REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CRIMINAL APPLICATION NO.16 OF 1998

MONICA OKEMBO CHENEME.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

These two appeals are consolidated. The two appellants were originally charged with three offences jointly with a third person.

In count one they were jointly charged with the offence of Trafficking in Narcotic Drugs c/s 4(a) of the Narcotic Drugs and Psychotrophic substances (Control) Act NO. 4 of 1994. In the alternative they were jointly charged with the offence of unlawful Possession of Narcotic Drugs c/s 3(1) and 3(2) b of the same Act and lastly in count two they were charged with the offence of wilfully obstructing a police officer c/s 253 (b) of the Penal Code.

After a full trial, both appellants were found guilty of the alternative to count one and convicted accordingly. Micha Chereme the second appellant herein was also found guilty on the second count and convicted accordingly.

On the alternative count to count one, each appellant was fined kshs. 350,000 in default to serve 5 years imprisonment. In count 2 the second appellant herein was fined kshs. 15,000/- in default to serve one year imprisonment.

Both appellants being aggrieved by the said convictions and sentences appealed.

When these appeals came up for hearing Mr Wandugi and Mr Githinji appeared for the appellants while Mrs Ondieki appeared for the state.

Mr Wandugi took the court through the record to show that the subject matter was not proved to be cocaine and that possession of the premises in which the appellants were said to have resided was in issue.

The learned counsel for the Republic then requested to go through the original record to verify, in particular, the evidence adduced in respect the report by the Government Chemist.

On her return the learned counsel for the Republic submitted that she could not support the convictions that is, she conceded the appeals.

As the first appellate court, it is my duty to go over the record of the lower court, evaluate the evidence and make independent conclusions. this I have. in the end I find, I am in agreement with the learned counsel for the Republic.

This was no doubt a case relating to serious offences. However the presentation of the evidence and the exhibits was so casual that one wonders whether the investigators and prosecution had any wish to drive it to its logical conclusion.

From the record MF1 28 which was the Report of the government chemist was never produced. This is the most crucial evidence is cases of this nature. It is upon that report that the trial court could have founded a conviction if possession had been established.

Even if the said report were to be produced by pw5, he was a police officer, he could not testify on its contents and be cross-examined on the same.

In the judgment of the learned trial magistrate there is not a single mention of MF 128 or how the court satisfied itself that the subject matter was cocaine.

In cases of this nature the appellate court would readily order for a retrial. However, counsel have rightly pointed out that the learned trial magistrate ordered the disposal of the exhibits. This included the controversial MF128. A retrial order will therefore be in futility.

I should mention that, the order for destruction or disposal of crucial exhibits should never be made before the entire appellate system is exhausted.

Except where exhibits are of a perishable nature, all others must be preserved. That way the ends of justice shall be achieved.

In view of the foregoing, these two appeals are hereby allowed convictions quashed an sentences set aside. If the fines were paid the sae shall be refunded to the appellants and if they are serving prison terms, they shall be released forthwith unless otherwise lawfully held.

Some money was forfeited to the state. This was US &12,747 and Kshs. 8,541/50 (Exts. 6 and 13) Following the success of the appeals the money must also be surrendered. A declaration Form had been produced in defence to show the source of the money (DFII). The 2nd appellant had all conceded that the money belonged to the 1st appellant Monica Okembo. I order that the money be released to the 1st appellant Monica Okembo. The second appellant must have served sentence on the second count. I make no orders therein.

These are the orders of the court.

Dated at Nairobi this 13th day of November, 1998.

A. MBOGHOLI MSAGHA

JUDGE