



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 3 OF 2017**

**LIBAN SHEIKH MOHAMED.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

The appellant was charged in the Magistrate's Court at Mandera with 2 counts of trafficking narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars of count 1 were that on the 16th October 2016 at about 1500hrs at Rhamu Town within Mandera North Sub-county in Mandera County trafficked in narcotic drugs by storing narcotic drugs namely cannabis to wit 53 rolls with a street value of Kshs. 1,590 in contravention of the said Act. The particulars of count 2 were that on the same day, time and place trafficked in narcotic drugs by storing narcotic drugs cozepam to wit 54 tablets with a street value of Kshs 2,160 in contravention of the said Act. He denied both charges. After a full trial, he was convicted on both counts. With regard to count one, he was sentenced with a fine of Kshs. 1,000,000 in default to serve 14 years imprisonment. With regard to count 2 he was warned and discharged under Section 35(1) of the Penal Code.

He has now come to this court on appeal. The grounds of appeal are that:-

1. That the Magistrate did not allow him enough time for investigations to be carried out before trial.
2. That there was conflicting evidence from the prosecution witnesses.
3. The sentence of 14years was excessive and oppressive.
4. That the language used by prosecution witnesses was not recorded.
5. That crucial witnesses were not called by the prosecution to testify.

The appellant also filed written submissions which I have read and considered. He also added orally that he was not in possession of the alleged items and that no photos were taken of him having those items. He also submitted that the police wanted him to give something and implicated him in the process.

Learned Prosecuting Counsel Mr. Okemwa emphasized that the prosecution was duty bound to prove all the elements of the offence. Counsel submitted that there were contradictions in the prosecution evidence. Counsel added that Police Officers who visited the shop were five but only two of them testified in court and their evidence was contradictory. Counsel submitted that the government analyst reports was produced by the arresting officer casually without laying the relevant grounds under the law for producing

of such a report in the absence of the expert witness. Counsel also wondered why the court discharged the appellant on count 2 without giving reasons for so doing.

This is a first appeal. As a first appellate court I am required to evaluate the first evidence on record and come to my own conclusions and inferences. See the case of OKENO-VS-REPUBLIC (1972) EA 32.

I have re-evaluated the evidence on record. Two prosecution witnesses testified. They were PW1 PC Duncan Nyakondo and PW2 PC Justin Kiptoo. They all stated that on information received and instructions from the DCIO they visited a shop in Rhamu town where they found the shop locked and the appellant inside. They made him open the door and on doing a search therein found the items in the charge sheet hidden under a counter in the shop and arrested the appellant who was later charged in court with the two charges.

The appellant gave an unsworn testimony and stated that business rivals wanted to give him a negative image as and they did not want him to prosper. He denied committing the offence and said that he had been arrested many times before and bribed the police to gain freedom.

The appellant has raised a number of issues on appeal. With regard to language, indeed the court did not indicate the language used in court. This was a mistake. However, the appellant participated fully in the proceedings and cross-examined each of the two witnesses who were also re-examined. He also gave his defence statement explaining his side of the story including the fact that he was married with 9 children 5 of whom were attending school and that he originally came from Wajir. It cannot thus be said that he did not understand the proceedings. He was not prejudiced by the mistake of the trial court of not recording the language used. I dismiss that complaint

On recovery of the items and ownership of the shop, the evidence on record is that he locked himself in that shop and opened only when the police arrived and knocked. The search revealed the items in the charge sheet under the shop counter. In his defence the appellant did not deny ownership of the shop.

Infact, he said that his competitors in the shop business were tarnishing his name. In my view therefore the magistrate was right in finding that the appellant owned and controlled the shop premises where the items were recovered.

With regard to calling crucial witnesses, it is true that only two out of 4 or 5 police officers testified in court. Though the Prosecuting Counsel is of the view that more police officers should have attended court to testify, in my view the evidence of the police officer on record was straightforward. I find no contradictions in their evidence. In my view, there was no need for the prosecution to call additional witnesses.

However, the items recovered were said to be narcotic drugs and were sent to the Government Analyst for proof of what they were alleged to be. The expert report was not produced by the Government Analyst. In my view, the prosecution did not lay the legal basis for producing the Government Analyst's report under section 77 of the Evidence Act, in the absence of the government analyst. That was a mistake. The evidence was so crucial that the prosecution should have informed the court in the hearing of the appellant that they wished to produce the expert report in the absence of the expert, for the appellant to give his response to that request.

I agree with the Principal Prosecuting Counsel that the production of the Government Analyst report was done casually and as a result it cannot be said that indeed that is a genuine report from a Government Analyst. I will give the benefit of the doubt to the appellant on this account. He is lucky due to this technicality, otherwise I caution him not to be engaged in the business on narcotic drugs in future.

In the result, I allow the appeal, quash the conviction and set aside the sentence. I order the appellant set at liberty unless otherwise lawfully held.

**Dated at delivered at Garissa on 15<sup>th</sup> June, 2017**

**GEORGE DULU**

**JUDGE**