IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: CHUNGA, C.J., TUNOI & SHAH, JJ.A.)

CRIMINAL APPEAL NO. 47 OF 2000

BETWEEN

PETERSON GICHOBI MUNENE ..... APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Mombasa (Waki, J.) dated 26th November, 1999

in

H.C.CR.A. NO. 173 OF 1998)

JUDGMENT OF THE COURT

PETERSON GICHOBI MUNENE, the appellant herein, was arraigned in the Chief Magistrate's Court, Mombasa, on one count of trafficking in narcotic drugs contrary to section 4(a) of the **Narcotic Drugs and Psychotropic Substances (Control) Act, No.4 of 1994**, the Act, and on an alternative charge of being in possession of Narcotic Drug Contrary to Section 3(1) of the Act as read with sub-section 2(a) of the same section. He was, however, convicted on the alternative charge and sentenced to 10 years imprisonment. On his first appeal to the superior court Waki, J. upheld the conviction but reduced the term of imprisonment to 5 years. The appellant now comes to this court on a second appeal; and that being so, only matters of law fall for our consideration.

Two Police Officers Naftali Rioba, (PW.1), and Francis Wambua, (PW.2), were on Mobile Patrol duties at 7:00 p.m. when they received a tip-off that drugs were being sold at Kilifi stage in Mtwapa Shopping Centre. They proceeded there and parked their car. For about five minutes they observed the appellant exchanging drugs for money with various members of the public. They pounced on him and introduced themselves as Police Officers. A quick search on the spot revealed nothing on the person of the appellant. They led him to the nearby Police Patrol Base where a thorough search was made on his body. Seven satchets of a brown substance were found in the right small pocket of his jeans trousers together with Shs.2,890/=. The satchets were submitted to the Government Chemist who examined them. He determined them to be heroin (Diacetly-morphine).

The appellant, in his testimony before the trial court, contended that the heroin was planted on him by

the Police. He disowned it together with the money that was recovered from his person. The trial court accepted the evidence of the two police officers as being truthful and consistent. The first appellate court concurred. It further observed that the trial court had erred in not making a finding on the main charge, but that having convicted the appellant on the alternative charge it must reasonably be premised that there was no evidence to buttress the main charge and therefore an order that commended itself upon the trial court was that of an acquittal. With respect, we agree.

As for the alternative charge of possession, the matter rests on the credibility of the two Police Officers who testified at the trial. On first appeal, the learned Judge said:-

> ***"The best judge for that is of course the trial magistrate as she saw and heard them. She believed their testimony that they only made a q uick search at first and found nothing on the person of the appellant... I have no reason to doubt the veracity of that evidence or to impute improper motive on the Policemen ... I uphold the finding of the learned trial magistrate ..."***

Mr. Gikandi, counsel for the appellant, argued that the learned judge ought to have held that the Police Officers were on the proved circumstances unworthy of belief and that their uncorroborated evidence was unsafe to sustain the conviction.

It is trite law that when the question arises as to which witness is to be believed rather than another and that question turns on manner and demeanour, the first appellate court must on first appeal be guided by the impression made on the trial magistrate who saw and heard the witnesses. However, there may be other circumstances, quite apart from manner or demeanour, which may show whether a statement is credible or not which may warrant the court in differing from the judge or magistrate even on a question of fact turning on the credibility of witnesses whom the first appellate court has not seen. On second appeal it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles.

In the instant case, having regard to the passage from the judgment of the learned Judge above set out, we are satisfied that the learned Judge had the right rule in mind and did not err in principle or otherwise in its application.

The drug found in possession of the appellant was classified as heroine, but, the charge was laid under section 3(1) as read with section 3(2)(a) of the Act which relates to cannabis sativa. The two psychotropic substances, however, attract penalties which differ in severity. In our view, we are satisfied that despite the mix up, no substantial miscarriage of justice has in fact occurred in convicting the appellant. See section 361(5) of the Criminal Procedure Code.

On our part we have carefully considered the evidence adduced in the trial court and the decision reached therein and also the well considered judgment of the learned Judge and we are satisfied that the courts below had made no error of law or fact which would justify this court in intefering with the conviction. This appeal fails and is ordered dismissed in its entirety.

Dated and delivered at Mombasa this 19th day of July, 2000.

B. CHUNGA

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CHIEF JUSTICE

P. K. TUNOI

.....

JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR