



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CRIMINAL APPEAL NO. 37 OF 2019**

**ISAACK BAGAJA MOHAMED.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The Appellant was charged with the offence of trafficking in a narcotic drug contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act. The particulars of the offence were that between unknown dates and 5<sup>th</sup> February 2018 at Buna Sub-County within Wajir County jointly with others not before court, he trafficked in a narcotic drug namely cannabis sativa to wit 731kgs with a market valued of Kshs.7,310,000/= using motor vehicle registration number KBT 015S Mitsubishi Fuso.

2. He pleaded not guilty and after full trial he was convicted and sentenced to a fine of 10 million and in default to serve 15 years imprisonment.

3. Being aggrieved by the aforesaid decision, he lodged instant appeal and set 6 grounds of appeal namely:

*(1) The learned trial magistrate erred in both law and fact by convicting the appellant on purely circumstantial evidence which did not conclusively point at him.*

*(2) That the learned trial magistrate erred in both law and fact by convicting the appellant after the prosecution failed to prove their case beyond reasonable doubt, and more so in proving that the appellant was found to be in "possession" of the exhibits in question.*

*(3) That the trial magistrate erred in both law and fact by convicting the appellant despite the existence of screaming contradictions and inconsistencies on the prosecution's case.*

*(4) That the trial magistrate erred in both law and fact by convicting the appellant without considering the strong and corroborated defence put forth by the appellant, hence arriving at a wrong conclusion in law.*

*(5) That the learned trial magistrate erred in both law and fact by taking into account irrelevant and extraneous considerations that did not form part of the evidence tendered, therefore reaching a wrong conclusion in law hence the entire decision amounts to miscarriage of justice.*

*(6) That the learned trial magistrate erred in both law and fact by sentencing the appellant excessively and in violation of the relevant laws.*

4. The parties filed submissions and highlighted the same.

**APPELLANT'S SUBMISSIONS:**

5. The appellant submitted that as on the face of the charge, the appellant is said to have committed the crime with others one before court yet it is evident from the testimony of the prosecution witnesses that the appellant was in the motor vehicle together with three other persons being Abdul Mohammed, Robert Ndiritu and Hassan Abdi who were said to have suffered gunshot wounds from an attack by militia and rescued by police officers who took them to hospital and later had them record statements and released.

6. That the said statements vividly give an account of what transpired and in fact the said persons state that the vehicle was empty and had no such substance, two of these persons being turnboy of the vehicle as such ought to know at every given time what is loaded in the vehicle and not the driver who is the appellant in this circumstance.

7. That for the police not to arrest the said persons they had actually been convinced by their statement which is that the vehicle was empty and had no any such substance of the nature of narcotic drugs.

8. The prosecution further through its witnesses talked of members of public been at the vicinity of the arrest and recovery of the narcotic drugs yet none of such persons was called to corroborate their narrative.

9. The appellant submitted that it has been held and captioned in his relied authorities where courts have held that where there is an independent witness who is said to be such due to the fact that such witness is usually not bias as such his/her witness will go along way in reaching at the truth.

10. That in relation to evidence produced in support of the prosecution case, it is evident that there were two weighing certificates which was produced as exhibit 1. The one the court and the prosecution had a signature against the appellant's name and a DCI stamp on each page.

11. That however the one the prosecution served the defence had no signature against the name of the appellant and it bears 2 DCI stamps on each page and the court noted so. The prosecution did not refute the authenticity of his document having not have originated from them. Why were there two documents and which was the genuine one?

12. He further submitted that the trial magistrate in his ruling on a case to answer and judgment without any basis whenever addressing an issue of doubt decided to side with the prosecution even when it is so clear in law that any doubt should be construed in favour of an appellant person. That where a doubt arises in the prosecution case the same should be interpreted in favour of an appellant person.

13. That the two vital witnesses were never called to testify being Cpl Albashir Allow and Cpl Geoffrey Kikuni who are said to be from the Anti-Narcotic, Nairobi who took the samples and also conducted the weighing. It is the same weighing certificate that is in doubt as they generated two copies further by the two witnesses not testifying as authors of the document the doubt is justified as it is not disputed.

14. That failure to attend court also breaks the chain of custody as to the manner of what was handled and returned to be narcotic drugs. No justifiable reason was given for their non-attendance in court.

15. Lastly the prosecution was also unable to justify the 36 hrs period it took them before the vehicle was inspected. During that period the physical possession of the vehicle was in the custody of the prosecution while the appellant was in custody. Under what charge was the appellant therefore being held before inspection?

16. The appellant in his defence made a sworn statement during both his examination in chief and cross-examination. His testimony was unshaken and precise with no doubts as to his dealings on the material date.

#### **RESPONDENT'S SUBMISSIONS:**

17. The Respondent submitted on the first ground of appeal that the appellant was convicted on a purely circumstantial evidence. PW3 the OCS Buna Police Station expressed on how he was called by one Chief Mohamed over a lorry that had been shot by bandits. He went to the scene. He was told the lorry was carrying bhang by some youth. Though he did not see anything, he instructed the lorry to be taken to Buna Police Station. He requested the County Commissioner to send experts to establish if indeed the lorry was carrying bhang.

18. Among the officers who were send was PW1 an officer from the Directorate of Criminal Investigations in Wajir East. He indicated that in the presence of the appellant they searched the motor vehicle registration No. KBT 015S and found the modifications in the body. They pulled out modified iron sheets and found some parcels. They unloaded the parcels and arranged them on the ground. They found that they contained a green substance which they believed to be narcotic drug.

19. Premised on that they arrested the appellant and impounded the lorry. Together with officers from Anti-Narcotics, they weighed the recovered exhibits and documented the same. The appellant was present. Upon weighing each bale was 5 kilograms totaling to 731Kgs.

20. The evidence of PW1 and PW3 was of how the appellant was found with the lorry which was carrying bhang. The evidence irresistibility points to the appellant and the argument that the evidence is purely circumstantial is unassailable.

21. On ground No. 2, contention that the appellant was not found to be in possession of the exhibits in question. From the evidence, it is indisputable that the appellant was the one driving the motor vehicle which had modified compartments loaded with bhang.

22. On the contention that there were screaming contradictions and inconsistencies on the prosecution case, the same were not material as to dislodge the prosecution's case. It has been appreciated that the inconsistencies can occur in criminal trial.

23. In the case of **Robert Peter Kazawili vs Republic [2018] eKLR which cited with approval, the Uganda Court of Appeal in Truchangane Alfred vs Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA** as thus,

***“With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will***

***ignore minor contradictions unless the court thinks that they point to deliberate intrusiveness or if they do not affect the main substance of the prosecution's case.*** In the instance case the inconsistencies if at all exist are immaterial.

24. On the issue of the strong corroborated defence put forth by the appellant, it is barefaced from the record that the defence by the appellant is analyzed as against the prosecution's case by the trial magistrate. The defence did not dislodge the prosecution's case.

25. The contention that the trial magistrate took into account irrelevant and extraneous consideration is farfetched. From the record, what transpired in the both prosecution's case and the defence is par material in the judgment.

26. The sentence meted out is within the law and is not excessive at all. Section 4(a) of the Narcotic Drugs and Psychotropic Substance (Control) Act No. 4 of 1994 provide thus:

***“Any person who traffic 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 anti-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 greater and in addition to imprisonment for life.”***

27. On the sentence that was meted out, the trial magistrate judiciously and religiously applied judicial temper.

#### **ISSUES, ANALYSIS AND DETERMINATION:**

28. After going through the evidence on record and the submissions tendered, the court finds the issues are; -

***(i) Whether prosecution proved case beyond reasonable doubt?***

***(ii) Whether there were material contradictions to warrant vitiation of the convictions?***

***(iii) Whether appellant's defence was considered?***

***(iv) Whether sentence was excessive?***

29. The appellant was charged jointly with trafficking in narcotic drugs contrary to **section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act** with the particulars indicating that he trafficked in a narcotic drug namely cannabis sativa to wit 731kgs with a market valued of Kshs. 7,310,000/= using motor vehicle registration number KBT 015S Mitsubishi Fuso.

30. Section 2 of the Act defines trafficking as **‘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.’**

31. From the evidence before the court it is not in issue that the appellant was travelling from Moyale on 5<sup>th</sup> February 2018 when he was attacked by bandits. After the attack police officers from Buna Police Station escorted him to the said station. The appellant was driving motor vehicle registration number KBT 015S.

32. PW3 testified that at the scene some youth told him that the motor vehicle was carrying bhang. When he conducted a secondary search, he did not find the said bhang. It was his evidence that he ordered that the lorry be taken to Buna Police Station. At the station the lorry was searched by DCI officers from Wajir.

33. PW1 testified that when they searched the lorry, they found some modifications. Inside the modifications they recovered 160 bales of what they believed to be narcotics. This was corroborated by PW2. He told the court that the lorry had 2 modifications.

34. One of them was near the driver's cabin and the other one was on the lorry's floor. It was his testimony that they recovered 160 bales from the modifications. PW3, PW4 and PW5 also corroborated the testimony of PW1 and PW2. It is not in issue that the mentioned witnesses participated on the search that was conducted on the lorry.

35. The appellant in his defence told the court that when he left Moyale the lorry was carrying nothing. From his defence the appellant appeared to suggest that the load found in the lorry was loaded when he was in custody. The appellant also told the court that only his turn boys could tell what the lorry was carrying.

36. Hassan Abdi who was one of the turn boys recorded a statement and stated that when they left Moyale the lorry was empty. Similarly, the second turn boy namely Abdul Mohamed in his statement recorded that the lorry was empty.

37. It is not in issue that the lorry was searched hours after it was impounded. It was explained by PW7 that the reason the search could not take place at the scene was because the area was volatile. The trial court had no reason to doubt this especially considering that before the lorry was impounded it had been attacked by armed bandits.

38. At the police station the lorry was searched in the presence of police officers. Among the police officers present were PW1, PW2, PW3, PW4, PW5 and PW7. The trial court was not given a reason to doubt the truthfulness of credibility of these witnesses. Similarly, the court was not given any reason as to why the 6 prosecution witnesses framed the appellant. It was submitted by the defence advocate that crucial witnesses were not called.

39. In the opinion of the trial court the witnesses who were called were crucial. The fact that all of them were police officers did not make them any less crucial. That some of the witnesses were not called to testify does not have bearing on this case. In any event it is within the purview of prosecution to elect the witnesses to call.

40. The above-mentioned witnesses testified that they found modifications on the lorry. From the photographs of the lorry (exhibit 7) it is clear that the lorry was specially modified by welding some metal plate and bars on its floor. It is not necessary that the modification was for carrying drugs. However, from the prosecution witnesses the 160 bales of the dried plant material was recovered from the modifications.

41. From the foregoing the trial court had no reason to believe that the dried plant material was loaded at the police station. The same had been hidden in the modifications as at the time the motor vehicle was impounded.

42. The 160 bales of the dried plant material that was recovered was weighed and sampled. The appellant witnessed weighing and signed the documents. This was in line with provisions of **Section 74(A) of the Narcotic Drugs and Psychotropic Substances (Control) Act** that requires that weighing of the recovered substance be done in the presence, where practicable, of the accused, an advocate for the accused if any inter-alia.

43. The samples were taken to the Government Chemist for analysis. The defence advocate submitted that the report generated after the analysis was not produced by a competent person. However, PW6 introduced himself as Government Analyst working for the Government Chemist. He testified that he held a Bachelor of Science Degree from the University of Lucknow in India.

44. Defence did not challenge PW6's qualifications. Therefore, the court had no reason to believe that he was an incompetent person.

45. PW6 testified that after analyzing the 160 samples of the dried plant material that were taken to him he found them to be cannabis which is listed under the Narcotic Drugs and Psychotropic Substances (Control) Act.

46. His findings were contained in his report dated 9<sup>th</sup> March 2018 (exhibit 7). From the foregoing the trial court had no doubt that the 160 bales that were recovered from motor vehicle registration number KBT 015S was cannabis sativa.

47. On the contention that there were screaming contradictions and inconsistencies on the prosecution case, the defence did not demonstrate any existence of any material contradictions as to dislodge the prosecution's case. It has been appreciated that the inconsistencies can occur in criminal trial.

48. In the case of **Robert Peter Kazawili vs Republic [2018] eKLR** which cited with approval, the **Uganda Court of Appeal in Truchangane Alfred vs Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA** held that, *"With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate intrusiveness or if they do not affect the main substance of the prosecution's case."* In the instance case the inconsistencies if at all existed were immaterial.

49. On the issue of the trial court not considering what was stated to be strong and corroborated defence put forth by the appellant, hence arriving at a wrong conclusion in law, it is manifest from the record that the defence by the appellant was analyzed as against the prosecution's case by the trial magistrate. The defence did not dislodge the prosecution's case.

50. In light of the above, it was proved and appellant admitted that he was the person who was driving at the material time the motor vehicle registration number KBT 015S. The motor vehicle was proved to have been carrying cannabis sativa subject matter herein. Therefore, it is the court's finding that the prosecution case was proved beyond any reasonable doubt and thus trial court findings cannot be faulted.

51. There is contention that sentence meted out was excessively high and in violation of the relevant laws. The provisions of **Section 4(a) of the Narcotic Drugs and Psychotropic Substance (Control) Act No. 4 of 1994** provide thus:

**"Any person who traffic 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. In respect of anti-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 greater and in addition to imprisonment for life."**

52. On the sentence that was meted out, the trial magistrate considered mitigations tendered and awarded sentence which is legal and fair in the circumstances and applied judicial temper.

53. Thus the court makes the following orders;

***i) The appeal is dismissed, the conviction is upheld and sentence confirmed.***

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 27<sup>TH</sup> DAY OF MAY, 2020.**

**C. KARIUKI**

**JUDGE**