REPUBLIC OF KENYA

AT THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO. E010 OF 2021

PHILIP NYAKUNDI KIBAGENDI ……..APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. Mbayaki Wafula, Senior Resident Magistrate, in Marsabit SRM`S Court criminal case No. E404 OF 2020 delivered on 4/8/2021)

JUDGMENT

1. The appellant was convicted of the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotics and Psychotropic Substances (Control) Act No.4 of 1994 and sentenced to a fine of Ksh.500,000/- and in addition to serve 20 years imprisonment. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal.

2. The grounds of appeal are that:

1. That the learned magistrate erred in law and in fact in failing to find that there were reasonable doubts in the evidence tendered by the Prosecution which doubts ought to have been resolved in favour of the Appellant.

2. That the learned Magistrate erred in law and in fact in giving superficial or no consideration to the evidence tendered in favour of the appellant's case, while giving undue and disproportionate weight and significance to the evidence tendered by the Prosecution contrary to law.

3. That there was variance between the particulars of the charge and the evidence adduced in breach of section 214(1) of the criminal Procedure Code.

4. That the learned trial Magistrate erred in law and fact by convicting the appellant after the prosecution had failed to prove their case beyond reasonable doubt.

5. That the trial court erred in relying on circumstantial evidence without corroboration to convict the appellant.

6. That the trial court erred in convicting the appellant in disregard of sections 4, 67, 74(a) and 86 of the Narcotic Drugs and Psychotropic Substance Control Act, 1994.

7. That there was no evidence linking the appellant to the charge.

8. That the court's finding on possession did not meet the required legal standards.

9. That the conviction was arrived at on mere suspicion.

10. That the trial court misapprehended the fact and applied wrong legal inferences to the appellant's prejudice.

11. That the doctrine of common intention was not established as envisaged in Section 21 of the Penal Code.

12. That the trial court erred in advancing theories and speculations to fill glaring loopholes in the prosecution case.

13.That the trial court erred in considering the respective prosecution and defence case in a speculative, skewed, slanted and unfair manner (the appellant was not accorded a fair hearing).

14.The trial court rejected the appellant's defence without good reason.

Facts of the Case –

3. The brief facts of the case are that the appellant is a resident of Nairobi. That on the 20/11/2020 the appellant called a car hire dealer, **Francis maina PW3** who is based in Nairobi and ordered a car for hire. He paid car hire charges of Ksh.36,000/-for three days` use. He sent his driver Abel Twabe Kamanda to pick the vehicle. The driver signed the necessary car hire documents and was given the vehicle registration No KCF 600F Toyota Land Cruiser Prado. The appellant instructed the driver to deliver the vehicle to him at Moyale. The driver did as instructed and delivered the vehicle to the appellant at Moyale.

4. That on the 24/11/2020 at 7pm police officers from Marsabit police station who included **PC Boniface Mwilu PW1**, were manning a road block at KBC area on the Marsabit/Moyale highway when they stopped the said vehicle which was being driven by the appellant. Abel Kamanda was seated on the co-driver`s seat. A man and a lady, **PW4** and **8** were seated on the back seat. Policemen inspected the vehicle and smelt a strange smell from the boot. The duty officer at Marsabit police station **Sgt Kinyua PW2** was called and escorted the vehicle to Marsabit police station for a thorough search. It was searched and 40 stones of what was suspected to be bhang was found in the spare tyre. The stones were taken to Marsabit Post Office for weighing where they were weighed at 13.44 Kg in the presence of the appellant and the other occupants of the vehicle. An inventory was prepared that was signed by the appellant and the other occupants of the vehicle. It was discovered that PW4 and PW8 had been given a lift in the vehicle. They were released. The plant material was taken to the government analyst. It was examined and found to be bhang. The appellant and his driver were charged with the offence.

5. In his defence, the appellant stated in an unsworn statement that he is a resident of Nairobi. That he had sent his co-accused to deliver a car hire vehicle to him at Moyale. That upon the vehicle being delivered he realized that it had a puncture. He took it to a garage for puncture repair. He left a mechanic with the tyre and went to withdraw money to pay for the repair. That when he went back the mechanic told him that his rim was worn out and was not fit for use. The mechanic referred him to a certain garage at Isiolo. The mechanic locked the tyre in its compartment. That as he started his journey Abel called him and asked for a lift as he had been left by the bus. He offered to give him a lift up to Isiolo. At Walda he gave a lift to 2 other people. They were stopped by policemen at Marsabit KBC road barrier. He is the one who was driving. The policemen searched the vehicle. They said that the car had something fishy. He objected and insisted that a thorough search be conducted at the police station. At the police station he was astonished when 13kg of marijuana was found in the spare tyre. He suspected that it is the mechanic who had checked the tyre who had put the drug in the tyre. He suspected that that is why the mechanic had referred him to a particular garage at Isiolo as a scheme of their trafficking.

6. The appellant`s co-accused was acquitted while the appellant was found guilty of the offence and sentenced as stated above.

Submissions –

7. The appeal was canvassed by way of written submissions by the advocates for the appellant, **Atwal & Manwa Advocates** and the learned Principal Prosecution Counsel **Mr. William Ochieng**. The learned counsel for the appellant submitted that there was no evidence that the appellant was found in possession of the drug. He relied on the definition of the term "possession" in Black`s Law Dictionary to mean:

> **"The fact of having or holding property in one's power, the exercise of dominion over property. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of the claim to the exclusive use of a material object. Something that a person owns or controls."**

8. Counsel further cited the definition of the term "possession" in section 4(a) of the Penal Code that:

> **"be in possession of "or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in a place (where belonging to or occupied by oneself or not) for the use or benefit of oneself or of another person;**

9. Counsel submitted that the definition of possession connotes two elements –

(1) being in physical control of the items of the offence and or in joint control with another

(2) knowledge or intention of having the article, instruments, thing or items constituting the offence.

10. On case law counsel cited the following cases that expounded the meaning of the term "possession" –

Jean Wanjala Songoi & Patrick Manyola v Republic (2014)eKLR where it was held that:

> **"…Possession would involve an element of control of the thing a person is said to have. It is in effect the act of having and controlling property. The right under which a person can exercise control over something to the exclusion of all others. In this case, the aspect of the offence was not established beyond reasonable doubt against the appellants**."

Peter Mwangi Kariuki v Republic (2015)eKLR where Mativo J. stated that:

In my view, possession includes two elements; namely being in physical control of the item and knowledge of having the item. To be guilty of possession, an accused person must be shown to have knowledge of two things, namely, that the accused knew the item was in his custody and secondly he knew that the item in question was prohibited. A person has possession of something if the person knows of its presence and has physical control of it, or has the power and intention to control it.

11. Consequently, counsel submitted that the appellant never knew of the existence of the drugs in the spare tyre. That he was made aware of it after they were found at the police station. That the prosecution did not prove the point at which the drugs were put in the tyre. That the appellant had hired the vehicle from PW3 who also had the capacity to equally place the drugs in the spare tyre. That the vehicle had gone through several hands before the appellant received it.

12. It was submitted that it was not clear how the bhang which was in stone form could met out a foul smell to tip the police officers into suspecting that the motor vehicle was carrying suspicious commodity yet the other passengers who were in the vehicle PW4 and PW8 had not smelt it. Therefore, that it cannot be ruled out that the police officers knew the presence of the drugs in the spare wheel and that the whole thing was a set up. That the trial court failed to consider the appellant`s defence that it is the mechanic who planted the drug in the spare tyre. That the court failed to consider that the drug might have been put there before the appellant received the tyre. That the charge was not proved beyond reasonable doubt.

13. The prosecution counsel on the other hand submitted that the appellant admitted that he is the one who had hired the vehicle that was found with the drugs and that he was driving it at the time of arrest. Therefore, that he was in control of the vehicle where the drugs were found. That the case was proved beyond reasonable doubt.

Analysis and Determination –

14. This being a first appeal the duty of the court is to analyze and re-evaluate afresh the evidence adduced at the lower court and draw its own independent conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify -see **Okeno v Republic** (1972)EA 32.

15. The appellant admits that the vehicle that he was driving was intercepted by policemen along Moyale/ Marsabit highway and 40 stones of bhang weighing 13.44 Kg found in the spare tyre of the vehicle. The same was examined by a government analyst and was confirmed to be cannabis sativa. There was then no dispute that the bhang was found in the vehicle that the appellant was driving. The question was whether the appellant was the one in possession of the bhang.

16. The meaning of the term "possession" was brought out in the submissions of the advocates for the appellant. The Black`s Law Dictionary 10th Edition defines the term possession to mean –

The fact of having or holding property in one's power, the exercise of dominion over property. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of the claim to the exclusive use of a material object. Something that a person owns or controls."

17. The prosecution was therefore required to prove that the bhang was under the physical control of the appellant and that he had the knowledge of the existence of the bhang in the spare tyre.

18. Counsel for the appellant submitted that the bhang might have been put in the spare tyre by the person who hired the vehicle to the appellant, Francis Maina PW3. The said person testified in court and no question was put to him that he is the one who put the bhang in the spare trye. There was no reason for PW3 to be treated as a suspect in the case as even the appellant never suspected him of being the one who put the bhang in the spare tyre. If PW3 was the trafficker of the drug he would most likely have made attempt to remove it from the vehicle when it reached Moyale. Moreso, there was no basis of the suggestion that he could have set up the appellant with the drug as there was no reason for him to do so. No grudge was alluded to between him and the appellant. There was no basis in implicating PW3 with the commission of the offence.

19. Counsel for the appellant further submitted that the appellant`s co-accused could be the one who put the drug in the vehicle. This cannot be the case as the appellant exonerated his co-accused from any association with the drug as he confirmed that the co-accused was to travel by bus after he delivered the vehicle to him. He confirmed that he gave him a lift at the eleventh hour after he was left by the morning bus. He said that he was giving him a lift up to Isiolo. If the co-accused was to be dropped at Isiolo, there is no way that he could have been associated with the drugs as he would have left the drugs in the vehicle upon disembarking at Isiolo. In the premises, the appellant`s co-accused had no connection with the drugs.

20. The appellant exonerated the other two passengers who were found in the vehicle when he admitted that he had given them a lift in the vehicle. These two could thereby not have known what the vehicle was carrying.

20. Counsel for the appellant submitted that the drugs could have been planted in the vehicle by the police since it is only them who smelt the strange smell from the boot of the vehicle which PW4 and Pw8 did not smell. There was no evidence that the two witnesses were at the back of the vehicle when the policemen opened the boot of the vehicle. No question was put to them in cross-examination on whether they smelt anything. Besides that, the police officers who searched the vehicle PW1, PW2 and PW7 were not questioned on whether it is the police who planted the bhang in the vehicle. I find no substance in this submission.

21. The appellant argued that the trial court did not consider his defence. This is far from the truth as the court did consider the defence and stated that the explanation that it is a certain mechanic who had put the drug in the spare tyre was not convincing. I a m in agreement with the trial court on that. The appellant did not identify the particular mechanic to the police so that investigations could be conducted. He does not

appear to have raised that issue with the police. He did not cross-examine the policemen who testified in the case - PW1, PW2 and PW7 - on the issue. In my view the defence was an afterthought that could hardly be believed. The appellant must have had knowledge of the presence of the bhang in the spare tyre. It is to be noted that the appellant did not give any explanation on the use he wanted to put the hired vehicle to when he could have travelled by public means. The irresistible conclusion to be drawn is that the appellant had hired the vehicle for use in trafficking the bhang. The trial court was right in dismissing the defence.

22. The term "trafficking" is defined in section 2 of the Narcotic Drugs and Psychotrophic Substances (Control) Act to mean -

> **"the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance or making of any offer in respect thereof."**

23. The Appellant was charged with the offence of trafficking the bhang by transporting it in a motor vehicle. The definition of the term "trafficking" as shown above does not have the term "transporting." The term used is "conveying". The **Oxford English Dictionary, 12th Edition**, defines the word "convey" to mean "transport or carry to a place". It is clear to me that the two words are synonymous and mean the same thing. Though the term used was transporting, I do not think that the appellant suffered any prejudice by use of that term instead of the term "conveying". I find that the prosecution had proved beyond reasonable doubt the charge of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No 4 of 1994 by conveying the in motor vehicle registration No. KCF 600F. The appellant was rightly convicted of the offence.

Sentence –

24. Section 4(a) of the Narcotic Drugs and Psychotrophic Substances (Control) Act provides as follows:

> **Any person who trafficks in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence and liable—**
>
> **(a) in respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life; or…**

25. The value of the bhang in this matter was said to be Ksh.270,000/-. The trial magistrate in his sentencing stated that though the appellant was liable to a fine of Ksh.1,000,000/- or 3x270,000/- whichever was greater and in addition to life imprisonment, there was no valuation certificate to confirm the market value of the cannabis. That it would be speculative for the court to maintain Ksh.270,000/- as the street value without a valuation certificate. The trial court then sentenced the appellant to a fine of Ksh.500,000/- and in addition to serve 20 years imprisonment.

26. The prosecution counsel argued that the fine imposed by the trial court was illegal as it was not three times the value of the drug the appellant was convicted of. He urged the court to rectify the error so as to comply with the law.

27. Section 86 of the Narcotic Drugs & Psychotrophic Substances (Control) Act provides as follows:

> **(1) Where in any prosecution under this Act any fine is to be determined by the market value of any narcotic drug, psychotropic substance or prohibited plant, a certificate under the hand of the proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by the court as prima facie evidence of the value thereof.**
>
> **(2) In this section "proper officer" means the officer authorized by the Minister by notification in the Gazette for the purposes of this section.**

28. The question then is what happens where there is no certificate produced to prove the market value of the narcotic drug. The Court of Appeal has had occasion to deal with the provisions of that section in the case of **Kibibi Kalume Katsui –vs- Republic (2015) eKLR** where it expressed itself as follows;

> ***"The valuation certificate whose importance cannot be gainsaid as it conquers the awkward position the court is put in to second guessing the value, was not produced. However all is not lost, we take note that Pw4 and Pw2 were part of the Anti-narcotic Police Unit that recovered the drugs. It can be safely presumed that as they frequently interacted with drug-users or even dealers they brushed on the minute idea of the retail value of the drugs as at that time. We shall take the value to be as stated but with caution, we are not giving the police a free-hand by doing this, no! They must pull-up their socks.***

29. The same court also in the case of **Priscilla Jemutai Kolongei v Republic** [2005] eKLR held that the provisions of the said section are not mandatory. The court stated that:

> **Parliament has the powers to prescribe a fixed punishment or range of punishments applicable to all offenders found guilty of a specified offence. It has done so in Section 4(a) of the Act by giving to the Court several options in sentencing for trafficking narcotic drugs.*Section 86* is not a mandatory provision on sentencing but evidential aid, again for the benefit of the Court, in the valuation of goods for penalty.**

30. In this case the appellant was found with 40 stones of bhang. The market value given was Ksh.270,000/-. That would mean that the value

of each stone was Ksh.6,750/-. The bhang weighed 13.4Kg. It would mean the cost of each kilo is Ksh.20,150/-. It seems to me that the value of the drug was exaggerated. The Investigating officer who charged the appellant with the offence PW7 did not explain how he arrived at the stated market value. There was no evidence that he had experience in investigating drug cases nor that he was aware of the market value. I would agree with the trial court that to pass sentence based on the market value stated in the charge sheet would be doing an injustice to the appellant.

31. In my view, the fact that no certificate has been produced to prove the market value of the drug that an accused person has been convicted of cannot vitiate the conviction. My interpretation of section 4(a) is that where the court is unable to determine the market value of the drug the court has the discretion to impose a fine of up to a maximum of Ksh1,000,000/- and in that case disregard the limb on the market value of the drug.

32. The upshot is that the conviction is upheld. I however find that the fine imposed by the trial court of Ksh.500,000/- and the sentence of 20 years imprisonment to be excessive when there was no evidence on the market value of the cannabis. I accordingly reduce the fine to Ksh.200,000/- and the sentence of 20 years to six years imprisonment. The sentence to commence from the date of arraignment in court, i.e. on 25/11/2020.

33. In case the appellant fails to pay the fine of Ksh.200,000/- he is to serve an extra default sentence of one year imprisonment.

Delivered, dated and signed at Marsabit this 21st day of April 2022.

JESSE N. NJAGI

JUDGE

In the presence of:

Mr. Manwa for Appellant - virtually

Mr. Ochieng for Respondent

Appellant Present

Court Assistant: Peter

14 Days R/A.