REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 50 OF 2020

SAMUEL OMBOKE OKODA.. APPELLANT

VERSUS

REPUBLIC... RESPONDENT

(From the original judgment of Hon. E. M. Muiru (SRM) in Kilungu Principal Magistrate's Court SRMCRC No. 243 of 2019 delivered on 14th February, 2020).

JUDGMENT

1. The Appellant was charged in the magistrates' court with trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances (*Control*) Act No. 4 of 1994. The particulars of offence being that on 8th July 2018 at Ndii area within Mutito Andei - Makueni county along Mombasa- Nairobi highway were found trafficking cannabis (bhang) to wit 13 gunny bags weighing a total of 525 kilogrammes with a street value of Kshs.10,500,000/= in a motor vehicle Registration No. KCD 021X Toyota Voxy Silver, grey in colour which was not in medical preparation.

2. He denied the charge. After a full trial, he was convicted of the offence and sentenced to 10 years imprisonment.

3. Dissatisfied with the decision of the trial court, the Appellant has come to this court on appeal through counsel M/s Omondi Ogutu & Associates on the following grounds –

> ***1) The trial magistrate erred in law and fact in proceeding to convict the Appellant based on a defective charge.***
>
> ***2) The trial magistrate erred in law and fact in proceeding to convict and sentence the Appellant based on evidence that had glaring/conspicuous omissions, gaps and inconsistencies.***
>
> ***3) The trial magistrate erred in law and fact (by) disparaging and or disregarding the defence preferred by the Appellant hence shifting the burden of proof to the Appellant.***
>
> ***4) The trial magistrate erred in law and fact in disregarding and attempting to interpret the mandatory provisions of statute and the regulations made thereunder.***
>
> ***5) The trial magistrate erred in fact and in law in failing to appreciate that the evidence of the witnesses lacked in material credibility as to be untruthful which tainted the trial.***
>
> ***6) The trial magistrate erred in law and fact in convicting the accused person even after making a finding of fact in her judgment that there was no evidence directly linking the Appellant to the offence.***
>
> ***7) The learned trial magistrate erred in fact and in law in failing to exhaustively analyse all the evidence on record and hence arrived at a wrong finding.***
>
> ***8) The trial magistrate erred in law and fact by convicting the Appellant on conjecture.***
>
> ***9) The trial magistrate erred in law and fact in convicting the accused based on circumstantial evidence though no circumstances were preferred directly linking the Appellant to the motor vehicle in which the narcotics were apparently being ferried.***
>
> ***10) The trial magistrate erred in law and fact by holding that since the car was hired out to the accused, he was the bonafide owner of the narcotics found therein yet the totality of the evidence on record does not prove that a car-hire contractual***

relationship existed between the Appellant and the Complainant.

11) The trial magistrate erred in law and fact in delving into character evidence without sufficient proof of the Appellant's previous relationship with the Complainant if any.

12) The trial magistrate erred in law and fact in convicting the accused yet all the evidence on record could not establish the accused person as the driver of the motor vehicle found ferrying the drugs.

4. The appeal proceeded by filing written submissions. Both the Appellants' counsel and the Director of Public Prosecutions filed their written submissions which I have perused and considered. Both sides relied upon a number of legal authorities.

5. This being a first appellate court, I am bound to consider the evidence on record afresh and come to my own independent conclusions and inferences – **Okeno –vs- Republic (1972) E.A 32**. This legal principle has been applied consistently by courts, and I will only cite here the case of **Gabriel Kamau Njoroge –vs- Republic (1982 – 88) KAR 1134** wherein the court stated as hereunder in respect of the duty of the 1st appellate court –

"It is the duty of the first appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this."

6. It is also trite that this in all criminal cases, the burden is always on the Prosecution to prove the guilt of the accused beyond any reasonable doubt. The accused does not have a burden to prove his innocence. In this regard in the English case of **Woolmington –vs- DPP (1935) AC 462 at page 481 – Sankey LC** stated as follows with regard to the legal burden of proof –

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception…

7. The charge herein was trafficking in narcotic drugs. The Appellant's counsel has raised many grounds of appeal including a ground that the charge is defective.

8. With regard to the ground of a defective charge which was ground 1, counsel argued that though the charge sheet stated that the Appellant was trafficking cannabis to wit 13 gunny bags weighing a total of 525 kilograms with a street value of Kshs.10,500,000/= , no valuation officer or valuation certificate was produced in court. Counsel relied on section 86(1) and (2) of the Narcotic Drugs and Psychotropic Substance Control Act which states as follows –

86(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.

9. Counsel also relied on the case of **Jason Akumu Yongo –vs- Republic (1983) eKLR** on what constitutes a defective charge under section 214(1) of the Criminal Procedure Code (Cap 75).

10. Having perused the charge and considered the submissions on both sides and the law, I do not think that the fact that the prosecution did not produce a valuation report made the charge defective. In my view, such omission would only affect the validity or legality of the sentence, if the sentence was a fine, which in this case it was not. I find no defect in the charge sheet and dismiss that ground.

11. I now turn to the issue whether the trial court shifted the burden of proof to the Appellant, which was ground 3 of appeal which counsel argued separately. On this ground counsel relied on section 107(1) of the Evidence Act (Cap 80), as well as the case of **Peter Wafula Juma –vs- Republic (2014) eKLR** in which the English case of **Woolmington –vs- DPP (1935) AC 462** was cited. Counsel argued that shifting the burden of proof to the accused was unconstitutional as it violated the principle of presumption of innocence and the right of an accused person against being made to tender self-incriminating evidence, as well as the right of an accused to remain silent.

12. On this ground also, counsel argued that the trial court failed to give consideration to the defence of the Appellant and thus erroneously shifted the burden of proof to the Appellant.

13. With regard to the defence of the Appellant, I note that the trial court stated in the judgment as follows –

"Pw1, Pw2, Pw3 did testify that in the company of Pw6 they arrested the accused person at his home in Oyugis. He however resisted arrest and they had to give a chase to eventually arrest him. From the foregoing, it is clear that Pw6 is the person who links the accused person to the offence. The accused in his defence admitted that he knew Pw6 but contended that they had never entered into any transaction over car hire. He further alluded to a grudge between him and Pw6 over a woman and thus indicated the said Pw6 had framed him as a result.

Be that as it may the defence also faulted the investigations in the matter and contended a seizure notice was not issued as provided

by law.

14. From the above contents of the trial court's judgment, it is clear to me that the trial court did consider the defence for the Appellant as against the Prosecution evidence as required under section 169 of the Criminal Procedure Code (*Cap 75*) and disbelieved the defence of the Appellant and believed the Prosecution evidence. The trial court was entitled to do. I find no basis for the argument that the trial court did not consider the defence of the Appellant. I also find no basis for the ground that the court shifted the burden of proof to the Appellant.

15. The third and major issue is whether the Prosecution discharged its burden of proving its case against the Appellant beyond any reasonable doubt as required by law.

16. This is a case based on circumstantial evidence as nobody saw or recognized the driver of the motor vehicle KCD 021X which carried the cannabis gunny bags. The Appellant was not the owner of the vehicle and was arrested some days after the vehicle was impounded.

17. With regard to whether the items found in the vehicle were cannabis (*bhang*), though the defence doubt so because the analyst's report was not produced by the Government Analyst, I have no doubt that the items were cannabis since the Government Analyst's report was produced by the Investigating Officer under section 77 of the Evidence Act which is allowed in law, and the Appellant who was represented by counsel at the trial did not object.

18. With regard to the connection of the Appellant to the alleged offence, this being a case based on circumstantial evidence, the principles to be applied by the court before convicting on the basis of the same were clearly re-stated in the case of **Sawe –vs- Republic (2003) KLR 234** wherein the Court of Appeal held as follows:-

> (1) *In order to justify conviction on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.*
>
> (2) *Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances widening the chain of circumstances relied on.*
>
> (3) *The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused".*

19. Does the evidence on record satisfy the above requirements in relation to the Appellant herein who was convicted of conveying cannabis?

20. There is no doubt that the Appellant does not own the motor vehicle in which the cannabis gunny bags were found registration No. KCD 021X Toyota Voxy Silver grey. The Said vehicle belongs to Pw5 Beatrice Achieng and was jointly registered in her name and the name of the bank which financed the purchase. It is also the evidence on record that Pw5 handed over the vehicle to her brother Pw6 William Mbuga Omenyo to operate as a taxi in order to raise money to repay the bank loan.

21. The evidence that connects the Appellant to the vehicle and thus to the alleged offence, was that of Pw6 who stated that he handed over the vehicle to the Appellant in 2017 for him to operate and pay him Kshs. 4,000/= a day which was later converted to monthly payment arrangement of Kshs.60,000/=, and that the Appellant paid mainly by M-Pesa until July 2018 when he defaulted and that because of pressure from his sister Pw5, Pw6 searched for the Appellant but did not get him, and made a report to the police. It was the evidence of Pw6 that later with the assistance of somebody who did not testify in court, he was shown the rural home of the Appellant at Oyugis, and he led the police to the Appellant's arrest. The Appellant was thus arrested on 1st March 2019 by Pw1 CI James Karani Moyari and Pw2 George Magori at Migori.

22. In my view, this being a case of circumstantial evidence, the prosecution was required to prove that the Appellant was in possession or in control of the said motor vehicle, and participated in the transport of the cannabis or facilitated the same and there should be no reasonable hypothesis that someone else could have done so. In my view, the oral evidence of the Pw6 to the effect that he gave the vehicle to the Appellant on hire for several months without any record that he told his sister Pw5 that he had hired the vehicle; and the fact that the loss of the vehicle was reported by Pw6 to the police in July after it had already been impounded on 7th July 2018 leaves a lot to be desired on whether Pw6 was involved. Again though Pw5 said that she had not been paid for a number of months and had started looking for the vehicle after the bank called her severally, there is no evidence that Pw6 informed Pw5 what he had been doing with the vehicle. In my view, the evidence on record pointed more against Pw6 than the Appellant for the illegal trade. Finally, in the absence of oral confirmation from at least one witness that Pw6 leased the vehicle to the Appellant, in my view it was not safe to convict the Appellant on the evidence of Pw6 on record.

23. I also note that though the charge is against Samuel Omboko Okoda the Appellant, the payments through Safaricom M-Pesa were made through a number in the name of Philemon Lumba telephone number 254 721430160, and there was no evidence tendered from Safaricom Ltd to show that the telephone number belonged to or was connected to the Appellant.

24. In those circumstances, I find that the Prosecution failed to prove beyond reasonable doubt, on the circumstantial evidence on record, that the Appellant was the culprit and no one else.

25. As such, I have no alternative but to allow the appeal. I thus allow the appeal, quash the conviction and set aside the sentence imposed. I order that the Appellant be set at liberty unless otherwise lawfully held.

Delivered, signed & dated this 23rd day of March, 2021, in open court at Makueni.

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GEORGE DULU

JUDGE