REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 693 OF 1992

LAYSON TEMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No 2887 of 1992 of the Chief Magistrate's Court at Nairobi B Ochieng Esq)

JUDGMENT

The appellant, Layson Tembo, was convicted by the learned Chief Magistrate, Nairobi, on his own plea of guilty for offence of unlawful possession of methaqualone (*mandrax*) contrary to rule 9 of the Dangerous Drugs Rules as read with Legal Notice No 217 of 1989 punishable by section 18(2) of the Dangerous Drugs Act as amended by Statute Law (Miscellaneous Amendments Act No 11 of 1983). The particulars of the offence were that on the 2nd day of June, 1992 at about 9.15 pm at Namanga border entry point in Kajiado district of the Rift Valley province, was found in possession of 266,000 methaqualone (*mandrax*) tablets in a motor vehicle Reg No APA 584, pick up Toyota Land Cruiser otherwise then in accordance with the provisions of the Dangerous Drugs Act. Upon his conviction, he was sentenced to serve 8 years imprisonment. His appeal to this Court is against conviction and sentence.

It became plain to me during the hearing of this appeal, in the course of arguments by the learned counsel for the appellant, that the police officers who arrested the appellant and subsequently charged him with the offence that was laid against him, made a fatal blunder when they rushed him to Court for plea before the alleged drugs found on him were taken for examination by the Government Analyst. He was brought to Court for plea on the 5th June, 1992 on which day he was sentenced to serve 8 years imprisonment having pleaded guilty to the offence. It later transpired when counsel for the appellant was praying his appeal and asked for the Government Analyst report concerning the said drugs from the police station where the arrest was affected, that such drugs had not, in the first instance, been taken for examination. It was not until the 12th of June, 1992 that the alleged drugs were handed by PC Joseph Ngila Ndambuki to the Government Analyst for examination and it was not until the 29th of July, 1992 when the Government Analyst, Mrs PA Hagono prepared the report. That report was produced in Court for the first time during the hearing of this appeal by counsel for the appellant to illustrate her point that the facts relied upon to constitute the offence did not disclose the offence charged. This was so, she argued, because by the time the appellant's plea was being taken by the Chief Magistrate, the drugs allegedly found with him had not yet been scientifically examined and found to be the drugs alleged. It was inaccurate report to the Court as stated by the prosecutor that such drugs had by then been tested and found to be the drugs alleged in the charge while in actual fact, no such drugs had been submitted for examination and the results known. The prosecutor therefore misled the Court and the accused (appellant) that the drugs found on him had been confirmed by examination to be dangerous drugs.

According to the Government Analyst report dated 29th of July, 1992, only some 266 round greyish tablets were submitted for examination by PC Joseph Ngila Ndambuki and yet the charge against the appellant was in respect of some 266,000 *mandrax* tablets. If it is true that the appellant was found with such a large number of tablets then over 200,000 tablets were not accounted for. Clearly the charge as laid before the Court was therefore at variance with the true facts. The appellant cannot therefore be said to have pleaded unequivocally to the charge.

I believe that the learned Chief Magistrate was also misled in believing that the appellant had been found with some 266,000 *mandrax* tablets and yet in "further" only 266 tablets were taken by the police to have been found with him. In sentencing the appellant to 8 years imprisonment, he must have acted on the basis of the alleged number of drugs found on him. He could most likely have not imposed such a serious penalty had the true facts been known to him.

Because of the basic irregularities in handling the drugs allegedly found with the appellant and the inaccuracies to which I have referred, I am satisfied that the appellant's plea was faulty and his conviction cannot stand. Learned state counsel concedes this appeal and I think rightly so. I am satisfied that this is not a suitable case where a retrial can be considered because the drugs allegedly found with the appellant had not been submitted for examination before he was charged.

For reasons given, I allow this appeal. I quash the conviction of the appellant and set aside the sentence that had been imposed. I order that he shall be set free and be released forthwith unless otherwise lawfully held.

Dated and Delivered at Nairobi this 11th day of February 1994.

S.O.OGUK

JUDGE