRIMINAL APPEAL NO.198'B' OF 2001

(From Original Conviction and Sentence in Criminal Case No.1295 of 2001 of the Senior Resident Magistrate's Court at Mombasa – H. Njiru, Esq., - S.R.M.)

GULAM SADIK.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

R U L I N G

The Applicant was the 2nd Accused before Mombasa Senior Resident Magistrate charged with the offence of being in possession of Narcotic Drugs contrary to Section 3(1) as read with Ss.2(a) of Act 4/94. He pleaded guilty to the offence and was sentenced to serve 2 years imprisonment. The 3rd Accused was similarly convicted but the 1st Accused pleaded not guilty.

The Applicant filed an Appeal soon after to challenge both the conviction and the sentence. He also filed a Notice of Motion seeking bail pending the hearing of the Appeal.

Learned counsel for him Mr. Khatib submitted that the plea was not unequivocal since there was no evidence from the Government Chemist to confirm that the substance produced in court was indeed any of the substances defined under the Act. It was referred to in the facts given by the prosecution as “**a certain green material**” . Learned State Counsel Ms.

Kwena conceded that the omission to classify the substance before the plea was taken was prejudicial to the Applicant. She conceded the application.

I think she was right to concede. It was incumbent on the prosecution to satisfy the court that even where the plea is one of guilty, that what was before the court was a substance prohibited under the law. The Act creates no offence for substance described as “**a certain green material**”. The plea cannot therefore be said to have been unequivocal.

I would have granted bail pending the hearing of the main Appeal in this matter. Owing to the glaring transgression of procedure and the concession by the Attorney-General in that regard however, I would exercise my powers under Section 352A of the Criminal Procedure Code and allow the main Appeal summarily. I quash the conviction and sentence imposed on the Appellant. I order that there shall be a retrial **de novo** before another court of competent jurisdiction.

Pending the appearance of the Applicant before the Chief Magistrate's Court for the mention of the case on 10.7.01 the Applicant shall execute his own bond of Kshs.20,000/- together with one surety of like amount.

**Dated this 3rd day of July, 2001.**

**P.N. WAKI**

**J U D G E**