REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 10 OF 2018

BADI MOHAMED NAGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in the Principal Magistrate Court at Lamu Criminal Case 53 of 2016, Hon. Njeri Thuku (PM) dated 22nd March 2018)

JUDGEMENT

1. The Appellant was charged with trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic and Psychotropic Substance Control Act (NPSCA) No. 4 of 1994. The particulars of the offence were that on 27th January 2016 at about 1945 hours at Pate village, Pate Location in Lamu East Sub-County within Lamu County, the Appellant was found trafficking in narcotic drugs namely cannabis to wit 203 medium rolls with a street value of Ksh. 81,200/- by conveying in contravention of the said Act.

2. The accused person pleaded not guilty and the matter went to full trial. The prosecution called four witness in support of its case. PW1 Bwana Rehema Ali Mohamed was the chief of Pate Location for 21 years and he used to be a teacher at Pate Primary School the Appellant was his student. He told the court that on the 27th January 2016 he was on patrol with P.C Sulubu (PW2) and P.C Cakwe when they met the Appellant who was coming from the opposite direction carrying a briefcase and a sack. That when the Appellant saw them he turned and ran and they gave chase. That the Appellant disappeared to a house under construction and reappeared without the sack. That they stopped and him and questioned him about the briefcase which had a strong smell of bhang. That the Appellant led them back to the house under construction where they recovered the sack with 203 rolls of bhang.

3. PW2 P.C. Fredrick Sulubu was based at Siyu Police Post. He stated that on the 27th January 2016 at 7:45 pm together with P.C Chakwe they went to Pate to execute a warrant of arrest. That they met with PW1 who directed them to the sea front but they did not find the person they were looking for. That on their way back they saw a man carrying a brief case and a sack. That the man turned and entered a house under construction. They followed him and found him near the house and questioned him about the other luggage. That they checked the house and recovered the sack with bhang inside. They went to the chief's house where they counted the rolls and found there were 203 rolls. They took him to the station and charged him.

4. PW3 George Lawrence Oguda was the principal government chemist, gazetted officer 6934/27/7/2007. He presented the report on behalf of Mr. Yahya Maingu with whom he had worked for 16 years and was familiar with his (Mr. Yahya's) handwriting and signature. He told the court that on 8th March 2016, Mr. Yahya received an exhibit in an envelope marked Y containing 20 rolls of dry plant material from 203 rolls from Corporal Baya of Kizingitini Police Station. That he examined the substances using a Blue B test and VV spectroscopy and found the dry 197/2016 YHM and prepared his report dated 8th March 2016 which he produced as P.Exh4.

5. PW4 P.C Benson Marwa from Siyu police post was the investigating officer. He told court that on 13th March 2017, the OCPP, Sgt Charles Lesat, instructed him to take over conduct of the case from P.C Mohamed Chakwe, the former investigating officer, who had been transferred to Mombasa and subsequently dismissed. He stated that the information he had gathered was that the Appellant was arrested with the sack containing 203 rolls of bhang and a black suitcase. He produced the 203 rolls of bhang which were counted in court and marked as P.Exh 3. The sack was produced as P.Exh2 and the brief case as P.Exh 1.

6. After the prosecution closed its case, the learned trial magistrate found that the prosecution had established a prima facie case and the Appellant was put on his defence. He gave a sworn statement and called one witness.

7. DW1 the Appellant stated that he was a farmer and he cut mangroves. He told the court that on 27th January 2016 at 7:45 pm he was on his

way from his aunt, Fatuma Pembe's, house with an empty black suitcase which he wanted to put clothes in back at his house. That his two-year-old daughter had followed him but she started crying when two donkeys started fighting and he was forced to return her to her aunt's place. He then saw PW1 following him, enter a house and emerge with a white nylon sack. That two other people appeared. That PW1 took the suitcase and put the sack in and they all went to PW1's house. He stated that the house belonged to the chief was abandoned and incomplete. That he had never been caught with drugs and that the chief brought the case against him because of an ongoing land case, ELC 46 of 2015 in Malindi where he was one of the 15 plaintiffs.

8. DW2 Ali Hassan Mahrus was a casual labourer. He stated that on 27th January 2016 at 6:45pm he was on his way to the beach when he heard donkeys fighting. That when he looked up he saw the Appellant's child crying and the Appellant carrying a suitcase. That the Appellant returned to the child and comforted her. That from the sea front he saw PW1 enter a house and later stepped out dragging a sack and then instructed two police officers to arrest the Appellant as he left his house. He stated that he never saw the Appellant carrying the sack and he did not know why the Appellant was arrested. He told the court that the Appellant's family and PW1's family had differences over land.

9. At the end of the trial, the learned magistrate found the Appellant guilty and sentenced him to 20 years' imprisonment.

10. The Appellant being aggrieved by the conviction and sentence lodged his appeal through his advocate A.B. Olaba. The grounds of appeal were that the prosecution failed to produce an exhibit memo form; that the police failed to prepare an inventory of the items found; that the police failed to weigh the drugs and serve the Appellant with a notice of seizure as required by the law; that the Appellant was not informed in advance of the evidence the prosecution intended to rely on in contravention of Article 50(2)(j) of the Constitution of Kenya 2010, and; that the sentence was illegal.

11. The Appellant filed his written submissions dated 15th October 2018 on the 17th October 2018 which he relied on during hearing. His submissions were to the effect that the failure by the prosecution to produce the exhibit memo form was fatal as it rendered it impossible for the court to reach a conclusion that the 203 rolls of cannabis handed over to the government chemist were the same ones that the Appellant was alleged to have trafficked.

12. At the hearing of the appeal on 31st October, 2019 Mr. Olaba, learned counsel for the Appellant, submitted that the Appellant was not accorded a fair hearing, as he was not served with the evidence that the prosecution intended to rely on in contravention of Article 50(2) of the Constitution of Kenya 2010. It was his contention that the court had a duty to ensure that its orders to serve the Applicant were complied with and which duty the lower court failed to do.

13. In addition, counsel submitted that the police failed to prepare an inventory of the items the Appellant was apprehended with and that they failed to issue a notice of seizure. Finally, it was the Appellant's submission that there was no compliance with the NPSCA as the drugs were not weighed and a valuation certificate was not prepared which was fatal to the prosecution case.

14. The Respondent filed written submissions dated 18th November 2019 in opposition of the appeal which it relied on during the hearing. The submissions were to the effect that the failure to produce an exhibit memo was not fatal as it was a mere technicality which did not affect the fair administration of justice as provided for in Article 159(2)(d) of the Constitution and that a certificate confirming that the exhibits were narcotics was produced.

15. It was further submitted that failure to strictly adhere the provisions of section 74A of the NPSCA was not fatal due to the quantity of the drugs involved and placed reliance on the case of **Moses Banda Daniel vs R (2016) eKLR.** Finally, it was the Respondent's submission that the Appellant was accorded a fair trial as the court ordered the Respondent to supply him with all the documents and further that the Appellant was represented by an advocate who never raised an issue throughout the trial. It was contended that the Appellant was given an opportunity to cross-examine all the prosecution witnesses.

16. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

17. I have considered the grounds of appeal, the record and submissions of the parties. The issues for determination are whether the Appellant's rights to a free trial were infringed; whether the provisions of the NPSCA were complied with, and; whether the prosecution proved the case beyond reasonable doubt.

18. The Appellant contends that his right to a fair trial was infringed by the prosecution as he was not informed in advance of the evidence the prosecution intended to rely on and he did not have reasonable access to the evidence in contravention of Article 50(2)(j) of the Constitution.

19. Article 50 (2)(j) of the Constitution provides that:-

> ***2 Every accused person has a right ot a fair trial which includes the right***
>
> ***"to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;"***

20. The importance of furnishing an accused person with witness statements was aptly highlighted in **Joseph Ndungu Kagiri v Republic [2016] eKLR** by Mativo J, who held that:-

"Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence… This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence….

21. Based on the foregoing, it is clear that the prosecution should furnish an accused person with witness statements before the trial begins and the duty of disclosure continues throughout trial. From the record of the trial court, it is clear that the trial magistrate on the 28 th January 2016 ordered that the Respondent to furnish the Appellant with all witness statements, charge sheet plus any other document. When the matter came up for hearing on the 23rd April 2016, the Appellant, who was by then represented by Mr. Njuguna an advocate, proceeded with the hearing. It was also clear from the record that during the hearing the Appellant through his advocate was able to aptly cross-examine all the prosecution witnesses and further prepare his defence.

22. It is the Appellant's submission that the court had a duty to ensure that the Appellant had been supplied with the evidence as ordered. However, in certain circumstances an accused person has a duty to inform the trial court when his rights to a fair trial have been breached. In **Hadson Ali Mwachongo v Republic [2016] eKLR** the Court of Appeal stated that:-

"We are equally satisfied that the appellant's constitutional right to a fair trial was not violated. The record does not indicate the appellant raising any issue pertaining to access to witness statements. On the contrary, he is recorded informing the court that he was ready for the hearing of the case... In short, the appellant's complaint regarding denial of access to witness statements is simply not borne out by the record. As this Court stated in Francis Macharia Gichangi & 3 Others v. Republic, Cr. App. No. 11 of 2004 it is to be reasonably expected that an accused person who claims that his or her trial rights have been violated will at the very least raise the issue with the trial court."

23. Guided by the above decision, I find that the Appellant or his advocate failed to inform the trial court that he had not been supplied with any evidence throughout the hearing. There was no way the trial court could have known that the Appellant was not supplied with any evidence. I also find it hard to believe that the Appellant's advocate in the trial court was able to proceed with the trial to the extent of being able to cross-examine the prosecution witnesses without any evidence being availed to him. This ground therefore fails.

24. The second issue for determination is whether the provisions of the NPSCA were adhered to. It is the Appellant's contention that the police failed to weigh the drugs, that no notice of seizure was issued to the Appellant and that there was no valuation certificate issued.

25. On whether the drugs in question were weighed in accordance to the law, Section 74A of the NPSCA states as follows:-

"(1) Where any narcotic drug or psychotropic substance has been seized and is to be used in evidence, the Commissioner of police and the Directors of Medical Services or a police or a medical officer respectively authorized in writing by either of them for the purposes of this Act (herein referred to as "the authorized officers") shall, in the presence of, where practicable –

(a) the person intended to be charged in relation to the drugs (in this section referred to as "the accused person");

(b) a designated analyst;

(c) the advocate (if any) representing the accused person; and

(d) the analyst, if any, appointed by the accused person (in this section referred to as "the other analyst"), weigh the whole amount seized, and thereafter the designated analyst shall take and weigh one or more samples of such narcotic drug or psychotropic substance and take away such sample or samples for the purpose of analysing and identifying the same."

2. After analysis and identification of the sample or samples taken under subsection (1), the same shall be returned to the authorized officers together with the designated analysts' certificates for production at the trial of the accused person.

3...

26. A reading of the above section shows the procedure to be followed when narcotic drugs are seized. The section requires that the drugs or substance be weighed by an authorized officer in the presence of the accused person, his advocate, if any, an analyst, if any appointed by the accused person and the designated analyst before samples are released to the government (designated) analyst.

27. In the current case, it was the evidence of PW1 and PW2 that the Appellant was arrested and taken to the house under construction where they found the sack containing the bhang. It was their evidence that they proceeded to count the rolls of bhang/cannabis in the presence of the Appellant where they found there were 203 rolls of bhang. Additionally, during hearing in the trial court, the learned magistrate ordered that the cannabis be counted where it was found to be 203 rolls.

28. From the evidence adduced, it is clear that neither PW1 or P.C Chakwe who was with PW1 and PW2 weighed the cannabis but they instead counted the number of rolls which is not provided for in the NPSCA. However, it is trite that the proviso of section 74A is not mandatory but where practical and is therefore directory. The test is whether failure to comply prejudiced the accused.

29. In **Moses Banda Daniel v Republic criminal appeal no. 62 OF 2015 [2016] eKLR** the Court of Appeal stated as follows:

> ***"After the seizure, an expert opinion must be obtained to ascertain the nature and the weight of the drugs. This is to be done, where practicable, in the presence of the accused person, his advocate, if any, an analyst, if any appointed by the accused person and the designated analyst. The use, in the section, of phrases like "Where practicable" and "if any" convey the meaning that the procedure is not mandatory but directory and the use of the word "shall" must be so interpreted. A procedural provision would be regarded as not being mandatory if no prejudice is likely to be caused to the other party or if there is substantial compliance with the procedure."***

30. This position was further reiterated in **Joshua Atula & Another v Republic [2016] eKLR** where the Court of Appeal pronounced itself thus:-

> ***"Accordingly, the objective of this provision74A was to deal with instances where the exhibits disappeared. However, in the present case, the offence related to trafficking in 2200 stones of cannabis sativa. This was confirmed by the government analyst through the exhibits produced before the court. The 2200 stones were availed as exhibit and the appellant raised no complaint as to tampering. There was no prejudice occasioned to the second appellant in the circumstances."***

31. It is also safe to state that failure to weigh drugs is not fatal as the weight of drugs is only considered in sentencing. This was the holding by the Court of Appeal in **Kabibi Kalume Katsui v Republic [2015] eKLR** where it stated that:-

> ***"The law is clear on the offence of trafficking, the quantity of the drugs and its value only goes to the consideration to be given in sentencing and not on the gravity of the offence itself."***

32. It was the Appellants further contention that the prosecution failed to produce a valuation certificate in line with section 86 of the NPSCA which states that:-

> ***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.***

33. With respect to the production of a valuation certificate, it has been held that the value of drugs only arises during sentencing and in particular when imposing a fine. See **Kabibi Kalume Katsui v Republic (*supra*).**

34. In **Antony Mbithi Kasyula v Republic [2015] eKLR** the Court of Appeal held that:-

> ***"Finally, the appellant took issue with the failure by the prosecution to prove the value of the cannabis sativa. Where, as in this case, the value of the drugs is indicated in the particulars of the charge, it is necessary that the stated particulars be established. However, it should be noted that under section 4(a) of the Act, the value of the drugs do not constitute the ingredients of the offence. The value merely becomes relevant in sentencing especially in regard to the fine which is pegged on the value of the drugs..."***

35. I am guided by the above case law and find that the failure by the prosecution to produce a valuation certificate was not fatal. Furthermore, the trial magistrate while sentencing the Appellant did not issue a fine, which would have been based on the value of the drugs, but she only issued a custodial sentence. For this reason, I find this ground also fails.

36. It was the Petitioner's further contention that the police officers failed to issue the Appellant with a notice of seizure as provided for under section 77(1) of the NPSCA.

37. Section 77(1) of the NPSCA provides that:-

> ***Where any narcotic drug or psychotropic substance, motor vehicle, aircraft, ship, carriage or other conveyance or any other article or thing liable for forfeiture is seized under this Act, notice of the seizure shall be given by the person seizing the same as soon as possible to the owner or to the person in charge thereof if such person is not the owner.***

38. In **Abdullahinassir Said Chute & another v Republic [2019] eKLR** Chitembwe J faced with a similar issue held that:-

> ***"Under section 77 (2) the notice under section 77(1) is to be given to the owner or the person in charge. The Section is in relation to Seizure of drugs and the chattel that was being used to carry the drugs. This can be a motor vehicle, ship, aircraft or the motor cycle in this case. The presumption is that once the drugs have been taken in as exhibits, they have been seized. Although a notice of seizure is required under Section 77, lack of notice does not disprove the seizure of drugs. All what the court should do is consider the sequence of events and the facts of the case. If the claim is fabricated and it appears that no such drugs were seized then the Court will deal with the specific case according to the evidence adduced before it. One cannot seek to be acquitted simply because he was not served with a notice of seizure of the drugs."***

39. I am in agreement with the above holding. The Appellant cannot seek to be acquitted merely on the basis that he was not issued with a notice of seizure, yet there is no dispute that there was a sack found containing 203 rolls of cannabis which was produced in court. The only issue that was in dispute was ownership of the sack and the cannabis therein. This ground also fails.

40. The Petitioner further faulted the police for failing to prepare an inventory for the items recovered from him. As held in **Leonard**

Odhiambo Ouma & Another v Republic [2011] eKLR the failure to prepare an inventory was a procedural issue and not fatal. In this regard the Court of Appeal rendered itself thus:-

> ***"The failure to compile an inventory as contended in ground 5, is in our view, a procedural step which in the circumstances, did not prejudice the appellants in any way and for this reason the omission did not vitiate the trial."***

41. Similarly in **Stephen Kimani Robe and Others -Vs- Republic [2013] eKLR** the two judge bench of Muchemi J and Odunga J held that:-

> ***"The purpose of an inventory is to keep a record of exhibits recovered during the investigation. Failure to prepare an inventory cannot override the physical existence of the exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence."***

42. The Petitioner also faulted the prosecution for failure to produce an exhibit memo form with respect to what was forwarded to the government analyst for examination. As I have held in relation to the inventory, the production of the exhibit memo form is a procedural step which did not in any way prejudice the Appellant or the evidence adduced as the drugs seized were produced in court as Pexh 2.

43. As demonstrated above, I have considered each technical ground relied on by the Appellant. They do not at all support his case to earn him an acquittal. I have also carefully evaluated the factual evidence of the appellant's arrest. It was the evidence of both PW1 and PW2 that on the 27th January 2016 at around 7:45 pm, they met with the Appellant who was carrying a briefcase and a sack. That the Appellant took off on seeing them and soon thereafter emerged from a house under construction without the sack. That when they questioned the Appellant, he led them to the said house where they retrieved a sack containing 203 rolls of what was suspected to be cannabis. 20 rolls of the substance were forwarded to the government analyst, Yahya Maingu, who analyzed the substances and found them to be cannabis.

44. Further there was no issue regarding the identity of the Appellant. He was arrested at the scene, a fact that he himself has admitted. My overall evaluation of the evidence leads me to the finding that the prosecution proved its case beyond reasonable doubt.

45. In the final analysis, I find the case against the Appellant proven to the required legal standard and I uphold the conviction.

46. On sentence however the 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

> ***1. Retribution: To punish the offender for his/her criminal conduct in a just manner.***
>
> ***2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.***
>
> ***3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.***
>
> ***4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.***
>
> ***5. Community protection: To protect the community by incapacitating the offender.***
>
> ***6. Denunciation: To communicate the community's condemnation of the criminal conduct.***

47. In **Caroline Auma Majabu V Republic (2014) eKLR** the Court of Appeal pronounced itself thus:

> ***"While we do not encourage small time trafficking in drugs, we are of the view that the sentences imposed in such cases should be realistic and should aim at rehabilitation rather than incarcerating and completely destroying the offenders."***

48. Guided by the precedent above, and the sentencing guidelines, I have considered the sentence meted to the Appellant. The Appellant is a first time offender. I observe that he has been out on bond during the pendency of his appeal. However, the trial and appeal have hung over his head since January 2016 when he was first arrested. I substitute the prison term with a fine of one hundred thousand shillings (Kshs. 100,000/=). In default, the Appellant shall serve 3 years' imprisonment. The default sentence shall commence 30 days from the date of this judgement.

49. Orders accordingly.

Judgment delivered, dated and signed at Garsen on this 30th day of April, 2020.

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R. LAGAT KORIR

JUDGE

This judgement was delivered in the presence T.Maro (Court Assistant), Mr. Gekanana holding brief for Mr.Olaba for the Appellant, Ms. Sombo holding brief for Mr. Mwangi for the Respondent. Mr. Olaba was initially on video link but dropped off due to a technical hitch.