



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Masime, Gicheru & Muli JJ A)

CRIMINAL APPEAL NO 44 OF 1992

Between

CHARLES MUTINDA KAVEMBA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Justice DC Porter) dated the 27th day of June, 1991

in

High Court Criminal Appeal No 863 of 1990)

JUDGMENT

This is the second appeal from the conviction and sentence of the appellant by the Resident Magistrate sitting in Nairobi. The appellant, Charles Mutinda Kavemba, had been charged with the offence of being in possession of diacetylmorphine commonly known as “heroin” contrary to rule 9 of the Dangerous Drugs Rules as read with section 14 (1) (c) of the Dangerous Drugs Act, cap 245 Laws of Kenya and punishable under section 18(2) of the Act.

On 9th March 1989, acting on information or a tip off, Chief Inspector Charles Mulandi (PW5) in the company of Corporal Samuel Kipgentich (PW1) and other police officers proceeded to Keekorock Road where in an office, they met a man called Kingoo who, on being searched, he was found to be in possession of what looked like heroin. While this was going on, the appellant appeared in the scene and was also searched and found in possession of Kshs 400/-. He admitted that the office was his. The office was also searched and nothing of evidential value was found. The appellant told the police that he lived in Naseems Annex Lodge and led the police there. He opened room No 6 which was searched and a sum of Kshs 18,000/= in a brown bag was found. On searching further, Chief Inspector Mulandi found a key in the pocket of one of the coats in the wardrobe. The key was labeled “1”. The appellant denied knowledge of room “1” but led the police there and opened the door with the key “1”. On one of the beds in the room No 1 were wrapped papers. Chief Inspector Mulandi opened one of the wrapped papers and suspected its contents to be heroin. He arrested the appellant and took the contents to be heroin. He arrested the appellant and took the contents of the wrapped papers to the Government analyst who confirmed that the contents were in fact heroin. The appellant was charged with the offence. The prosecution case was that

the appellant was the occupant of room No 1 that he was in possession of the key to that room and was in possession of the heroin.

The appellant denied possession of the heroin stating that he was not the occupant of room No 1 but someone else who had booked out on the previous day. The trial Court accepted the evidence of the prosecution and rejected that of the appellant. Hence, the conviction and the sentence of 5 years imprisonment. The appellant appealed to the Superior Court and his appeal was dismissed. He now appeals to this Court against both the conviction and sentence. Mr Odhiambo who appeared for the appellant properly abandoned ground two of the Memorandum of Appeal which was against the sentence. See *Shantilal Maneklal Ruwala v R* [1957] EA 570. His sole ground of appeal is whether the appellant was proved to be in possession of the heroin.

There was ample evidence to establish that the substance retrieved from room No 1 was heroin. The only issue is who was in physical control of room No 1 from which the heroin was found. The appellant admitted that he was the occupant of room No 6. It was from that room that the key from room No 1 was found in the pocket of the coat in the wardrobe. There was no evidence to establish who the owner of the coat was. However, the appellant led the police to room No 1 and opened the door with the key recovered in the coat in room No 6. The only evidence upon which the trial magistrate based the conviction was simply that the key to room No 1 was in the coat in the wardrobe of room No 6 which, admittedly, was occupied by the appellant at the material time. In order to establish possession, actual or constructive, there must be evidence to establish exclusive control of room No 1 by the appellant to the exclusion of all other persons. Since room No 1 was locked at the time, there must be evidence to establish that no other person had access to that room by showing peculiar nature of the lock and the absence of any duplicate or a master key which could open the door to that room. There was no such direct evidence adduced. Mr Alex Mulwa (PW3) and Mustapha (PW4) did not go sufficiently far to dispel the above hypothesis.

The lodge-keeper's (PW) evidence did not go far enough to exclude the possibility that another person or persons had access to room No 1 during the material time. The burden of proof of facts which justify the drawing of the inference of guilty from the facts to the exclusion of any reasonable hypothesis of innocence was on the prosecution. This burden was not discharged. The burden was on the prosecution through out and never shifted to the appellant. We have examined the evidence carefully and are satisfied that the prosecution did not prove guilt of the appellant to the required standard of beyond reasonable doubt. The appellant was entitled to the benefit of the doubt that he was not the only occupant of room No 1 to the exclusion of all others at the material time.

In the result we allow the appeal, quash the conviction and set aside the sentence imposed by the lower court. We direct that the appellant be set at liberty unless he is lawfully held on another warrant.

Dated and delivered at Nairobi this 16th day of December 1992

J.OMASIME

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JUDGE OF APPEAL

J.E GICHERU

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JUDGE OF APPEAL

M.G MULI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR