REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 120 OF 2019

NICHANOR AGONDO RADOLO *alias*

NICHOLAS ONYANGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence by Hon. C.A Mayamba (PM) in Kilungu Principal Magistrate's Court Criminal Case No. 513 of 2018 delivered on 19th July, 2019).

JUDGMENT

1. **Nichanor Agondo Radolo** *alias* **Nicholas Onyango** was charged with the offence of **Traffiking in Narcotic drugs contrary to section 4(a) of the Narcotic drugs and Psychotropic Substances Control Act No. 4 of 1994**. The particulars of the offence were that on the 8th day of July 2018 at Kathonzweni township within Makueni county, the Appellant jointly with another not before court were found trafficking cannabis (bhang) to wit 321 kilograms and 4806 brooms (bundles)(92 kilograms) with street value of Kshs.2,000,000/= in motor vehicle registration No. KCL 750B make Toyota Wish, black in colour which was not in medical preparations.

2. There was an alternative count of **being in possession of cannabis (bhang) contrary to section 3 as read with section 3(2) (a) of the Narcotic drugs and Psychotropic Substances Control Act No. 4 of 1994.**

3. The Appellant pleaded not guilty and after a full trial, the learned trial Magistrate convicted him on the main count and sentenced him to a fine of Kshs.1.7 million indefault 10 years imprisonment.

4. Aggrieved by that decision, the Appellant filed this appeal and raised the following 7 grounds;

a) That, the learned trial Magistrate erred in law by adopting written submissions by the Appellant's counsel who had not consulted the Appellant on the issue thereby contravening the provisions of sections 213 and 310 of the Criminal Procedure Code.

b) **That,** the trial court erred in law and fact in convicting the appellant of the charge notwithstanding that the prosecution acted in disregard and in contravention of sections 74(A), 75, 79 and 86 of the Narcotic drugs and Psychotropic Substances Control Act No. 4 of 1994.

c) **That,** the conviction was arrived at on the basis of mere suspicion.

d) **That,** the doctrine of common intention was not established in this case as envisaged in section 21 of the Penal Code.

e) That, the learned trial Magistrate erred and misdirected himself in law and fact by evaluating and analyzing the respective cases of the prosecution and defence in a speculative, skewed, slanted and unfair manner against the appellant.

f) **That,** the learned trial Magistrate erred in law and fact by failing to find that the prosecution's case was not proved beyond reasonable doubt.

g) **That,** the learned trial Magistrate erred in law by rejecting the Appellant's defence without assigning any good reason for so doing thereby contravening the provisions of section 169 of the CPC.

5. Before the trial court the prosecution called four witnesses *to wit*, the Government analyst (Pw1), an assistant Superintendent of police attached to Northern Corridor Patrol Unit as the commanding officer (Pw2), a police constable based at highway patrol, Mtito Andei sub-

sector (Pw3) and a police constable attached to Nothern Corridor Transit Patrol Unit.

6. The prosecution case was that on 08/07/2018, Pw1, Pw3 and other colleagues were at Emali when they received a tip off that a black Toyota wish, with two occupants, was carrying suspected bhang and had diverted at Makindu towards Kathonzweni. They tracked the vehicle to Spark Hotel in Kathonzweni and a waiter led them to two men who had arrived with the vehicle.

7. The two denied ownership of the vehicle but a body search revealed an ignition car key in the pocket of the Appellant's co-accused. The key opened the vehicle and the officers recovered 321 kgs and 1806 loose brooms of suspected bhang. The two men were arrested and charged with the said offence but the Appellant's co-accused absconded trial and it proceeded without him.

8. The Appellant's unsworn defence was that he had a problem with his leg and had gone to Kathonzweni to seek the services of a herbalist who had been recommended to him by a friend. He was taken to a hotel to relax and they were in the process of having their meals when five officers arrested them.

9. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

10. On ground (**a**), the Appellant submits that the trial court allowed his Counsel to file written submissions without express permission from him thus rendering the case untenable. He relies *inter alia* on

> **Akhuya –vs- Republic (2003) eKLR** where the Court of Appeal held that;
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> "*The trial procedures before the High court are covered under Part IX of the Criminal Procedure Code which gives the prosecution and the defence the right to address the court by ay of submissions. A careful examination of the provisions shows that the submisssions must be made in open court in the presence of the accused.*
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> *Moreover, even the Constitution in section 77(2) makes it mandatory for an accused person to be present at the hearing of his case except where voluntary consents to stay away or where due to his conduct, the court excludes him from the court room.*
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> *That a presiding officer of a court is expected to orally hear such submissions as both sides in a criminal case wish to make and to seek clarification of such submissions as found necessary in order to appreciate each sides case before delivering his opinion.*
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> *The accused person is also supposed to hear the submissions and has the right to clarify any point raised or to object to it being raised where he considers it necessary for his benefit.*
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> *The trial cannot be said to be complete unless the record shows that both sides were granted an opportunity of addressing the court on the merits or otherwise of the case against the accused.*
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> *Written submissions do not have any sanction of the law. Magistrates and judges who ask for or accept them deny the accused person a statutory right of orally persuading the court to grant him an acquittal."*

11. He submits that it is erroneous for courts to think that this trend has shifted due to congested court diaries and cites the practice where courts ordinarily accept written submissions in order to expedite the hearing. He relies on **Nairobi HCCRA 1226 of 1994; Otieno Kopiyo Gerald –vs- Republic (2010) eKLR** where the Court stated that;

> "*It is not necessarily a fatal mistake for the Court to accept written submissions…the mistake is only fatal if the express consent of the accused is not obtained by his advocate who then files written submissions."*

12. Further, he cites **Criminal Appeal No. 9 of 1961; Surinder Singh Kanda –vs- The Government of the Federation of Malaya where the privy Council *(Lords Denning, Hodson & Devlin)*** held as follows;

> "*The right to be heard carries with it the right of the accused to know the case made against him, the evidence given and the statements made affecting him; and he must be given a fair opportunity to correct or contradict them. The Judge or whoever has to adjudicate must not hear evidence or receive representation from one side behind the back of the other. The court will not enquire whether the evidence or representations did work to his prejudice. The court will not go to the likelihood of prejudice. The risk of it is enough."*

13. The Appellant has also relied on the **Judiciary Criminal Procedure Bench Book of 2018** which states;

> "*Written submissions should only be accepted with the express consent of the accused. In Henry Odhiambo Otieno versus Republic (Court of Appeal at Kisumu, Criminal Appeal No. 83 of 2005), the Court held that in light of sections 213 and 310 of the Criminal Procedure Code and the right to public trial under*
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> *section 77(2) of the repealed Constitution of Kenya, written submissions without the express consent of the accused rendered the proceedings null and void. In John Mughisha –vs- R (High Court at Nairobi No. 162 of 2013), the Court noted that the practice of written submissions is accepted so long as the accused has consented..*

If the accused consents to written submissions, the Court upon receiving the submissions should further enquire whether the parties also wish to make oral submissions. These oral submissions should form part of the record. When written submissions have been submitted, it is good practice for the parties to highlight important points contained in the submissions."

14. On ground (**b**), he submits that there was no gazzetted officer to give the value of the recovered plant material and to prepare a certificate of valuation thereto as per the provisions of section 86 of the Narcotic Drugs and Psychotropic Substances Control Act, No. 4 of 1994 *(herein after, the Act)*. He submits that the prosecution failed to call essential witnesses like the spark hotel waiter, the watchman who ushered them into the hotel, the informer who led to their arrest and the lady alleged to have been in their company. He relies *inter alia* on **Criminal Appeal No. 9 of 1986; Patrick Kabui Maina & Others –vs- Republic** where the Court of Appeal stated;

"*If the accused person is arrested on the strength of the information given by the informer and the said informer was not put in the witness box to give evidence in chief and to be cross examined, then such evidence or fact is disregarded as hearsay which is no evidence in law."*

15. He has also cited **Nairobi High Court Miscellaneous Criminal Application No. 345 of 2001: George Ngodhe Juma & Others –vs- AG (2003) eKLR** where the Court held that;

"*A matter which alarms opponents of a broad duty of disclosure, is the fear that disclosure may put at risk the security and safety of persons who have provided the prosecution with information. But protection of the identity of informers is well covered by separate rules relating to informer privilege and exceptions thereto (see Marks v Beyfus (1890) 25 QBD 494), and any rules with respect to disclosure would be subject to this and other rules of immunity. There is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted; and the erosion of this right due to non-disclosure may lead to the conviction and incarceration of an innocent person. Anything less than complete disclosure by the prosecution falls short of decency and fair play."*

16. On ground (**c**), he submits that the circumstantial evidence did not irresistibly point to him to the exclusion of all others. He contends that he was not seen by anyone loading the cannabis sativa into the car, that the recorded evidence did not give the description of the car occupants, that the police did not lift finger prints from the car to establish the identity of occupants. He submits that suspicion however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt. He relies on **Criminal Appeal No. 2 of 2002: Sawe –vs- Republic** where the Court of Appeal stated;

"*In this state of evidence, the 2 watchmen are not excluded from being persons who might have started the fire or for that matter; any intruder might have done so. If that be the case, the evidence does not irresistibly point to the appellant to the exclusion of all others.."*

17. He has also cited **Criminal Appeal No. 10 of 1997: Dhalay Singh –vs- Republic** where the Court of Appeal stated;

"*For our part, we think if there be co-existing circumstances which would weaken of destroy the inference of guilt, then the case has not been proved beyond reasonable doubt and an accused is entitled to an acquittal."*

18. On ground (**d**), he submits that the prosecution did not demonstrate an earlier brewing occasion between him and his co-accuseds and relies on **Criminal Appeals No.s 318 and 329 of 1955** where the Court of Appeal of Eastern Africa stated that; for the doctrine of common intention to be alleged, it must be shown that an accused person shared with the actual perpetrators of the crime a specific unlawful purpose which led to the commission of the offence charged.

19. Further, the Appellant submits that non-compliance with chapter 245 of the Act made the case null and void. He submits that from the evidence of the investigating officer, it is apparent that he did not conduct any meaningful investigations and if at all he did, the same were shoddy. He also refers to the mention of one Moses Ratemo during the application to release the vehicle and contends that the court was neither told who he was neither was he called as a witness.

20. On ground (**a**), the State, through the learned prosecution counsel Mr. Kihara, submits that the Appellant did not inform the court that he had no confidence with his counsel and contends that the court cannot interfere with counsel who has been appointed by the accused. He submits that there is an advocate-client confidentiality rule which should be respected at all times and any resultant prejudice or inadequate representation should not be revisited on the court.

21. On ground (**b**), he submits that the purpose of the valuation is to get the approximate street value so as to guide the Court while sentencing. He relies on **Kibibi Kalume Katsui –vs- Republic (2015) eKLR** where the Court of Appeal stated that failure to produce a valuation certificate is not fatal. He argues that the quality of the drugs and their value only goes to the consideration to be given in sentences and not on the gravity of the offence.

22. On ground (**c**) (**e**) & (**f**), he denies that conviction was based on mere suspicion and submits that the prosecution evidence established that; the substance netted was cannabis, that the accused was in possession of the bhang and that the quantity netted was meant for trafficking.

23. On ground (**d**), he submits that the common intention between the Appellant and his co-accused was brought out by the fact that they were found in the hotel together and the vehicle that was being tracked had two occupants.

24. On ground (**g**), he submits that the Appellant did not call the friend who took him to the herbalist as a witness neither did he call the

herbalist. He submits that the Appellant's condition of a swollen leg did not exonerate him from the crime and contends that it was just an afterthought.

Analysis and determination

25. This being a first appeal, this court has a duty to scrutinize the evidence on record, make it's own findings and draw it's own conclusions giving due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses. See **Okeno –vs- Republic 1972 E.A 32; David Wairimu Njuguna (2010) eKLR**.

26. Having considered the grounds of appeal, the rival submissions and entire record, it is my considered view that the following issues arise for determination;

a) Whether adoption of written submissions by the trial court was fatal.

b) Whether sections 74(A), 75, 79 and 86 of the Act were contravened; and the effect of any contravention.

c) Whether the prosecution proved its case to the required standard.

(a) Whether adoption of written submissions by the trial court was fatal.

27. Section **213** of the **Criminal Procedure Code (CPC)** deals with trials before subordinate courts while section 310 deals with trials before the High court. Section 213 provides as follows;

> *"The prosecutor or his advocate and the accused and his advocate shall be entitled to address the court in the same manner and order as in a trial under this Code before the High Court."*

28. I find relevance in **Malindi H.C Petition No. 16 of 2015; Ali Ngumbao Baya & 2 others –vs- Director of Public Prosecution [2016] eKLR** where Chitembwe J expressed himself as follows;

> *"Reliance has been placed on the Court of Appeal decision in the case of ROBERT FANALI AKHUYA (supra). That case was decided on 12th July, 2002. It no longer stands as good law. Article 159 of the Constitution is against technicalities. Submissions can either be oral or written. It all amounts to addressing the court as provided by Sections 213 and 310 of the Criminal Procedure Act. Submissions simply put means an evaluation of the evidence by each party and analysis of the law……The holding that the term addressing the court is restricted to formal speech made orally before the court is a narrow interpretation of Sections 213 and 310 of Cap 75 laws of Kenya. Written submissions qualify to be part of "addressing" the court. "*

29. Further, in **Nairobi HCCRA 314 of 2012: Joseph Mwangi Njoroge –vs- Republic [2017] eKLR**, Ngenye J stated that;

> *"It is now a settled practice under the new constitutional dispensation that filing of written submissions has become the norm. With the provision in the Constitution at Article 159 that courts should not dwell on technicalities but focus on doing substantive justice, written submissions serve the purpose of expedience. Therefore, submissions can now be oral or written."*

30. I totally agree that the decision in the **Akhuya case *(supra)*** can no longer be considered as good law. The practice, post 2010 Constitution, has completely displaced the rigidity. In our case, the trial court record does not have the final written submissions, the trial Magistrate did not refer to them anywhere in his judgment and they are not in the record of appeal. Evidently, the Appellant's advocate did not even file them thus making this ground of appeal baseless.

31. Be that as it may, the Appellant's advocate was given the liberty to file submissions after close of the defence case and the Appellant, who was in court, did not raise any objection. Further, the Appellant was out on bond and therefore had the chance and opportunity to give his input or prevent his advocate from filing the submissions. Nobody stopped him from doing that.

(b) Whether sections 74(A), 75, 79 and 86 of the Act were contravened and the effect of any contravention.

32. The Appellant's major grievance is with regard to section 86 of the Act which provides as follows;

> *"Valuation of goods for penalty*
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> *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.*
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> *2) In this section "proper officer" means the officer authorized by the minister by notification in the gazette for the purposes of this section."*

33. The charge sheet states that the street value of the bhang was Ksh.2,000,000/= but none of the prosecution witnesses talked about the value and a valuation certificate was not produced. In the circumstances, I draw guidance from the **Kibibi Kalume case (supra)** where the

Court of Appeal expressed itself as follows;

> *"The valuation certificate whose importance cannot be gainsaid as it conquers the awkward position the court is put in to second guessing the value, was not produced. However all is not lost, we take note that Pw4 and Pw2 were part of the Anti-narcotic Police Unit that recovered the drugs. It can be safely presumed that as they frequently interacted with drug-users or even dealers they brushed on the minute idea of the retail value of the drugs as at that time. We shall take the value to be as stated but with caution, we are not giving the police a free-hand by doing this, no! They must pull-up their socks.*

34. Similarly in this case, Pw2 and Pw3 were part of the Anti-narcotic police unit that recovered the drugs and I am referring to them as such because the Government analyst (Pw1) confirmed that the plant material submitted to him for analysis was bhang. Pw2 testified that when they got the tip off about the bhang, they were in the process of escorting Pw3 and others to their work station in Mtito –Andei. Pw3 and his colleagues had intercepted another vehicle carrying bhang at Tsavo area and had escorted it to Sultan Hamud police station. Accordingly, it can also be safely presumed that the officers involved in this case had frequently interacted with drug users or even dealers and had capacity to attach the street value prevailing at that time.

35. Section 74A deals with the procedure to be followed upon seizure of narcotic drugs, section 75 deals with; keeping of property seized under the Act and section 79 deals with disposal of seizures.

36. Pw2 and Pw3 testified that they seized the bhang on 08/07/2018 at around 8.20pm. They proceeded to Sultan Hamud police station where they weighed the seizure and established that the plant material was 321 kgs and 1806 brooms. Pw1 testified that he received the plant material on 12/07/2018, analyzed the samples on the same day and returned the exhibits to the officer.

37. Section 74A (1) requires that the weighing of the drugs be conducted in the presence of the following persons where practicable *(emphasis mine)*; the accused person(s), designated analyst, advocate representing the accused person (if any) and analyst representing the accused person (if any). From the evidence, it is not clear whether the procedure was followed but even if it was not, the section does not make it mandatory.

38. **Section 75** of the Act provides as follows;

> *"All articles and things, including any narcotic drug or psychotropic substance, motor vehicle, aircraft, ship, carriage or other conveyance seized by any person under this Act shall, as soon as possible, be delivered to the Commissioner of Police with a statement of the particulars relating to the seizure and the Commissioner of Police shall arrange for the articles and things to be kept safely until they are dealt with in accordance with any other provision of this Act, and shall ensure that all reasonable steps are taken to preserve the articles and things while they are so kept.*

39. From the evidence, I note that the seized plant material was delivered to the Government analyst within four days of the seizure. It is therefore evident that the seizure was dealt with in accordance with provisions of the Act within the shortest time possible. There is no specific complaint from the Appellant with regard to storage of the drugs before analysis or their disposal. Accordingly, there is really no evidence upon which this court can make a finding that the stated sections were contravened. The Appellant has also not demonstrated the prejudice (if any) that he suffered from the alleged contraventions. The upshot is that this ground of appeal has no merit.

(c) Whether the prosecution proved its case to the required standard:

40. **Section 4** of the Act defines the offence of Traffiking as follows;

> *"Means 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 ..."*

41. It is not in dispute that the appellant and his co-accused were arrested at Spark Hotel in Kathonzweni within Makueni county. The evidence of Pw2 and Pw3 was corroborative on how they acted on intelligence about a black Toyota wish that was carrying bhang and had two occupants. The vehicle registration No. KCL 750B was produced as P.Ex-6. Their intelligence led them to the said hotel where they arrested the two men.

42. The evidence shows that the two men denied any association with the vehicle but a body search revealed an ignition key from the other occupant of the motor vehicle and the key was produced as P.Ex-3. Pw2 pressed the open button and it worked. Inside the vehicle, they recovered plant material which was later weighed and found to be 321 kgs (P.Ex-4) as well as 1806 loose brooms which translated to 92kgs (P.Ex-5).

43. In my view, the key established a direct connection between the two men and the vehicle. The Appellant argues that the circumstances in this case were not complete enough to leave no doubt about his guilt. He has not said anything about the car key and the man he was with. I am of the considered view that his conduct after arrest was consistent with guilt.

44. The evidence shows that the Appellant lied about his names to the police officers. Pw1 testified that the exhibits he received showed the names of the Appellant to be Nicholas Onyango. Pw4 testified that he submitted the men's fingerprints to Kenya Bureau at NSSF house and got their real names as Nichanor Agonda Radolo and Collins Okoth Otieno.

45. In his judgment, the trial Magistrate noted that the two pleaded guilty to giving false names before Hon. E. Muiru and were convicted

and put on probation. If indeed the Appellant was an innocent man seeking the services of a traditional herbalist, it would not have been necessary to give a false name.

46. Cannabis is one of the narcotic drugs listed in the first schedule of the Act and the fact that it was in a vehicle shows that it was either meant to be supplied, conveyed, delivered or distributed hence fitting within the meaning of the term trafficking. It is noteworthy that the appellant did not attempt to show that the drug was for his own personal consumption. Accordingly, I am convinced that the substance netted was cannabis meant for trafficking and the Appellant was found in possession.

47. As for the complaint that the prosecution failed to call essential witnesses, section 143 of the Evidence Act acknowledges that no particular number of witnesses is required to prove a fact. In **Criminal Appeal No.11 of 2015;Uche –vs Republic,** the Court held that;

> *"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecutor and a court will not interfere with that discretion unless it may be shown that the prosecutor was influenced by some oblique motive"*

48. In this case, the intelligence given by the informer became direct evidence through the testimonies of Pw1, Pw2 and Pw3 hence it became unnecessary to call the informer as a witness. As for the waiter at spark hotel, his evidence was also unnecessary as the ignition key established a direct link between the occupants of the vehicle (the Appellant being one of them) and the vehicle. It is therefore my considered view that the witnesses availed were sufficient.

49. As for the doctrine of common intention, I have no doubt that the appellant was working in cahoots with another. Everything else from the evidence on record links the Appellant to the offence he was convicted of. Further, the evidence of Pw2 and Pw3 was that their intelligence was about a black Toyota Wish with two occupants. I agree with the trial magistrate that the appellant's defence was a mere afterthought. The conviction is hereby confirmed.

50. The trial court while sentencing the Appellant and his (co-accused) who never attended the hearing stated:

> *"I do however sentence both to pay a fine of Kshs.1.7 million in default to serve 10 years in prison. The sentence as against the 2nd accused shall commence upon arrest."*

51. It is therefore not clear whether each was to serve the same sentence as the sentence given refers to both. Due to that error I hereby set aside the sentence against the Appellant and substitute it with a fine of Kshs.1.2 million in default six (6) years imprisonment. Save for that the appeal lacks merit and is dismissed.

Orders accordingly.

Delivered, signed & dated this 30th day of September 2020, in open court at Makueni.

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H. I. Ong'udi

Judge