



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 38 OF 2018

ZAMZAM MOHAMED.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Senior

Resident Magistrate Court at Lamu Criminal Case 390 of 2015, Hon. Njeri Thuku (SRM) dated 2nd June 2017)

JUDGMENT

1. The Appellant was charged with trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic and Psychotropic Substance (Control) Act No. 4 of 1994.
2. The particulars of the offence were that on the 14th July 2015 at about 1745Hrs at CDF Area along Mtangawanda-Faza-Kizingitini road in Lamu East Sub-County within Lamu County was found trafficking in narcotic drugs namely Heroin to wit 44gms with a street value of Ksh. 129,000/- by conveying them in a small bag in contravention of the said Act.
3. The Appellant pleaded not guilty and the matter went to full trial. At the conclusion of the trial, the trial magistrate found the Appellant guilty and sentenced him to imprisonment for 20 years.
4. The Appellant being aggrieved by the conviction and sentence lodged his appeal dated 27th September 2017 through his advocate on record A.B. Olaba. He raised two grounds that: the prosecution had failed to produce the certificate of value of the drugs in line with section 86(1) as read with section 86(2) of the NPSCA and secondly; that he trial court had denied the Appellant an opportunity to defend himself by declining to recall the two key prosecution witnesses.
5. On the 13th March 2019 the firm of K. Lughanje & Company Advocates came on record for the Appellant in place of A.B. Olaba Advocate. K. Lughanje with leave of court filed a supplementary Petition of Appeal on three grounds namely that: the prosecution had failed to prove the offence beyond reasonable doubt; secondly, that the trial magistrate had erred by refusing to recall PW1 & PW2 for cross-examination by the accused's counsel and; lastly, that the sentence was harsh.
6. The Appellant through his advocate filed his written submissions dated 12th April 2019 on the 6th May 2019. During hearing Mr. Lughanje highlighted the submissions which were to the effect that the ingredients of the offence had not been proved as there was no evidence that the drugs were weighed in the presence of the accused person in contravention of section 74A of the NPSCA. Further, the report by the analyst was not produced by the maker and that there was no proof that the analyst who made the report and the analyst who produced the report were duly authorized to do so. It was also submitted that there was no proper chain of custody of the exhibit as P.C. Koech, who handed the exhibit to the government analyst, was not called as a witness and further, that it was not clear how P.C. Koech came to be in possession of the exhibits.
7. Mr. Lughanje submitted that the Appellant was denied an opportunity to cross-examine PW1 & PW2 without any grounds yet the evidence of the two witnesses had probative value with regards to the ingredients of the offence. He relied on the case of **Elijah Omondi Owino v R HCCA 464 of 2009**. Lastly, it was submitted that the market value of the drugs was not established as provided by section 86 of the NPSCA and that the sentence was not commensurate with the offence.
8. Mr. Kasyoka, learned counsel for the Respondent conceded the appeal on the ground that the trial court denied the Appellant an opportunity to cross-examine PW1 & PW2 through his advocate in contravention of his rights under Article 50(2)(f) of the Constitution of Kenya 2010.

9. Despite the Respondent conceding the appeal, it is trite that the court should examine the facts for itself in considering merit to the prosecution's concession. In **Odhiambo vs. Republic (2008) KLR 565** the Court held that:-

“the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence.”

10. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come to its own conclusion. See **Okeno v R (1972) EA 32; Eric Onyango Odeng' v R [2014] eKLR**.

11. I have considered the grounds of appeal, the record and submission of the parties. I consider the issues in this appeal to be whether the trial magistrate erred by failing to recall the prosecution witnesses; whether the prosecution proved its case to the required legal standard, and; whether the sentence was justified.

12. On whether the trial magistrate erred to recall the prosecution witnesses; the record shows that when the matter came up for hearing on the 13/9/2016, Mr. Njuguna holding brief for Mr. Olaba for the accused informed the court that Mr. Olaba was held up in a case before Hon. Justice Chitembwe and sought to adjourn the matter. The prosecution counsel, Mr. Mwaura, opposed the application for adjournment on the ground that the witnesses were police officers from Usalama camp and that they had come to court on four different occasions when the hearing did not proceed. The trial magistrate denied the application for adjournment on the ground that the date had been taken in the accused advocate's presence who did not object to the said date.

13. The hearing proceeded with two prosecution witnesses namely Sergeant Amir Badi, PW1 and PC Kamweto Musee as, PW2, who were both the arresting officers by which time Mr. Njuguna had left the court. After examination-in-chief of each witness, the accused stated that he did not have anything to ask during cross-examination.

14. During the next hearing on the 20/9/2016, Mr. Olaba, counsel for the accused, made an application for recall of PW1 and PW2 for purposes of cross-examination on the grounds that the accused person was unrepresented when they testified. The prosecution opposed the application on the grounds that it would be difficult to secure the two witnesses as they were attached to Usalama camp in Kiunga.

15. In her ruling delivered on the 5th September 2016, the trial magistrate dismissed the application to call PW1 and PW2 on the grounds that the witnesses were based at Usalama camp which was only accessible by sea due to the threats of the Al Shabaab and was at times rough and dangerous to travel by sea to Lamu island. She further stated that Usalama camp was an operation area and an officer could not come and go as they pleased as they were protecting the Kenyan border and people from external aggression. Lastly, the trial magistrate stated that the reason that the accused was not represented was insufficient and that Mr. Olaba had failed to provide information regarding the court matter he was attending in the High Court on the 13th September 2016.

16. The law provides for the recalling of witnesses and Section 146(4) of the Evidence Act Cap. 80 provides that:-

“The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so the parties have the right of further cross-examination and re-examination respectively.”

Section 150 of the CPC states as follows:-

A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”

17. A reading of the above provisions give the court the discretion to recall any witness who has already testified, however, a good reason must be given before the court recalls any witness. In the present case the advocate for the Appellant submits that the Appellant was unrepresented when the witnesses testified and that the testimony of the witnesses was of probative value.

18. Article 50 (2) of the Constitution of Kenya provides that an accused person has a right to fair hearing which includes: -

“(a) to be presumed innocent until the contrary is proved;

(c) to have adequate time and facilities to prepare a defence;

(g) right to choose and be represented by an advocate;

(k) to adduce and challenge evidence;”

Article 25 (c) of the Constitution further provides that a right to fair trial shall not be limited.

19. The Appellant was facing the likelihood of life imprisonment if found guilty. Contrary to the trial court's assertion, the Appellant was duly represented by an advocate of his choice, Mr. Olaba, who was on record. Unfortunately, on the day when PW1 & PW2 were in court, Mr. Olaba was not in court as he was appearing before Hon. Justice Chitembwe. It would be in violation of the Appellant's right to deny him representation by his advocate of choice.

20. I understand the difficulty that the prosecution may face in recalling the witnesses but from the record, it is not lost to this court that PW4, P.C Boniface Muya, the Investigating Officer, was also from June 2016 temporarily posted to Usalama camp similar to PW1 and PW2. He was however available at a later date for hearing on the 1st November, 2016. As rightly pointed out by Mr. Kasyoka for the Respondent, the right to fair trial is non-derogable and there is no prejudice that would have been occasioned to the Respondent if they were to recall the witnesses.

21. In **Moses Ndichu Kariuki Vs Republic Criminal Appeal No. 228 of 2008 (2009) eKLR**, the Appellant claimed his right to fair trial had been breached when he was not afforded an opportunity to further cross-examine the Appellant. The Court of Appeal considered the provisions of section 77 of the former Constitution which is similar to Article 50 of the Constitution stated thus:-

“In our determination, the right to cross-examine is the linchpin of the concept of a fair trial in that, it has a bearing on the principle of the equality of hearing and the equality of arms without which a trial cannot be said to have been conducted fairly. On our view, denial to cross-examine in turn means that the defence was not treated fairly and the two requirements of equality of hearing and equality of arms were not satisfied. Our view on this is reinforced by the marginal notes in Section (Article) 77 in that the entire provision is entitled the provisions to secure protection of law. Clearly the failure to recall the complainant for purposes of further cross-examination by the appellant caused prejudice to the appellant.”

22. In **Republic v Salim Mohamed Criminal Case No. 4 Of 2015 [2016] eKLR** where the court was faced with an application to recall prosecution witnesses after the accused had changed his advocate, Chitembwe J held that:-

“It is clear that Mr. Shujaa was not the one representing the accused when the witnesses to be recalled testified. I do understand the position of the state in opposing the application as it is expensive and takes time to have a witness attend court and testify. Once a witness has testified it takes a lot of effort to convince such a witness to come back to court and testify again. However, Section 146 (4) allows the recalling of a witness who has already testified. Recalling a witness is part of the right to a fair hearing. It should not be felt that the court shielded the witness from further cross-examination unless it can be shown that the request to have the witness called is based on ulterior motive.”

23. In **Joseph Ndungu Kagiri v Republic Criminal Appeal Number 69 Of 2012 [2016] eKLR** Mativo J held as follows:-

“The question that arises is whether the further cross-examination was a good reason or whether it was necessary for the ends of justice. Counsel had just come on record, he had just been supplied with the proceedings and prosecution witnesses statements and the accused persons had hitherto been unrepresented and did not have the benefit of the witnesses statements at the time the trial proceeded nor did they have the benefit of legal representation. Counsel, in his wisdom deemed it fit to apply to cross-examine the said witnesses and the court overruled this application.

...In this case, it was improper for the court to refuse the application to recall the witnesses, thereby occasioned grave injustice to the accused persons by locking out evidence that could have been brought out by the intended cross-examination. This refusal was in my view to the detriment of the accused persons who hitherto had no legal representation.”

24. In view of the facts of this case, I find that the trial magistrate erred in denying the Appellant the right to recall the prosecution witnesses for cross-examination. The denial was prejudicial to the Appellant's defence.

25. Having concluded that there was a mistrial the only question before the court is whether a retrial should be ordered.

26. The Court of Appeal in **John Kariuki Gikonyo V Republic Criminal Appeal No. 14 Of 2018 [2019] eKLR** quoted with approval the case **Fatehali Manji V Republic (1966) E.A. 343**, which held that:-

“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it.” (Emphasis mine).

27. In **John Njenga Kamau v Republic Criminal Appeal No. 203 OF 2016 [2018] eKLR** the Court of Appeal quoted the English case of **Reid vs R - (1978) 27 WIR 254**, to explain interest of justice where it held that:-

“The interest of justice that is served by the power to order a new trial is the interest of the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury... It is not in the interest of justice that the prosecution should be given another chance to cure evidential deficiencies in its case. Among the factors to be considered in determining whether or not to order a new trial are:

(a) the seriousness and prevalence of the offence; (b) the expense and length of time involved in a fresh hearing; (c) the ordeal suffered by an accused person on trial; (d) the length of time that will have elapsed between the offence and the new trial; (e) the fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new trial; (f) the strength of the case presented by the prosecution, but this list is not exhaustive."

28. In the present case, three of the prosecution witnesses PW1, PW2 and PW4 were police officers meaning that they were subject to regular redeployment and transfers to any part of the country. It may prove difficult, expensive and time consuming to procure their attendance to court to testify again. Further, I observe that the Appellant has already served part of the sentence. I find that a retrial would be prejudicial to him and that the same would not serve the interests of justice.

29. Accordingly, I hereby allow the appeal, quash the conviction and set aside the sentence. The Appellant is set at liberty forthwith unless otherwise lawfully held.

Orders accordingly

Judgment dated delivered and signed at Garsen on this 18th day of June, 2019.

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R. LAGAT KORIR

JUDGE

In the presence of:

The Appellant in person

S. Pacho - Court Assistant

Ms Wambui - For Appellant

Mr. Kasyoka - For Respondent