

IN THE HIGH COURT OF TANZANIA

AT DODOMA

DC CRIMINAL APPEAL NO 98 OF 2016

(Original Criminal Case No. 201 of 2016 of the District Court of Kondoa at Kondoa)

ASHIRAFU AYUBU @ RAMADHANI APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

08/02/2017 & 08/2/2017

A. MOHAMED, J.

The appellant was charged with and convicted of the offence of unlawful possession of narcotic drugs c/s 11 (1) (d) of the Drugs Control and Enforcement Act No. 5 of 2015 (hereinafter "the Act") and was sentenced to 30 years imprisonment.

Against that decision the appellant appeals on a number of grounds which can be consolidate into the following:

1. That his plea of guilty was equivocal
2. the appellant was suffering from a disease of the mind at the trial
3. In view of the gravity of the sentence, the trial court ought to have found the appellant's plea of guilty improper and proceeded to conduct a trial

The appellant had been arrested by the police at Kondoa with possession of 5 rolls of cannabis which were tendered in evidence at the trial court by the prosecution.

At the hearing of the appeal on 8/2/2017, the appellant appeared in person whilst Ms Mgoma, learned State Attorney, represented the respondent. At the outset she supported the appeal on the following grounds;

First, she submitted, the prosecution had failed to tender a seizure certificate requisite under 38 (1) (a) of the Criminal Procedure Act [Cap 20 R.E 2002] when it tendered 5 rolls of cannabis in court. This failure, she argued, was fatal to the case.

Secondly, the prosecution similarly failed to tender a report from the Government Chemist to prove whether the said rolls tendered in court as evidence were really cannabis. This, she argued, contravened section 29 (2) of the Drugs Control and Enforcement Act. No 5 of 2015. The said provision reads:

“Where there is any inconsistency in matters relating to weight, type of chemical concerned or any other matter of similar matter provided in this section, the weight, type of chemical or other matter determined by the Government Chemist shall prevail”

For the above reason, she contended, there was no proof the seized rolls were cannabis as alleged by the prosecution and therefore the evidence was insufficient to ground a conviction.

Thirdly, she argued that section 11 (1) of the Drugs Control and Enforcement Act that the appellant was charged with was improper as the total weight of the seized cannabis was not proved to reach 50 grams. She said Rule 3 (1) (a) of the Regulations to the Drug Control and Enforcement Act provides that cannabis that does not exceed 50 grams falls under a small quantity of narcotic drugs or psychotropic substances. She maintained that the proper section the appellant ought to have been charged with was section 17 (1) of the Drugs Control and Enforcement Act. And that its attendant punishment was a fine of not less than one million shillings or a sentence of not less than 5 years imprisonment or both. She was therefore of the view that the sentence of 30 years imprisonment was excessive. She finally urged this court to appropriately consider the appeal in the light of the above legal deficiencies. In his rejoinder submissions, the appellant had nothing to add.

After hearing the parties and having gone through the trial court's record and considered the arguments, I from the outset state the appeal ought to succeed.

In regard to the absence of a seizure certificate in respect of the seized substance from the appellant, I am satisfied that indeed this was an irregularity as section 38 (1) (a) and (3) of the Criminal Procedure Act requires a police officer to issue a seizure certificate to an offender for anything seized. There was none and therefore the seizure was did not comply with the law and was unlawful.

I also find that the that the prosecution failed to tender a report from the Government Chemist certifying the sized item is a drug under the provisions of section 29 (2) of the Drugs Prevention and Enforcement Act. The said provision reads:

“Where there is any inconsistency in matters relating to weight, type of chemical concerned or any other matter of similar nature provided in this section, the weight, type of chemical or that other matter determined by the Government chemist shall prevail”

“

Further, section 17 (1) of the Act stipulates that:

“ Any person who in contravention of any provisions of this Act or permit issued under this Act, possess in a small quantity any narcotic drug or psychotropic substance which is proved to have been intended for personal consumption or consumes any narcotic drug of psychotropic substance shall on conviction, notwithstanding anything contained in this Part, be liable, if

(a) The narcotic drug or psychotropic substance in question in cocaine, morphine, diacetyl-morphine or any other narcotic drug or any psychotropic

- substance specified by the Minister by notice in the Gazette to a fine of not less than one million years or to both:***
- (b) The narcotic drug or psychotropic substance in question is other than those specified under paragraph (a), to a fine of not less than five hundred thousand shillings or to imprisonment for a term of three years or to both"***

Applying the above provision to the facts before me, I find myself in agreement with the learned State Attorney's argument that the appellant ought to have been charged with the above cited provision.

Finally, I am satisfied these irregularities could not have sustained a conviction at the trial court. It would now be futile to order a retrial as the trial court ordered the said rolls to be destroyed. I accordingly allow the appeal, quash the conviction and set aside any orders of the lower court. The appellant is to be freed forthwith unless held for lawful cause.

It is so ordered.

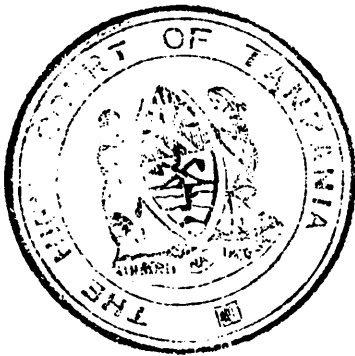


A. MOHAMED

JUDGE

8/2/2017

The right of appeal explained.



A. MOHAMED

JUDGE

8/2/2017