IN THE HIGH COURT OF TANZANIA

AT TANGA

CRIMINAL APPEAL NO.25 O 2010

[Originating from Handeni CR. Case No.192/2010]

MOHAMED JUMA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Date of last order: 18/10/2010
Date of Judgment: 29/10/2010

JUDGMENT

Teemba, J;

The appellant, Mohamed Juma, was charged with and convicted of being in unlawful possession of narcotic drugs contrary to section 12(d) & 24 of the Drugs and prevention of Illicit Traffic in Drugs Act No.9 of 1995 as amended by Act No.9 of 1996 and 31 of 1997. He was sentenced to a term of seven years imprisonment. Aggrieved, he has appealed against both conviction and sentence. His two grounds of appeal are as follows:

1. That, the prosecution side did not proved the case beyond all reasonable doubt.
2. That, the sentence imposed is excessive.

The appellant entered appearance when the appeal was called for hearing. The respondent Republic was represented by Mr. Mfinanga, learned State Attorney. He supported the appeal as far as the second ground of appeal is concerned.

Mr. Mfinanga declined to support the appeal in respect of the first ground for reason that the appellant pleaded guilty to the offence. The learned State Attorney cited **section 360(1) of the Criminal Procedure Act, Cap.20 R.E. 2002** which bars an appeal where an accused person pleaded guilty to an offence and was convicted on such plea.

The record shows that the appellant pleaded guilty to the charge when the same was read over to him before the subordinate court. The facts were outlined/given by the prosecution and the appellant confirmed the particulars to be correct and true. The trial court then proceeded to enter a verdict of guilty and accordingly, convicted the appellant. Under such a situation, the appellant has no right to appeal against his conviction unless it is proved that his plea was imperfect, ambiguous or unfinished. The court would also consider this ground of appeal as meritorious if it is shown that the appellant pleaded guilty as a result of mistake of misapprehension. Another good reason would have been that the charge laid against the appellant disclosed no offence known to law. These conditions are laid down in the case of **Lawrence Mpinga V.R. [1983] T.L.R. 166.**

In the present appeal, such conditions are not found on record. I am therefore convinced that the appellant pleaded guilty to the offence

and his conviction was appropriate. His appeal against conviction can not stand.

In his second ground of appeal, the appellant went to the extent of mentioning a sentence of one year instead of seven. His argument is that, the offence does not fall under the Minimum and Sentencing Act. Mr. Mfinanga reacted by conceding that the sentence was illegal. He submitted that the trial magistrate was supposed to impose a fine and in default of payment of such fine, then the custodial sentence should come in. I fully associate myself with him. Decided cases are clear on this position. In the case of **Lukatrasia V.R.** [1971] H.C.D. NO.39 it was held:

> *"Where the section which creates an offence specifically empowers the court to levy a fine as an alternative to prison sentence, the court should not normally impose a prison sentence unless the circumstances of the case warrant it."*

This position was confirmed by a number of recent cases including that of **Salum Shaban V.R. [1985] T.L.R. 71**. In this case, Mtenga, J. (as he then was) held:

> *"Where the legislature has given an option of a fine or imprisonment, the court, when imposing a sentence, must ascertain that a sentence of fine should first be imposed and in*

default of payment of such fine, then a sentence of imprisonment can be given."

In the present appeal, the record is silent on the option of fine. In fact the appellant was not given an option of fine and no given special circumstances to warrant the trial court to impose only a prison sentence. Section 12(d) of the Drugs and Prevention of Illicit Traffic In Drugs Act, Cap.95 R.E. 2002 provides for *"a fine of one Million Shillings or three times the market value of the prohibited plant, whichever is greater, or to imprisonment for a term not exceeding twenty years or to both fine and imprisonment."*

It was therefore wrong for the trial magistrate to sentence the appellant to seven years imprisonment without giving him an option of fine as provided by the statute. For this reason, I agree with the two sides in this appeal and allow the appeal in respect of the second ground. The sentence of seven years imprisonment is hereby quashed and set aside.

I have noted from record that the appellant was sentenced on 7th June 2010. This means that, he has served almost five months in jail. I would substitute the sentence but taking into consideration, the period already served in prison, I see no good reason to substitute his sentence now. The period served is sufficient in the ends of justice in this case. The

appellant should be released from prison forthwith unless he is held there for some other lawful cause. It is so ordered.

R.A. TEEMBA, J.
29/10/2010

Court:- The judgment is delivered today in the presence of the appellant and Miss Mdegela, learned State Attorney for the respondent/Republic.

R.A. TEEMBA, J.
29/10/2010