



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT MOMBASA**  
**(CORAM: TUNOI, SHAH & BOSIRE, JJ.A.)**  
**CRIMINAL APPEAL NO. 66 OF 2000**

BETWEEN

BENARD OMONDI ODULLO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

**(Appeal from a judgment of the High Court of Kenya at  
Mombasa (Waki, J.) dated 17th February, 2000**

in

**H.C.C.R.A. NO. 237 OF 1998)**

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**JUDGMENT OF THE COURT**

This is a second appeal by Benard Omondi Odullo (the appellant) against his conviction of being in possession of a narcotic drug, namely Heroin, contrary to section 3(1) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994, Act No.4 of 1994.

He was charged along with two others with the offence of trafficking in 35 grammes of Heroin. In the alternative count he was charged, jointly with two others, of being in possession of 35 grammes of the said Heroin.

The appellant was, as pointed out, convicted of the offence laid down in the alternative count by the Senior Principal Magistrate J. Kaburu Esq., at Mombasa and sentenced to 10 years imprisonment. That was on 27th August, 1998. He appealed against the conviction to the High Court. The High Court (Waki, J) dismissed the appeal on 17th February, 2000.

By his first ground of appeal referred to in the amended memorandum of appeal as ground 1A the appellant says:

"The learned appellate judge erred in fact by upholding the lower court's conviction which placed unduly heavy reliance on material contradictions that should have been resolved in the Appellant's favour."

In the ground of appeal referred to in the amended memorandum of appeal as ground 3A the appellant says:

"The learned appellate judge erred by upholding the lower court's finding in that the evidence of

P.W.1, P.W.2 and P.W.3, which was unsafe, was credible."

Mr. Kamau, who appeared for the appellant, argued the said two grounds together and made valiant efforts to show that there were material contradictions in the evidence of witnesses so as to vitiate the conviction. As a second appellate court it is not our function to weigh the facts as to make new finding or findings thereon unless of course there are obvious and glaringly wrong findings of facts or inferences drawn therefrom amounting to an error of law. Despite the discrepancies pointed out by Mr. Kamau we do not think that those amount to such fundamental contradictions as to constitute an error of law. Grounds 1A and 3A of the amended memorandum of appeal are therefore rejected as unmeritorious.

It is the 6th ground in the memorandum of appeal that has caused us anxiety. The ground as set out reads:

"The learned trial magistrate erred in law and in fact by convicting the Appellant when the prosecution had not produced the Government Chemist's report to accord the appellant a chance to cross-examine the maker thereof".

Section 77 of the Evidence Act (Cap.80) however, specifically provides that any document purporting to be a report under the hand of a Government Analyst (amongst others) may be used in evidence if the court is satisfied that such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time he signed it. The court is, by the said section, also given discretion to summon the analyst (among others) as to examine him as to the subject matter of the document.

The report of the Government Analyst which was produced by Inspector Mohamed Dida (P.W.1) appears ex-facie to be genuine in so far as what it purports to say. But the lacunae in the chain of evidence which led to the production of the report as an exhibit by P.W.1 are that there is no evidence to show who took the allegedly recovered drug to the Government Analyst; Why it took nearly two months to reach him? Who had the custody of the envelope containing the drug wrapped in polythene paper from 7th March, 1998 to 5th May, 1998? Why did it take the Government Analyst 22 days to prepare the report? These factors point out that the chain of evidence as to custody of the heroin was not complete. That being so there is a doubt as to whether what was recovered from the appellant was the heroin which was referred to in the Government Analyst's report. We must point out that greater care should be taken in future in proving the custody of exhibits and in case of drug related offences the custody of the drug itself.

This issue of the break in the chain of evidence as regards the custody of the offending drug was not gone into by the learned magistrate; nor was it gone into by the superior court. On this issue alone we have no alternative but to allow the appeal. Having reached this conclusion we need not address our minds on the other grounds of appeal.

In the result, this appeal is allowed. The conviction in question is quashed and the sentence of 10 years imprisonment is set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 20th day of July, 2000.

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

S. E. O. BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR