



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 32 OF 2017

ANTONY WASI TUVA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 811 of 2011 of the Chief Magistrate's Court at Malindi – Hon. Liza Gicheha, SPM)

JUDGEMENT

1. The Appellant, Antony Wasi Tuva, was charged, tried, convicted and sentenced to life imprisonment plus a fine of Kshs. 1 million for the offence of trafficking in a narcotic drug contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994 (**"the Act"**). The particulars of the offence disclosed that on 30th November, 2011 at Ngala area, Malindi District within Kilifi County the Appellant was found trafficking in a narcotic drug to wit about 2 grams of heroin with a street value of Kshs. 5,000 by conveying.
2. The Appellant being dissatisfied with both conviction and sentence has appealed to this court on the grounds amended on 10th July, 2018. It is the Appellant's case that the market value of the narcotic drugs allegedly recovered was not determined by a proper officer as mandatorily required by the Act; that the charge was defective as it did not specify the manner of the alleged trafficking; that the trial magistrate ought to have convicted him for a lesser offence as per the provisions of Section 179(2) of the Criminal Procedure Code, Cap. 75 (CPC); that he was convicted on contradictory evidence; and that the trial magistrate failed to consider his defence.
3. The appeal was dealt with through written submissions. The Appellant commenced his submission by stating that there was no certificate by a proper officer produced as required by Section 86(1) of the Act to confirm the street value of the heroin allegedly recovered from him. According to him, a proper officer under the section means an officer authorized by the Cabinet Secretary by notification in the Kenya Gazette.
4. Still on the issue of the alleged defectiveness of the charge, the Appellant submitted that no evidence was adduced to support the offence of trafficking as defined by Section 2 of the Act. According to the Appellant, for a charge to disclose the offence of trafficking, the particulars of the charge must specify clearly the conduct of the accused person which constitutes trafficking. He further asserted that the prosecution failed to connect him with the sample that was analysed by the government chemist. In addition, the Appellant submitted that neither the charge sheet or the evidence disclosed that he was in possession of narcotic drugs. His testimony was that the investigating officer had testified that he was not selling drugs and neither was he found with any money.
5. The Appellant submitted that the procedure to be followed when narcotic drugs have been seized was not followed in his case. He stated that the procedure to be followed was as stated by the Court of Appeal in the cases of **Mourine Okoth & Others v Republic, Criminal Appeal No. 193 of 2005** and **Wanjiku v Republic [2002] KLR 825**.
6. The Appellant cited the case of **Yongo v Republic [1983] KLR 319** for the proposition that a charge is defective where the evidence adduced does not accord with the charge because of inaccuracies or deficiencies in the charge.
7. The Appellant submitted that even if the court had found that the prosecution had proved its case beyond reasonable doubt, the trial magistrate ought to have convicted him for a lesser charge as commanded by Section 179(2) of the CPC.
8. It was the Appellant's case that the evidence adduced was inconsistent with the particulars of the charge and he ought to have been acquitted as a result of the contradictions. He cited the case of **Joseph Ochieng Ogina v Republic, Criminal Appeal No. 60 of 2010** in support of his assertion that contradictory testimony should be resolved in favour of the accused person. The Appellant concluded by urging the court to allow his appeal.
9. The Respondent opposed the appeal. It was submitted by counsel for the Respondent that there was no error in the charge as the offence for which the Appellant was charged had been disclosed. The particulars of the offence were also clearly stated. The decision of the Court

of Appeal in **Peter Sabem Leitu v Republic, Criminal Appeal No. 482 of 2007** was cited in support of the proposition that a proper charge is one that specifies the offence, the date and place of the offence and the manner in which the offence was committed.

10. It was counsel's assertion that even if there was any defect in the charge, then such defect would be curable by Section 382 of the CPC.

11. On the quality of the evidence adduced, counsel for the Respondent submitted that the arresting officer clearly narrated how he recovered from the Appellant a white powder, which upon examination turned out to be heroin. His view was that the case against the Appellant was proved to the required standards. Dismissing the Appellant's claim that his defence was not considered, counsel for the Respondent pointed to a line in the judgement in which the trial magistrate stated that the defence of the accused was unbelievable and did not shake the prosecution case.

12. Although the Appellant did not directly raise the issue of the harshness of sentence in his appeal or submissions, counsel for the Respondent urged this court to reverse the sentence of life imprisonment and impose an appropriate sentence. He supported his submission by citing the decision of the Court of Appeal in **Kabibi Kalume Katsui v Republic [2015] eKLR**.

13. Was the charge defective? The Appellant claims that the charge was defective. Section 137 of the CPC provides the rules for the framing of charges and information. Those rules require the statement of the offence which should describe the offence and refer to the section of the enactment creating the offence. This is then followed by particulars of the offence. The particulars of the offence would disclose the place, date and time of the offence. It would then state in brief the manner in which the offence was committed.

14. The Appellant was charged with trafficking in a narcotic drug. He is said to have contravened Section 4(a) of the Act. The particulars of the offence as stated disclosed the place, date and time of the offence. It also disclosed that he trafficked in a narcotic drug to wit heroin with a street value of Kshs. 5,000 by conveying it. The charge presented to court met the requirements for drafting a charge.

15. As for the Appellant's claim that the charge did not disclose the manner of trafficking, I find the allegation has no basis. The particulars of the charge clearly stated that he trafficked by conveying. The definition of trafficking by Section 2 of the Act includes conveying.

16. Another issue raised by the Appellant was that there was no valuation of the drug allegedly recovered from him and this breached requirement of Section 86 of the Act. Section 86 provides that:

“(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.

(1) In this section “proper officer” means the officer authorized by the Minister by notification in the *Gazette* for the purposes of this section.”

17. A similar issue was raised by the appellant in **Kabibi Kalume Katsui** (supra) and this is how the Court of Appeal handled the matter:

“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.”

18. It is indeed important for a proper officer to value the recovered narcotic drugs so that the street value put on the charge is backed by a certificate. However, failure to provide a certificate cannot be a ground for quashing a conviction. Indeed the valuation certificate is only meant to assist the court in imposing the appropriate sentence. The Court of Appeal actually observed in the already cited case of **Kabibi Kalume Katsui** 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.”

19. In summary, none of the grounds raised by the Appellant as to the defect in the charge has any merit.

20. I now turn to the issues raised by the Appellant on the sufficiency of the evidence. This being a first appeal, I have a duty to reconsider the evidence adduced in order to arrive at my own independent conclusion.

21. PW1 Corporal Ernest Mwenda testified that on 30th November, 2011 at about 3.50 a.m. he was on patrol with his colleagues at Ngala area within Malindi when they received information that there was a person selling drugs near Malindi High School and was suspected of selling drugs to students. They laid an ambush and two people arrived on a motorcycle. They stopped the motorbike and identified themselves. They arrested the Appellant who was the pillion rider. Upon search they recovered a wallet which had the Appellant's identity card, white powder in two sachets inside a black polythene bag and 22 pieces of cigarette papers. They arrested and escorted him to Malindi Police station where they filled a search certificate which the Appellant refused to sign.

22. PW4 Corporal Galgalo Kala testified that he was on patrol with PW1 and other police officers on the material day. He gave evidence similar to that of PW1.

23. PW2 Corporal Jane Chirchir of Anti-Narcotics Police Unit, Malindi told the court that she received the Appellant from the arresting officers and forwarded the recovered powder to the government chemist for processing.
24. PW3 George Lawrence Oguda, a government chemist from Mombasa produced a report showing that he tested the brown powder and found it to be heroin.
25. In his defence the Appellant denied committing the offence stating that on the material day he was at a hotel when he decided to go out briefly. It was then that police officers went and asked him whether he had seen some people pass by. He said he had not. He was told he knew the people and he was arrested and taken to the police station.
26. In situations like that in which the Appellant found himself in it can be very difficult to prove one's innocence. However, it must always be remembered that it is the duty of the prosecution to prove its case beyond reasonable doubt.
27. The question is whether the narrative placed before the court by the prosecution was believable. In brief the prosecution case was that police officers on patrol at night received information that there was a person suspected to be selling narcotic drugs to Malindi High School students. They went and laid an ambush and shortly thereafter the Appellant arrived being carried on a motorcycle.
28. This narrative raises a lot of questions. Who identified the Appellant to the officers? Why was the motorcycle rider left to go? Those questions are pertinent considering that in cross-examination PW1 and PW4 stated that they were not given the name of the Appellant and they did not know him before.
29. It is also telling that PW1 and PW4 failed to record in their statements the recovery of a crucial exhibit; the cigarette papers.
30. When PW3 was put under intense cross-examination about the time of the arrest of the Appellant, she kept contradicting herself and the court noted during her cross-examination that **"the demeanour of the witness suspect, she keeps changing statements."** It is not clear from the testimony of PW3 whether the Appellant was arrested at 4.00 a.m. or 4.00 p.m. The trial court found her demeanour wanting.
31. The story put forward by prosecution witnesses was unbelievable. PW1 and PW4 both hinted that the Appellant's house was nearby. Indeed PW4 stated that they were shown the house of the Appellant. If this was true isn't curious that police officers on the trail of a drug dealer never bothered to search his house? I find the prosecution case unbelievable. Weighing the evidence adduced by the prosecution against that of the Appellant, the defence case becomes plausible.
32. Based on what I have stated, the appeal finds merit. The evidence adduced was not sufficient to support the charge against the Appellant. He ought to have been given the benefit of doubt. In the circumstances, his appeal succeeds. The conviction is quashed and the sentence set aside. He is thus set free unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 31st day of January, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT