



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL NO. 1184 OF 1998**

**(From Original Conviction(s) and Sentence(s) in Criminal Case No5. 894 of  
1998 of the Chief Magistrate's Court at Nairobi**

**RAYMONT ROMANUS FIDLER.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The appellant was charged in count one with the offence of being in possession of psychotropic substances c/s 3(1) of the Narcotic Drugs and psychotropic substances (control) Act No. 4 of 1994 as read with sub-sec. 2(b) of the said Act. In count 2 he was charged with the offence of being in possession of Narcotic Drugs Inhaling implements c/s 5(1) (d) of the same Act and in count three he was charged with the offence of trafficking in obscene publication c/s 151 (1) of the Penal code.

The record shows that the appellant pleaded guilty to all the three counts and on conviction was sentenced to a fine of kshs. 500,000/- in default 12 months imprisonment on count one. In count two he was fined kshs. 200,000 in default 6 months imprisonment and on count three he was fined kshs. 5,000/- in default to serve 3 months imprisonment. This is an appeal arising therefrom.

The proceedings were well conducted by the learned trial magistrate and in fact the record cannot be faulted.

However, it is what the appellant said in mitigation through his advocate that changed the whole impact of the plea of guilty. In the said statement, it comes out clearly that what was stated in mitigation negated the plea of guilty. The drugs in count one were in his possession on prescription, the implements were used to relieve lung problems and the subject of the third count were private photographs and as he says in his petition of appeal, not intended for public viewing.

As at that stage, the learned trial magistrate, though having entered a conviction, had not yet passed sentence on the appellant. At that stage, if it appears to the court that the accused is denying the offence, it is perfectly lawful to reverse the proceedings and enter a plea of not guilty.

This with respect, is what the learned trial magistrate ought to have done in the instant case; because what the appellant offered in mitigation was a defence which amounted to a plea of not guilty. The counsel for the Republic agrees but asks for a retrial which the appellant does not mind.

With respect, I agree. This is an appropriate case for a re-trial. Having so found, I went through the original file and noted that the learned trial magistrate ordered the destruction of the drugs, implements and the photographs under the courts supervision. There is a certificate of destruction on record dated 15th October, 1998 which shows that the tablets were flushed the toilet, photographs burned and other documents destroyed. I note that as at the date of the said destruction, the appellant had already filed his appeal, the petition of which was received in court on 28th September, 1998.

Be that as it may, the only exhibits that have remained in the original record are Exh. 4(a) the Exhibit memo Form and Exh4(b) the Report of Government analyst. Those exhibits have their basis in the subject matter of count one. In the absence of that subject matter, the said exhibits cannot be used to sustain a conviction.

The court has drawn the attention of the learned counsel for the state to this discrepancy who has asked for appropriate orders and/or directions.

The destruction of exhibits before the process of appeal is exhausted was unfortunate. Unless the exhibits are of a perishable nature the same should be preserved until all appeals relating thereto are heard and determined. In that regard magistrates should ensure that at least they include in their orders for destruction a time limit, say "subject to the outcome of an appeal if any." Further, executive officers must confirm whether or not there is an appeal pending before the disposal of the exhibits. In so doing the ends of justice shall be met.

And so, whereas I have found this is a proper case for a retrial, regrettably I am unable to order one as it will be an exercise in futility, crucial exhibits having been destroyed.

Consequently, this appeal is allowed, conviction quashed and sentence set aside. The appellant shall be release forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Nairobi this 10th day of December, 1998

**A. MBOGHOLI MSAGHA**

**JUDGE**