REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO 1507 OF 1992

ABOUBAKAR SIDIKI DIAKITE ……..…… APPELLANT

VERSUS

REPUBLIC……..…… RESPONDENT

(From original conviction and sentence in Criminal Case No 6449 of

1992 of the Chief Magistrate's Court at Nairobi Babu Achieng Esq)

JUDGMENT

The appellant, Aboubakar Sidiki Diakite, who is a Quinean but a resident of the United State of America, was intercepted at the departure lounge at Jomo Kenyatta International Airport Nairobi by Anti – Narcotics Police Officers acting on information. He was interrogated about drugs and subsequently arrested and charged with the offence of unlawfully being in possession of diacetylmorphine contrary to rule 9 of the Dangerous Drugs Rules as read with section 14 (c) of the Dangerous Drugs Act (cap 245, Laws of Kenya) punishable by section 18 (2) of the same Act as amended by Statute Law (Miscellaneous Amendments) Act No 11 of 1983.

The particulars of the offence against the appellant were that: On the 13th day of November, 1992 at about 5.30 pm at Jomo Kenyatta International Airport in Nairobi within Nairobi Area, was found in possession of 31 pellets of diacetylmorphine (commonly known as heroin) weighing about 242 grammes valued at Kshs 242,000/- otherwise than in accordance with provisions of Dangerous Drugs Act.

When the charge was read to the appellant, the learned Chief Magistrate is on record as having merely recorded the word "guilty". He then called the prosecutor to outline the facts in which he stated that after the appellant had been intercepted at JKIA by the Anti-Narcotics officers and interrogated about drugs, he denied any knowledge of the same. However, on 13th of November, 1992 as he went to answer a call of nature, he emitted pellets which on examination, contained heroin called diacetylmorphine which is a dangerous drug under the said Act. Consequently, he admitted that the same belonged to him. All of them weighed 242 grammes. They were 31 of them. The estimated value was put at Kshs 242,000/-. The prosecutor went on to state that the appellant admitted that he had intended to take them to the USA for sale. He was then charged. "Here they are," said the prosecutor. (The prosecutor then produced the same). When asked whether such facts were correct, the appellant is on record as having stated:-

> "The facts are correct".

He was then convicted on his own plea of guilty and having heard that he was a first offender, the appellant was heard in mitigation in which he stated:-

> "I was here on a business mission. I got the drugs from a man at the Airport. It was my first time to come to Kenya.

The learned Chief Magistrate then sentenced the appellant to serve 8 years imprisonment saying that such offence was serious and a stiff sentence was necessary in the circumstances.

In his present appeal, the appellant is challenging his conviction and sentence. The main point taken up is that the conviction of the appellant was not based on his own unequivocal plea of guilty to the charge. Learned counsel for the appellant listed some 9 grounds of appeal some of which he argued together. The thrust of arguments advanced by counsel for the appellant was that the plea as taken, was irregular, defective and a nullity (ground 1). Mr Odhiambo, learned counsel for the appellant, argued that the learned Chief Magistrate failed to appreciate that the appellant had limited knowledge of english and could not have known the meaning of "guilty". It was further argued that the learned Chief Magistrate failed to record as near as possible the actual words used by the appellant in reply to the charge. Particular emphasis was laid on the failure of the learned magistrate to satisfy himself that the substance produced in Court as having been found in possession of the appellant was actually diacetylmorphine (commonly known as heroin). He submitted that the Court could only have satisfied himself that such substance was heroin, if the same had been scientifically examined by a Government Analyst produced before the Court. He submitted that it was not enough for the Court merely to be told by the prosecutor that such substance were examined and found to have contained Diacetylmorphine (heroin) without disclosing who had examined the same or producing the report of examination. He submitted that it was dangerous to rely on what the appellant (accused) might have stated as he was not an experienced drug dealer.

On the above grounds, learned counsel for the appellant urged the Court to find that the plea of the appellant was equivocal and that his conviction thereon was not proper. He urged that the appeal be allowed and the appellant be set at liberty.

Learned state counsel in response, submitted that the pleas of the appellant was unequivocal, regular and the conviction that was entered therein was quite proper. She submitted that failure to produce the Government Analyst report was not fatal as the drugs in question were actually produced in Court and the appellant admitted that he had been in possession of the same.

I agree with counsel for the appellant that the plea of the appellant which was simply recorded as "guilty" was not satisfactory and with respect, should have been explored. See *Wanjiru –v- The Republic* [1975] EA 5. The former Court of Appeal for Eastern Africa was quite explicit in the case of *Adan –vs- Republic* [1973] EA 445 where it was stated at page 446 letter "C" that:-

> "The word "guilty" is one to be treated with the greatest caution. It is a technical expression and it was said in *Biyrarufu Gafa –vs- R* [1950] 17 EACA 125, and *M'Mwenda – vs- R* (1957) EA 425, that there is no word exactly corresponding to it in any of the languages of Uganda or Kenya respectively."

The plea of the accused as recorded was inadequate. However, there are cases where a detailed narration of facts can cure a plea which is otherwise equivocal. This was so stated by the Court of Appeal in the case of *Daniel Wachira –vs- Republic* (Nakuru Cr Appeal No 181 of 1988) (un-reported) where Hancox, CJ reading the judgment of the court said:

"The plea 'it is true' was rightly criticized by the learned judge but he held that it was cured by the subsequent narration of the facts and admission thereto. We agree with him. But in doing so we are not to be taken to encourage this form of plea which has been criticized over the years and must not be used by magistrates, particularly when dealing with serious offences which carry substantial terms of imprisonment."

There can be no dispute that the offence facing the appellant was a very serious one which has acquired international concern. When it become clear to the learned Chief Magistrate that the appellant intended to offer a plea of guilty to the charge, such plea should have been taken in the best way possible as it was

going to relieve the prosecution of the burden of having to go a full length of trial to prove their case beyond all reasonable doubts. That being so, the prosecutor was under a duty to give a full narration of facts disclosing the offence charged. In this, the prosecutor performed poorly by failing to satisfy the Court that the substance actually found in possession of the appellant contained diacetylmorphine (commonly known as heroin). The mere production of such substance before the Court as was done here by the prosecutor without being accompanied by a scientific report, which in Kenya, is a Government Analyst report to the effect that same substance has been duly examined and found to be what it is alleged to be ie diacetylmorphine, was a fatal omission. Such a report should have formed an intergral part of the facts relied upon so as to prove that the substance found with the accused was a drug of the type alleged in the charge sheet. In producing such a report, the court prosecutor should obtain therefrom all the relevant facts and incorporate them in the statement of facts to be admitted by the accused person I think, with respect, that this ought to be the better procedure in handling drug related cases at the plea stage.

I am satisfied that there was no detailed narration of the facts relied upon by the prosecutor in this case and in the circumstances, I am unable to hold that the plea in this case was valid and amounted to unequivocal plea of guilty. On this ground alone, I allow this appeal, quash the conviction of the appellant and set aside the sentence that was imposed. I order that he shall be set free and be released forthwith unless otherwise lawfully held.

Dated and Delivered at Nairobi this 24th day of June, 1993

S.O. OGUK

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JUDGE