



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL APPEAL NO 18 OF 1995
HERMAN SHESHE MTOLIAPPELLANT
VERSUS
REPUBLICRESPONDENT

JUDGMENT

The appellant, Herman Sheshe Mtoli, was convicted on his own plea of guilty by the learned Resident Magistrate, Voi on a charge of being in possession of one roll of Cannabis Sativa (bhang) contrary to section 3(2)(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994. Upon his conviction, he was sentenced to serve 10 years imprisonment. His appeal to this court is against conviction and sentence.

Two main points were given on appeal, namely;-

- (1) That the plea did not amount to unequivocal plea of guilty to the charge as there was nothing to indicate that the charge was ever read and explained to the Appellant;
- (2) There was no proof that the substance found with the Appellant was in fact Cannabis Sativa (bhang).

It is clear from the typed record of the court below that it was never shown that the charge as laid was never read and explained to the Accused. After the name of the trial magistrate and his Prosecutor had been set out, the record reads as follows:-

“Plea: Not true”

The prosecutor then started to outline the facts of the case which the Accused admitted as true whereupon a plea of guilty was entered. The prosecutor then stated that he had no records and that the Accused could be treated as a 1st offender. He was then heard in mitigation and thereafter sentenced to 10 years imprisonment.

If the record of the court was correctly typed out and I have now confirmed that this was not so, then it would appear that the Appellant had not pleaded guilty to the charge. His plea on the typed record was that : “Not true.” having now looked at the original record, I have noted that this in fact was a typing error as the accused is clearly recorded to have stated that the charge was “true.”

In taking the plea of the accused, the learned Magistrate used a certain stamp which does not leave any clear impression at all. Whatever hurry the learned Magistrate found himself in, it was, with respect, a very poor way of taking plea. In my view, he should forthwith refrain from using such a stamp even in the very simplest of cases.

I have also confirmed from the record of the court below that nowhere in such record was it shown that the Accused was ever convicted of the offence he was charged with. This was a serious omission which in my view was fatal for you cannot punish an adult offender without first convicting him of the offence charged.

Perhaps the most serious flaw in the entire case was failure by the prosecutor to indicate in the facts as represented to the court that the substance allegedly found in the possession of the appellant was duly examined by the Government Analyst or by scientific evidence and found to be the drug alleged i.e Cannabis Sativa. We have over and over again stressed in these courts the necessity to have any substance alleged to be falling under the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994, examined by the Government Analyst for confirmation of the suspicious of the police that it is the drug alleged. Where such substance has been examined, the Prosecutor when outlining the facts in court on a plea of guilty should clearly state that the said substance has been established by such examination to be the drug alleged.

Since these offences attract very serious penalties, it is important that any trial Magistrate or the Prosecution for that matter adheres to matters of detail especially where a plea of guilty is offered.

I am satisfied that the plea in this case did not amount to unequivocal plea of guilty to the charge. Learned State Counsel does not support the conviction for the reasons I have already stated.

In the absence of any conviction I am satisfied that the Appellant is serving an illegal sentence.

I allow this appeal and set aside the sentence that was imposed. There was no conviction to be quashed. I order that the Appellant shall be set free and be released forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this February 24, 1995

S.O OGUKE

JUDGE