



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA, SICHALE, JJ.A)

CRIMINAL APPEAL NO. 34 OF 2014

BETWEEN

OMAR BAKARI MWAKURO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from Judgment of the High Court of Kenya at Malindi (Meoli, J) dated 11th June, 2012

In

HCCRA No. 69 of 2012)

JUDGMENT OF THE COURT

[1] Omar Bakari Mwakuro who is the appellant before us was charged with the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substance (Control) Act No. 4 of 1994. He was convicted by the Chief Magistrate Malindi on his own plea of guilty. He was sentenced to life imprisonment in addition to a fine of Kshs.one million. Being dissatisfied he appealed against his conviction and sentence to the High Court. His appeal was dismissed by the High Court sitting at Malindi (Meoli, J). He has now come before us appealing against the judgment of the High Court and seeking to have his conviction quashed and sentence set aside.

[2] The appellant has filed two sets of grounds of appeal. The first set which was filed by the appellant in person on 28th January, 2014 raised three grounds as follows:

- **That the honourable judge erred both in law and fact for failing to see that the imposition of a life imprisonment on me by the trial magistrate was unlawful due to the reasons that:-**
 - i. **I pleaded guilty to a defective charge whose facts did not meet the ingredients of the charge which was preferred against me.**
 - ii. **The quantity of drugs allegedly found with me was very small and did not call for such a harsh and excessive sentence.**
- **That the learned trial justice erred in law and fact when she declared the life imprisonment imposed on me regular without considering the rights of my younger family who is rendered helpless due to my incarceration (sic).**
- **That the honourable learned judge erred in law and fact for failing to express leniency**

despite having expressed remorse.

[3] The second set of grounds of appeal was filed by the appellant in person when he filed submissions in support of his appeal. Four grounds of appeal were raised as follows:

- **That both the trial court and the first appellate court judge erred in law by not considering that the charge sheet laid against me was null and void to uphold my conviction hence infringement of section 86 of the Narcotic Act (sic).**
- **That both the trial court and the High Court judge failed to consider that I was not informed the consequences of the charge sheet before pleading guilty hence violation of the Constitution Article 50(2), b and c.**
- **That both the trial court and first appellate court judge did not consider that I was coached by my arresters to plead guilty in a promise that I will be acquitted.**
- **That both the trial court and the High Court judge did not consider that the language used was not familiar to me hence violation of section 198 of the Criminal Procedure Code.**

[4] Ideally the appellant ought to have either withdrawn one set of the grounds of appeal or treated the second set as supplementary grounds of appeal. However, we appreciate that the appellant was unrepresented, and therefore we shall concentrate on the substance of the appeal and treat the second set of grounds of appeal as supplementary grounds.

[5] The appeal before us being a second appeal, under **section 361** of the Criminal Procedure Code this Court cannot entertain a second appeal:

“(a) On a matter of fact, and severity of sentence is a matter of fact; or (b) against sentence except where a sentence has been enhanced by the High Court unless the subordinate Court had no power under section 7 to pass the sentence.”

[6] It is evident from the record of the Subordinate Court that the appellant was convicted after the charge and the particulars were clearly explained to him, and that the appellant not only admitted the charge but also admitted the facts. In its judgment, the High Court examined the record and confirmed that the appellant’s plea of guilty was unequivocal. We note that under **section 348** of the Criminal Procedure Code, no appeal on plea of guilty

“shall be allowed in the case of an accused who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the extent or legality of the sentence.”

[7] Having examined the records of the two lower Courts, we are satisfied that plea was properly taken and that the charge sheet was proper. The appellant was charged with trafficking, which is defined under **section 2** of the Narcotic Drugs and Psychotropic Substance (Control) Act, to include any of the following acts:

“Importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution...”

[8] In this case, the appellant was alleged to be trafficking through selling narcotic drugs. The police found the appellant in possession of 43 rolls of cannabis sativa and 16 sachets of heroin. The appellant not only admitted the possession of the drugs but also conceded that he was using the sale of the drugs to sustain himself when he stated, *“I use the drugs in the beach to get something to assist me. I do not deny the charge but I ask Court to forgive me.”* This admission was reiterated further by the appellant in mitigation attached to his petition before the High Court when he stated that: *“it was due to being jobless and poor with the burden of the family that I was to be hired as a salesman by a drug dealer”*

[9] Under **section 4(a)**, of the Narcotic Drugs and Psychotropic Substance (Control) Act, there is no requirement that the trafficking must be of a specific quantity of drugs or that the person be found with any proceeds of the trafficking. It is enough that the person holds out any narcotic drugs or psychotropic

substance for any of the following reasons “importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution”. In our view the charge against the appellant was proper and the appellant having been convicted on his own plea of guilty, it is not open to him to challenge the conviction, as he has no further right of appeal in this regard.

[10] The sentence imposed on the appellant was that provided by the law under **section 4(a)** of the Narcotic Drugs and Psychotropic Substance (Control) Act No. 4 of 1994. The severity of the sentence is a matter of fact that is not open to this court to go into in this second appeal. Thus the attempt by the appellant to question the legality of the sentence falls flat on its face.

[11] For this reasons we find no substance in this appeal and do therefore dismiss the appeal in its entirety.

Dated and delivered at Malindi this 13th day of May, 2014.

H. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR