



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL APPEAL NO. 63 OF 2019

ZAWADI OMONDI OMWERI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. C. M. Kamau Magistrate in Rongo Senior Resident Magistrate's Criminal Case No. 456 of 2016 Delivered on 30/07/2019)

JUDGMENT

- 1. Zawadi Omondi Omweri**, the Appellant herein, was charged before the Senior Resident Magistrate's Court at Rongo on 20/07/2016. The charge was *trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic and Psychotropic Substances (Control) Act No. 4 of 1994*. The particulars were that 'on the 15th day of July 2016 along Migori-Awendo road, in Awendo Sub-County within Migori County in the Republic of Kenya, jointly with others not before Court, were found trafficking in Narcotic drugs namely Cannabis Sativa (Bhang) to wit 214 kilograms with a street value of Kenya shillings 2,140,000/= in a motor vehicle registration number KAU 369g, in contravention of the said Act'.
- The Appellant denied the charge and he was tried.
- Seven witnesses testified in support of the prosecution's case. **PW1** was one **Michael Okumu Ouko** who was the Chairman of the Community Policing Ranen Chapter. **PW2** was **Alphonse Okenyo Oyonga**, a resident of Kogelo village. **No. 2006055265 APC Eric Nyagori** testified as **PW3**. He was a member of the Quick Response Team (QRT) in Migori County. **Martin Oketch Abiera** was a *boda boda* rider stationed at Awendo stage. **No. 82722 PC John Pilale** testified as **PW5**. He was attached to DCI Rongo and Awendo and he was the investigating officer. **No. 62993 PC William Kemboi** was attached to the Scenes of Crime in Migori. He testified as **PW6**. A Government Analyst one **Richard Kimutai Langat** testified as **PW7**. He was attached at Kisumu Government Chemist Laboratory.
- The Appellant was represented by **Mr. Abisai**, Counsel during the trial. For the purposes of this judgment I will refer to the witnesses according to the sequence in numbers in which they testified before the trial court.
- At the close of the prosecution's case the trial court placed the Appellant on his defence. The Appellant opted to and gave a sworn defence and called three witnesses; the Appellant's wife one **Hilda Aleyo Zawadi (DW2)**, a neighbour of the Appellant one **Nelson Nyandiko Onyancha (DW3)** and the Appellant's brother one **Johannes Nyakundi Omweri (DW4)**.
- Thereafter the court rendered its judgment where the Appellant was found guilty as charged and convicted. He was fined Kshs. 1,000,000/= in default to serve one-year imprisonment. The court further forfeited the motor vehicle which was found carrying the drugs to the State.
- Being dissatisfied with the conviction and sentence, the Appellant, through his Counsel, preferred an appeal by timeously filing a Petition of Appeal where he challenged the judgment, conviction and sentence on some 18 grounds.
- Directions were taken and the appeal was disposed of by way of written submissions. The Appellant duly filed and highlighted the submissions. The prosecution made oral submissions.
- The Appellant consolidated the grounds into six clusters. They were on the identification of the Appellant, unreconciled inconsistencies, the defence, shifting of the burden of proof, the forfeiture of the motor vehicle and that the submissions were disregarded. Several decisions

were referred to in support of the grounds. Counsel for the Appellant prayed that the appeal be allowed, conviction quashed, sentence be set-aside and the motor vehicle be released to the owner.

10. The appeal was opposed by the State which submitted that the offence was proved beyond any peradventure. It was submitted that the offence was committed during the day hence identification was not in issue. It was also submitted that the conviction was safe save that the sentence was lenient. On the forfeiture of the motor vehicle the prosecution admitted that the procedure was flawed but prayed that the forfeiture proceedings be carried out afresh. The State however prayed that the appeal be dismissed in its entirety.

11. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

12. In line with the foregone, this Court in determining this appeal is to satisfy itself that the ingredients of the offence were proved beyond any reasonable doubt. Needless to say, I have carefully read and understood the proceedings and the judgment of the trial court as well as the record before this Court and also the submissions.

13. I will start with the issue of identification. The prosecution's case was that on 15/07/2016 at around 09:00am PW3 received a call from a member of public that motor vehicle registration number KAU 369G make Toyota DX (hereinafter referred to as '**the vehicle**') was ferrying some suspected drugs from Migori towards Awendo. PW3 reported the matter to his superiors and gave chase of the vehicle. PW3 used a taxi registration number KCC 734M (hereinafter referred to as '**the taxi**'). PW3 was joined by his colleagues at Awendo.

14. The vehicle had three occupants. The two vehicles slowed down at Awendo town due to heavy traffic. PW3 alighted from the taxi and approached the vehicle. As he was about to open the door, the vehicle sped off. PW3 asked the *boda boda* riders at Awendo stage including PW4 to assist in chasing after the vehicle. PW3, PW4 and other riders followed the vehicle. The vehicle left the main road and sped into a murram road towards Kogelo village. The vehicle hit a huge pothole near PW2's home and stalled. Two of the occupants ran away into a nearby bush.

15. PW1, PW2, PW3, PW4 and the riders variously arrived at the scene. PW1 did not know the Appellant before the incident. PW1 however saw the driver of the vehicle leave the scene in the taxi with PW3.

16. PW2 stated as follows: -

...I had never seen the driver of KAU 369U before. I have only seen him again today. No, I did not attend any identification parade.

17. PW3 arrived at the scene after two of the occupants had fled. He stated as follows: -

Only one person was left behind. I suspected he was the driver of the said vehicle....

No, I did not know the driver before it was the first time I saw him. Today is the second time I have seen him since. I do not even know his name.

18. PW4 also stated as follows: -

When I arrived the driver had been apprehended by person I believed to be police officers who were in the red vehicle [the taxi].

Yes, it was the first time I saw the driver. I then saw him again in court. Today is the third time I am seeing him.

No, in my statement I did not describe the physical appearance, dressing or other features of the driver.

No, I did not attend any identification parade.

19. PW5 was the investigating officer. He stated as follows: -

By luck, on 19/7/2016, we managed to arrest the accused person at Sirare..... We established that accused was in control of the vehicle at the time of the incident. He was charged.

20. The foregone evidence is startling. Whereas PW1 witnessed PW3 arresting and leaving the scene with the driver of the vehicle aboard the taxi, PW3 stated that the driver of the vehicle disappeared from the scene. It is not clear what led to the arrest of the Appellant at Sirare since none of the witnesses knew him before the incident.

21. All witnesses admitted seeing the alleged driver of the vehicle at the scene for the first time. There were many people at the scene. The scene was chaotic as the crowd was baying for the driver's blood. None of the witnesses gave the description of the alleged driver to the police. Again, none of them attended any identification parade.

22. The Court of Appeal in Kisumu recently dealt with the issue of identification on appeal. It was in **Criminal Appeal No. 143 of 2015 Joel Opwala Waburiri & Another v. Republic (2019) eKLR**. The decision was rendered on 21/11/2019. The facts of that case were that some residents in Ekeru village in Mumias were attacked and held hostage overnight by robbers. They were taken from home to home in their village as the robbers committed more robberies. The ordeal took so long and the residents were used to lure home owners to open for them. The robbers and the victims interacted so closely and for a whole night. Some of the victims recognized the robbers as their neighbours and even picked them out in identification parades.

23. The Appellants were identified as part of the robbers. They were the ones who were identified at the parade and who were well known to the victims. The trial court convicted them and their appeal was disallowed by the High Court. In allowing the second appeal the Court of Appeal stated as follows: -

Going through the evidence that we have recapped none of the witnesses called by the prosecution gave a description of the attackers to police when reports were made. As we have seen the whole ordeal took many hours; actually almost the whole night. Some of the witnesses after being robbed were abducted and taken to various homes where they were used to lure home owners to open so that they could also be terrorized robbed.

It has been the law in criminal jurisprudence in this country as elsewhere that a witness should be asked to give description of the accused and the prosecution should then arrange for a fair identification parade. That was what was held by this Court as way back as 1987 in the case of Gabriel Kamau Njoroge v Republic [1987] eKLR. A fair identification parade cannot be conducted if the identifying witness has not on first report stated that he could identify the accused and or given a description of the accused - see Roria v Republic [1967]EA 583. The witness ability to identify the accused can only be tested after he has given such a description or stated he would recognize the accused - see the case of Republic v Mohammed Bin Allui [1942] 9 EACA 72; Rex v Shabani Bin Donald [1940] 7 EACA 60. In the old English case of Republic v Turnbull [1976] 3 ALL ER 549 (which was cited by the trial magistrate) on the issue of identification it was stated that the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way e.g by passing traffic or a press of people. Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by him and the accused actual appearance?

So it has been held by this Court in many cases that it is not asking too much that the witness is asked to give a description of the accused and the prosecution to arrange for a fair identification parade.

In the instant case probably because they were heavily brutalized by the attackers and probably fearing for repercussions if they gave description of the attackers to the police, the witnesses feared to do so and withheld the information they had on identity of the attackers to police and only gave the names later. This will however not do in a criminal prosecution. Some witnesses were called to identification parades did not aid the prosecution case. One of the appellants had a visible growth on his head and there was no attempt to conceal it to enable the police mount a fair identification parade. Witnesses testified in court that their attackers were their neighbours but they did not give names or description to the police. We think that had the High Court considered these issues on reevaluation of the record the learned judges would have reached a different decision. The identification of the appellants at poorly organized identification parades which did not comply with Force Standing Orders rendered the identification worthless and without proper identification, the prosecution case had no legs at all.

Considering the whole matter we think that the conviction of the appellants was not safe. It is for this reason that we have reached the conclusion that the appeal has merit and hereby succeeds. We set aside conviction of the appellants and quash the sentences imposed and order that the appellants shall be set free forthwith unless otherwise lawfully held.

24. Going by the foregoing and in view of the facts in this case, it comes out that it is unsafe to uphold the conviction on the identification evidence on record. The prosecution failed to connect the Appellant with the commission of the crime.

25. Having found that the conviction cannot stand, there is really no need of dealing with the other grounds of appeal. The upshot is that the appeal is allowed, the conviction quashed and the sentence set-aside. The Appellant shall forthwith be released unless otherwise lawfully held. In the event the fine or any part thereof was paid the same shall be refunded. The motor vehicle registration number KAU 369G make Toyota DX which was forfeited to the State shall be released to the owner.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of January, 2020.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of:

Mr. Abisai Counsel for the Appellant in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant