



IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Gachuhi, Omolo & Akiwumi JJ A)

CRIMINAL APPEAL NO. 62 OF 1994

BETWEEN

DAN OWINO OWANO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Mombasa (Mr Justice ICC Wambilyanga) dated 8th June, 1994, in HCCRA No 537 of 1993)

JUDGMENT

The evidence on which the appellant was convicted was that two police officers who gave evidence as PW1 and PW2 visited room 13 at a Malindi hotel. In that room they found the appellant. He was alone. The policemen introduced themselves as officers and said they wanted to search the room.

They did so and in a basket containing the clothes of the appellant they found a packet which contained a substance and when that substance was later examined, it was found to be heroin. The appellant was there and then arrested and subsequently charged with possession of the heroin.

Having heard the evidence of the two police officers, the magistrate believed them and convicted the appellant of the charge. He unsuccessfully appealed against his conviction to the High Court and he now appeals to us a second time. He has listed three grounds of appeal. The first one is that the lower courts erred in finding that there was sufficient evidence to prove possession of the drug by the appellant. Mr Magolo now tells us that the room was, as it were, a public place, and that there was no evidence that the appellant was the only occupant of the room. The heroin was found among clothes identified as belonging to the appellant. He heard the two police officers give that evidence but he elected to say nothing. He was entitled to keep quiet but the magistrate was equally entitled to believe the evidence of the two officers and if that evidence was believed, it proved beyond a reasonable doubt that the appellant was the only person who could have possessed the drug. In the circumstances in which the heroin was found, the appellant was clearly in possession of the drug and ground one in the memorandum of appeal lacks any merit at all. The second ground which complains that the burden of proof was shifted to the appellant is equally frivolous as we can find nowhere in the magistrate's judgment to support that contention. All the learned magistrate did was to accept the wholly unchallenged evidence of the two witnesses and that cannot amount to a shifting of the burden of proof.

There is equally no merit in ground three and Mr Magolo for the appellant is right in abandoning it. Sentence is not a matter for this Court, as it was lawful. This appeal fails in *toto* and we order it dismissed. That shall be our order.

Dated and Delivered at Mombasa this 18th day of July 1994.

J.M.GACHUHI

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JUDGE OF APPEAL

R.S.C.OMOLO

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JUDGE OF APPEAL

A.M.AKIWUMI

.....

JUDGE OF APPEAL

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the original.

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