



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

HCRA. No. 29 OF 2015

SAID MWINYI DUKA.....APPELLANT

=VERSUS=

REPUBLICRESPONDENT

(An Appeal from the conviction and sentence of 20 years imprisonment for the offence being in possession of Narcotic Drugs contrary to section 3 (1) as read with sub section 2 (b) of the Narcotic Drugs and Psychotropic substance control Act No. 4 of 1994 by Hon. I. RUGURU (Ag. SRM) at MOMBASA LAW COURTS on 9th day of October 2014)

JUDGMENT

1. The Appellant was charged with being in possession of Narcotic Drugs contrary to section 3 (1) as read with sub section 2 (b) of the Narcotic Drugs and Psychotropic substance control Act No. 4 of 1994.
2. The particulars of the offence were that on 19th September 2014 at Blue Room along Haile Selasie road Mombasa township within Mombasa County the Appellant was found in possession of one sachet of heroin with a street value of Kshs. 200/= in contravention of the said Act.
3. The Appellant pleaded guilty to the charge and was sentenced to twenty (20) years imprisonment. He has now appealed against sentence only and he has filed written grounds of appeal as follows:-

(i) That he accepted the offence of being in possession of 1 sachet of Narcotic drugs contrary to section 3 (1) as read with sub section 2 (b) of the Narcotic drugs and psychotropic substances control Act No. 4 of 1994.

(ii) That he is a first offender and truly was using the drugs but now through prisons rehabilitation programme, he has been exposed to 'REACH OUT KENYA' group and counseling which has been taught him the effects of drugs and psychotropic substances to the health of the user.

(iii) That he has changed and reformed for the period that he has been behind the bars and when released he will preach the campaign against drugs and substance abuse in the society and he will act as an ambassador to the community against drugs and substance abuse.

(iv) That the sentence imposed upon him is harsh and it is his kind and humble prayer to this open and impartial court to set aside the sentence imposed or reduce it as deemed fit in his

favour.

4. The Appellant has filed the following submissions:-

(i) That he was found in possession of only one satchel of heroin and he regrets the offence he committed.

(ii) That he had now been reformed and joined 'REACH OUT KENYA' a group which visits prisons to assist addicts and he is willing to reach out to society at large to assist those who are using drugs.

(iii) That the sentence imposed upon him is harsh considering that he is a first offender and he was in possession of only one satchel with a street value of Kshs. 200/=.

5. The Respondent who opposed the Appeal submitted that section 3 (2) (b) of the Narcotic drugs and psychotropic substances control Act No. 4 of 1994 provides for 20 years for such an offence.

The Respondent urged the court to uphold the sentence since it is legal.

6. I have re-evaluated the proceedings in the trial court and my findings are as follows:-

(i) As the first appellate court, this Court is required to look a fresh at the evidence presented before the trial court, and evaluate the same so as to determine whether or not the appellant was properly convicted (see **Okeno v Republic** [1972] EA 32). In this appeal, the appellant pleaded guilty and was thus convicted of his own plea of guilty.

(ii) Section 348 of the Criminal Procedure Code bars appeals from subordinate courts where an accused was convicted upon a plea of guilty except on the extent and legality of sentence. It provides as follows:-

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent and legality of the sentence.”

(iii) In the case of **Olel v Republic** [1989] KLR 444, the court held:-

“Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (cap 75) does not merely limit the right of appeal in such cases but bars it completely.”

(iv) I find that the appellant is, by virtue of this section, and authority, barred from challenging the conviction and his only recourse was to challenge the extent or legality of the sentence imposed on him by the trial court.

7. However, the court has to satisfy itself that the plea is unequivocal. The Court of Appeal gave directions on how a plea should be recorded in the case of **Aden v R** [1973] 443 when it held:-

(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or add any relevant facts;

(iv) If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.

(v) If there is no change of plea, a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

8. A perusal of the record shows that the charge was read to the appellant in English/kiswahili language through an Interpreter which he understood and he pleaded to the charge. The appellant is then recorded to have responded:

"It is not true."

The record is captured as follows on page 4 of the proceedings:-

"The substance of the charge(s) and every element thereof has been stated by the court to the accused person in Kiswahili language that he understands, who being asked whether he admits or denies the truth of the charge(s) and he replies :

"It is not true."

9. However, the court then did not enter a plea of guilty but gave a date for facts, and when facts were read to him at a later date the appellant said in kiswahili and the court recorded as follows:-

Accused: Maelezo ni ya kweli

The court then recorded on page 5 of the proceedings as follows:-

Court: Plea of guilty entered

On page 6 the trial court again recorded:-

Court: Accused stands convicted on own plea of guilt.

The court then went on to sentence the Appellant to 20 years imprisonment.

10. I find that the plea taken herein is equivocal as the record shows that the Appellant pleaded not guilty. The original hand written page on the plea is missing. It is not clear whether this was a typing error. The plea of guilty was also entered after the facts.

11. I find that the trial court did not follow the procedure outlined in the case of Aden (supra) and on that ground alone I quash the conviction and set aside the sentence.

I further order that the Appellant be set free unless lawfully held for any other reason.

Dated and signed at Mombasa this 15th day of November 2016.

ASENATH ONGERI

JUDGE.