



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 123 OF 2019

KENNEDY OMONDI AMON.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal from the original Judgment of Hon. J. O. Magori (SRM) in Makindu

Senior Magistrate's Court Criminal Case No. 967 of 2017 delivered on 24th May, 2019).

JUDGMENT

1. **Kennedy Omondi Amon** the Appellant was charged with the offence of Trafficking in Narcotics Drugs contrary to section 4(A) of Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars were that the Appellant on the 30th day of November 2017 in Mtito Andei township of Kibwezi district within Makueni county, while driving a motor vehicle registration number KBY 968S make Toyota Axio silver in colour along Nairobi-Mombasa highway road, was found trafficking narcotic drugs namely cannabis to wit one thousand and fifty rolls (1,050) approximately thirty seven (37) kilograms of street value Kshs.300,000/= which was not in proper medical preparation.

He faced an alternative count of being in possession of narcotic drugs contrary to section 3(1) as read with section 3(2) of the Narcotics Drugs and Psychotropic Substances Control Act No. 4 of 1994. The particulars being that the Appellant on the 30th day of November, 2017 in Mtito Andei township of Kibwezi district within Makueni county, being the driver of a motor vehicle registration number KBY 968S make Toyota Axio silver in colour along Nairobi-Mombasa highway road, was found in possession of narcotic drugs namely cannabis to wit one thousand and fifty rolls (1,050) approximately thirty seven (37) kilograms with a street value of Kshs.300,000/= which were not in its medical preparation.

2. After a full hearing, he was found guilty, convicted and sentenced to six years' imprisonment. Being aggrieved by the judgment he filed this appeal raising several grounds. He later amended the grounds to read as follows:

- a) **That**, the provisions of section 214 of the Criminal Procedure Code were not complied with.
- b) **That**, the trial Magistrate erred in both fact and law by failing to observe that the Appellant's right to a fair trial was violated in contravention as per the provision of Article 50(2)(A)(c) of the constitution.
- c) **That**, the element of the offence of trafficking was not met following a void contract which was in existence to authenticate the leasing of the alleged motor vehicle.
- d) **That**, the trial Magistrate erred in law and fact in reaching a finding that the accused trafficked in the said narcotics by basing his reasons on belief, assumptions or presumptions without any evidence to back those beliefs upon and without observing that the essential witnesses were not called to testify.
- e) **That**, the trial court erred in law and fact in failing to hold that lawful procedures under section 74(a) of the Narcotic Drugs and Psychotropic substances control act were not followed.
- f) **That**, the prosecution did not prove its case beyond reasonable doubt as required by the law hence there was shifting of burden.

3. The prosecution case is premised on the evidence of three witnesses. It was the evidence of Pw2 **Kissinger Musyoka Muli** that he owned a motor vehicle registration No. KBY 968S Toyota Axio silver in colour. He leased it to the Appellant on 18th March 2017 at the rate of

Kshs.40,000/= per month which was to be paid through M-pesa.

4. He was to use it for personal use only. They entered into a written agreement (EXB4). The agreement of purchase of the car was (EXB5(b)) and log book (EXB5(a)). The Appellant gave him a copy of his driving license (EXB6). He only paid him Kshs.40,000/= by instalments for the month of April 2017. Thereafter his phone went off and he was not paying.

5. He tried to trace the Appellant in vain and he reported to Bamburi police station on 3rd July 2017. He also alerted his brother who stays in Mtito Andei about the ongoings. On 30th November 2017 his brother (*Chongo Muli*) spotted the motor vehicle and informed the CID officers in Mtito Andei. He later went there and found the motor vehicle damaged. He learnt that the Appellant had been charged.

6. Pw1 No. **88668 P.C Mwamumba Ali** and Pw3 No. **88455 P.C Kennedy Otieno** are officers attached to CID Mtito Andei. They confirmed having received information of a stolen motor vehicle having been spotted. The motor vehicle was KBY 968S Axion. They spotted it parked beside the road with the driver inside. He was ordered to open which he did. The officers found the back seat removed and there was a sack with rolls of plant material.

7. They directed him to go to the police station and at one point he drove so fast and the motor vehicle rolled. At the station they removed the jungle green sack and found 1,050 rolls of bhang (EXB2) in the sack. Photos of the motor vehicle were taken EXB3a – e. The rolls of bhang were packed in rolls of ten (10). Samples of the bhang were taken for analysis at the Government chemist. A report was done dated 11th December 2017 confirming it was bhang EXB9.

8. In his sworn statement of defence the Appellant said he had verbally leased a vehicle registration No. KBY 968S belonging to Pw2. They agreed he pays Kshs.40,000/= per month. He said he had leased the motor vehicle for purposes of campaigns of 2017 elections in respect to Tom Ogonde for an MCA seat in Homabay.

9. He paid Pw2 his money but the vehicle suffered an engine knock and he informed the owner. Due to pressure he switched off his phone. He switched on his phone on 20th November 2017, and planned to return the vehicle on 30th November 2017.

10. On 29th November 2017 at 1:00 pm he reached Mtito Andei and parked the vehicle and went for lunch. He said he had not carried any luggage in the car. Upon his return he found a motor vehicle GKB 271H parked next to the motor vehicle KBY 968S. Two people came out of the G.K vehicle and introduced themselves. They told him the KBY vehicle was stolen and they needed to search it, which they did.

11. Pw1 and Pw3 searched it but recovered nothing except his original driving licence and repair receipts. Pw1 drove the vehicle to Mtito Andei police station but on the way was involved in an accident while overtaking a trailer. He found himself at Mtito Andei sub-county hospital. He was later charged. He denied having carried any cannabis in the vehicle KBY 968S.

12. The appeal was canvassed by way of written submissions. The Appellant has submitted that his right to fair trial was violated when he was not given an opportunity to recall Pw1 after the charge sheet was amended. This he says went against section 214 Criminal Procedure Code. He relies on the cases of **Yongo –vs- Republic (1983) KLR 139**, **Njuguna –vs- Republic 2007 2 E.A 370**, **Wilson Washington Otieno & Another –vs- Republic (1986) – 92) 2 KAR 251** to argue this point. He adds that he had applied for the recall of Pw1 and an order made to that effect. The same was however never complied with.

13. He also contends that Article 50(2) (c) of the constitution was violated when the prosecution failed to comply with an order for service of the Government analyst's report before the hearing date. It was served on the hearing date. He was never supplied with witness statements. He confirms having been supplied with the said statements in bits. He relied on the case of **Thomas Patrick Gilbert Chomondeley –vs- R (2008) eKLR** to support this argument.

14. He submits that the fact that he was able to proceed and cross examine witnesses is immaterial in the face of such violations. He cited the cases of **Natasha Singh v C.B (2013) 5 SCC 741 and R –vs- Ward (1993) 2 ALL ER 557** in support of this argument.

15. He raised issue with the car hire agreement produced as it was signed by a person other than himself. That the person is Kenneth Madadi Awuor while he is Kennedy Omondi Amon. He contends that it did not matter that he admitted having hired Pw2's vehicle. His contention is that there was no contract between Pw2 and the Appellant and so the prosecution did not prove its case to the required standard. He submits that his defence was unfairly dismissed.

16. The Appellant has also challenged the manner of recovery of the exhibit, the manner it was weighed and samples taken to the Government chemist. It's his submission that section 74A of the Narcotic Drugs and Psychotropic Substances Control Act was **NOT** complied with in this case. Further that no evaluation was done to get the correct value of the drugs.

17. Finally, he submits that if the conviction is upheld the sentence should be upheld but ordered to run from the date he was arrested.

18. The appeal is opposed by the Respondent through the submissions filed by learned counsel Mr. Kihara. He submits that on the issue of section 214 CPC the Appellant did not follow up on the recall of Pw1 who was an arresting officer together with Pw3 whom he well cross examined. Secondly, that it's not in all cases that a recall is applied. Further that there was no prejudice caused by the said lapse.

19. Counsel submits that Pw1 and Pw2 proved that the Appellant was in possession of the motor vehicle KBY 968S which had the cannabis in question.

20. On issuance of witness statements counsel submits that the same were supplied and the Appellant did not raise any issue on

unpreparedness. He further submits that there was all evidence including his own defence showing that the Appellant hired the subject motor vehicle from Pw2.

21. He states that Pw1 and Pw3 testified on how the cannabis was found inside the subject vehicle. The officers were actually looking for this motor vehicle following a report of the same.

22. In response to issues raised by the Appellant in respect to compliance with section 74(A) of the Act, he states that compliance is not mandatory as was held in the case of **Moses Banda Daniel vs- Republic (2016) eKLR**. He states that the position is the same when it comes to a valuation certificate as was held in **Kibibi Kalume Katsui –vs- Republic (2015) eKLR**. He has no objection to the court making an order in respect to section 333 of the Penal Code as far as sentence is concerned.

Analysis and determination.

23. This is a first appeal and this court has a duty to re-examine and reconsider the evidence on record and arrive at its own independent decision. The court should also bear in mind that unlike the trial court it did not hear or see the witnesses.

24. In the case of **Okeno –vs- Republic (1972) E.A** the Court of Appeal set down principles governing a first appeal by stating as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1957] EA 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M Ruwala v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424.”

25. I have considered the evidence on record, grounds of appeal, submissions by both parties and decisions cited. I find the issues falling for determination to be as follows:

- i. Whether there was violation of section 214 Criminal Procedure Code and Article 50(2)(c) and (j) of the constitution.
- ii. Whether the Appellant was found in possession of cannabis for the purpose of trafficking.
- iii. If issue no. (ii) is in the affirmative whether the sentence was harsh and excessive.
 - From when the sentence if any should run.

Issue no. (i) Whether there was violation of section 214 Criminal Procedure Code and Article 50(2)(c) and (j) of the constitution.

26. Section 214 of the Criminal Procedure Code provides as follows:

“(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the

charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.”

27. The record shows that Pw1 **No. 88668 P.C Mwamumba Ali** who was one of the two arresting officers testified on 23rd May 2018. The matter was adjourned and the matter fixed for further hearing on 10th September 2018. On the 10th September 2018 the prosecution applied for substitution of the charge to which the Appellant had no objection. The amended charge sheet was read to him and he denied the same.

28. Later in the day the court took the evidence of one witness (Pw2) and the case was adjourned to 28th November 2018. There were several mention dates in between. When the matter was mentioned before a Magistrate other than the trial Magistrate on 7th December 2018 the Appellant made an application for recall of Pw1. The court directed that the application be made on the hearing date before the trial court.

29. When the case came for hearing on 16th January 2019 the Appellant did not apply for the recall of Pw1. He only requested for Pw3 to be recalled for purposes of counting the rolls of cannabis which was done and the prosecution case was then closed. In his defence he did not raise anything about this issue of recall of Pw1.

30. Section 214 Criminal Procedure Code has clearly set out what should be done in the event of an amendment to a charge sheet. I have had the privilege of perusing the original record with the original charge sheet and the original amended charge sheet. I have read each of them word by word.

31. The only difference between the two charge sheets is in the list of witnesses and not in the substance of the charge. The trial court must have noted that and therefore seen no need of inquiring whether the Appellant wished to recall Pw1. I find no prejudice caused to the Appellant in the failure to recall Pw1. Secondly Pw1 and Pw3 were the arresting officers and they gave similar evidence. Even if Pw1's evidence were to be disregarded Pw3's evidence would still show what transpired.

32. Article 50(2)(c) and j of the constitution provide:

(2) Every accused person has the right to a fair trial, which includes the right –

(c) to have adequate time and facilities to prepare a defence;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence

The Appellant does not deny having been served with witness statements plus all other documents in respect to this matter.

His complaint is that they were given to him in bits. On the first hearing date on 23rd May 2018 this is what transpired:

Prosecution: I have the arresting officer present and investigating officer but I wish to proceed with the arresting officer today.

Accused: I am ready to proceed but I have not been supplied with an agreement form for leasing the motor vehicle, copy of driving license, M-pesa statement and copy of my national identity card.

Prosecutor: We can avail the same to accused.

Court: The accused be supplied with copies of the motor vehicle lease agreement. Copy of driving license and identity card and copy of M-pesa statement. The copies be made at the expense of the court. case to proceed later.

Later:

Coram as before

Accused as present.

Accused: I have received the copies.

33. This record confirms that the Appellant already had the witness statements and was ready to proceed. Even the Government analyst's report was served on him before Pw3 testified. At no point did the Appellant raise any issue of unpreparedness due to lack of witness statements and other documents. I find no merit in this issue.

Issue no. (ii) Whether the Appellant was found in possession of cannabis for the purpose of trafficking.

34. Pw1 and Pw3 who recovered the cannabis sativa (*bhanga*) EXB2 said the same was recovered from a motor vehicle registration No. KBY 968S. EXB2 was packed in a light green sack (EXB1). It was Pw1's evidence that while on patrol within Mtito Andei they received information in respect to a stolen motor vehicle which had been spotted within Mtito Andei. The motor vehicle was KBY 968S, Axion.

35. They found the motor vehicle whose driver was the Appellant. The owner (Pw2) was traced. He produced the logbook and his purchase agreement EXB5a and b respectively. Pw2 also produced a car hire agreement of the motor vehicle between him and the Appellant (EXB4). In his sworn defence the Appellant did admit having hired the motor vehicle from Pw2. He is now asking this court to disregard EXB4 because the name of the person hiring is shown as Kenneth Madadi Awuor and not him who is known as Kennedy Omondi Anon.

36. The car hire agreement (EXB4) has not only shown the name of the person hiring but also his driving licence as 5702970 (KPL 014). These details were obviously lifted from the driving licence. He has not denied the signature and telephone number in EXB4 as not belonging to him. In cross examination Pw2 confirmed that the Appellant had given him his driving licence for identification as he had no national identity card at the time. This should therefore explain why his official names are not similar to the names in the car hire agreement (EXB) otherwise it may also be interpreted to mean that the driving licence is not a genuine document.

37. Pw1 and Pw3 were looking for the motor vehicle reported stolen. They came across the cannabis sativa in the process of discharging their duty. The Appellant appears to say that cannabis was planted on him. The amount of cannabis recovered was such a huge amount. It could not have just been picked from nowhere and planted on the Appellant.

38. The Appellant had been given this motor vehicle on 8th March 2017 in Mombasa and was to drive it within the coastal region. Condition No. 9 of the car hire agreement (EXB4) provides:

“Car should never be driven into neighboring counties. In case the car goes beyond Kilifi, Kwale and Mombasa counties, the car hirer must inform the car owner of the same”.

39. It is noted that on the date of arrest he had arrived in Mtito Andei on his way from Homabay. He had only paid hire charges for the month of April 2017. For the rest of the months upto 30th November 2017 he paid Pw2 nothing for the hire charges. He deliberately switched off his phone making it impossible for Pw2 to reach him.

40. I am satisfied that indeed EXB2 packed in EXB1 was found in the motor vehicle KBY 968S which at the time was being driven by the Appellant. Samples of EXB2 were taken to the Government chemist for analysis. The report (EXB9) and dated 11th December 2017 confirmed that the plant was cannabis.

41. Upon analysis I do agree with the learned trial Magistrate that the defence by the Appellant was a fabrication. The prosecution evidence was solid and sound. I find that the Appellant was found in possession of the cannabis EXB2 packed in EXB3. The said EXB2 was being trafficked as there was no explanation for its presence and neat package in the motor vehicle KBY 968S.

Issue no. (iii) If issue no. (ii) is in the affirmative whether the sentence was harsh and excessive.

42. The sentence provided for under section 4(a) of the Narcotics Drugs and Psychotropic Substances Control Act No. 4 of 1994 is a fine of one million shillings or three times the market value of the Narcotic Drug and Psychotropic substance whichever is the greater, and in addition, to imprisonment for life. The Appellant was said to be a first offender. The court considered his mitigation and sentenced him to six (6) years imprisonment.

43. The court did not give the fine which is part of the sentence and it is not optional. The Respondent did not say anything about that but asked for enhancement of the sentence. The Respondent is well aware that sentence enhancement can never be done without prior notice to the Appellant.

44. In his submissions the Appellant did not seek for reduction of sentence. He submitted that if the court upheld the conviction the sentence should be maintained but only made to run from date of arrest. The record shows that the Appellant was given bond but he remained in custody due to lack of a suitable surety. He was first arraigned in court on 1st December 2017 and was convicted and sentenced on 24th May 2019 which is a period of about one and a half years. The trial court did not record whether he had taken into account the Appellant's period in custody.

45. I therefore set aside the sentence of six (6) years imprisonment in order to give a sentence in accordance with section 4(a) of the Act under which the Appellant was charged.

46. The result is that the appeal on conviction is dismissed. I have considered the period the Appellant was in custody.

47. I substitute the sentence as follows:

- He is fined Kshs.100,000/= in default twelve (12) months imprisonment. In addition, he will serve three (3) years imprisonment. Sentences to run consecutively from date of conviction.

Orders accordingly.

Delivered, signed & dated this 29th day of July 2020, in open court at Makueni.

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H. I. Ong'udi

Judge