



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 69 OF 2018

SAID MOHAMED ALIAS BADI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

A. M. Omwancha for the Appellant

Ms. Sombo for the Respondent

JUDGEMENT

1. The instant matter emanated from the judgement of the Principal Magistrate Court at Lamu delivered on 13th December, 2018 delivered by **Hon. Njeri Thuku** in Criminal Case No. 303 of 2016. The Appellant was initially charged with the offences of trafficking in Narcotic Drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994. The Hon. Trial Court found the Appellant guilty and sentenced him 20 years imprisonment.
2. The Appeal is accompanied with a notice of motion application filed together with a certificate of agency dated and filed on the 19th November 2018, seeking the grant of leave to Appeal out of time. The application is brought in terms of Articles 50 and 151 (d) of the Constitution of Kenya 2010 and Section 349 of the Criminal Procedure Code Cap 75, Laws of Kenya.
3. The Application is predicated upon ten grounds couched on the face of it. It is indicated that the law entitles the Appellant to file an appeal as well as an appeal out of time where grounds are reasonable, and that the delay in filing the instant appeal is justified. It is indicated that the Appellant's advocate had misplaced his office file which was later located at the said HOLA Law Courts Registry. It is further indicated that there was also delay in preparing proceedings and judgement which were applied on the 19th December, 2017 and issued on the 5th February, 2018.
4. The applicant has also indicated that the appeal and if leave is denied, there is likelihood of prejudice as the Applicant would have been denied his fundamental right to be heard, that the delay was not inordinate and that it has high chances of success.
5. The Appeal anchored on the grounds encapsulated in the petition of appeal, dated and filed on 19th November 2018. The Appeal is a display of dissatisfaction with the judgement and sentence meted by **Hon. Njeri Thuku**, delivered on the 13th December, 2017 at Lamu. The grounds of Appeal are that there contradictions in the prosecution case; failure to take cognizance of discrepancies presented by the prosecution, failure to consider why no identification parade was conducted; failure to recognize glaring fabrication by the prosecution witness; ignoring and disregarding the Appellant's alibi defense and lastly; failure to take cognizance of the fact that inventory was not signed by the Appellant as required in terms of the law.
6. A brief review of the evidence tendered before the trial Court indicates that: **PW1 Abubakar Robbai**, a boat captain testified in support of prosecution case. He averred that on the material date, he transported the Appellant to Lamu and he had a yellow plastic jerry can (20 litres). As they go, the jerry can tipped over and he saw kunde seeds. As they reached Bush garden, the Appellant humped from the boat and ran away. Shortly after, he saw police approaching the boat who then demanded to search the boat and the parcel ferried in the boat.
7. The police officers found bang in the said yellow jerry can which was packed in rolls. The same was produced as exhibit before the trial court. The plastic jerry can was marked as MFI-1; kunde seeds from the jerry can was marked as MFI-1; seeds in the jerry can as MFI-2 and the rolls of bhanga as MFI-3. He stated that he was therefore placed in cells and told that he could only secure his release when the owner of the bang is court.

8. Upon cross examination by the Appellant, PW1 stated that he knew the Appellant before the material date and even his place of residence. **PW2 Hassan Ali Mnaka**, corroborated the evidence of PW1. He testified that he was also in the boat which ferried the Appellant to Lamu. He confirmed that the Appellant was carrying a yellow jerrycan which at some point tilted over. He saw kunde (cow peas) that spilled out after which he asked the Appellant why he was carrying cow seeds in a jerrycan. He points out at the Appellant as the person who had the jerrycan.

9. **PW3, Yahya Hamisi Maingu** who works at the government chemist laboratory examined the exhibits and produced a report dated 15/5/2016. He was handed over a clear polythene paper bag marked "M" with 86 rolls of dried plant material. Upon cross-examination by the substance turned out to be bang. He signed and produced it in court as evidence. PW4; No. 67789 Corporal **Mwinyu AG Shanguli** testified that he was called by his senior and instructed to meet him at jetty. When they reached jetty, they saw a boat approaching from Mokowe at 9 p.m. It had two men and one woman and a 20 litres yellow jerrycan which had stuff in it. They inspected the boat and found 86 rolls of bang in the jerrycan and took those on board to the police station. The suspects were placed in cells and the police preserved the exhibits.

10. PW5 is No. 101829 **PC Felix Koono** who testified that he was informed that there were narcotic drugs being transported from Mokowe to Lamu Jetty and that the boat was already in the sea. When the said boat arrived, they inspected it and some people on the boat escaped but they managed to arrest some. Upon inspecting the boat, they found a yellow jerrycan. They found bang in the jerrycan, arrested all the passengers who were on board and took them to the police station where the captain was interrogated. That is when he revealed that the Appellant was the owner of the jerrycan. The captain was charged and he named the suspect before court. The evidence of PW5; No. 74682 Corporal Ben Kiplagat basically corroborates the evidence of PW4. Their evidence was basically identical.

11. The Hon. trial court after having been looked at the evidence tendered by the prosecution witnesses; it was satisfied that a prima facie case had been made out. The Appellant was therefore placed on his defense. The defence was predicated upon the sole testimony of the Appellant who vehemently denied having committed the charges levelled against him. He denied having on the boat on the material date as alleged by the prosecution. He raised an alibi defense; he told the court that he was home.

12. Further, that he was arrested while at work during Ramadhan. After his arrest, he was placed in cells without being informed of the reason for the arrest. He was later informed the bang in the jerrycan belonged to him. He denied having travelled on a boat on the material night and that he was not part of the parade. Upon examination by the Learned Counsel for the state, he stated that he did not know PW1 and that nothing was brought before to show that he boarded a boat on the material night.

Submissions

13. The Learned Counsel for the Appellant; **A.M. Omwancha** filed submissions dated 21st March 2019 in support of this appeal. It indicated that the prosecution evidence is tainted with contradictions, inconsistencies and discrepancies. This pertains to the number of persons who were on the boat and the number of police officers who were present on the material date. PW1 says they were 7 people on board while PW2 says two more entered before the boat departed, to make a total number of 9. The other contradiction pertains to the number of rolls of bang. The investigating officer says they were 36 and the ones presented in court were 87. The Learned counsel for the Appellant contends that the contradictions water down the prosecution case. Counsel cited the case of **Michael M'maranya vs Republic, Criminal Appeal No. 126 of 2014** to advance the argument that whenever evidence is inconsistent, it should be dismissed without due considerations and the end result should result in an acquittal.

14. It is the Counsel's contention that the investigations were shoddy. It indicated that the prosecution could not explain why PW1 was handcuffed after he had mentioned the Appellant's name to the police. He challenged the criteria used which was used to arrest, charge and release PW1 and indicated that this caused miscarriage of justice. Therefore, according to the counsel for the Appellant, the investigations that led to the arrest of the Appellant were shoddy and unclear.

15. The Counsel for the Appellant also submitted on the defectiveness of the charge sheet. It is indicated that the evidence tendered by the prosecution witness did not support the charge of trafficking of narcotic drugs. He also submitted the failure by the police to conduct an identification parade. He cited the case of **Njihia vs Republic (1986) eKLR** to advance the contention that the identification parade does not exist as just mere decoration or fashion but are meant to test the correctness of the witnesses' identification of the suspect and that the National Police Service Standing Orders encapsulates strict rules and procedures that must be adhered to when conducting identification parade. According to the Counsel for the Appellant, the question as to why no identification parade was not conducted remains unanswered. The State did not file submissions in opposition of this Appeal.

Issues for Determination

16. The first re-evaluation is on the issue whether the prosecution proved the charge against the appellant beyond reasonable doubt touching on all essential elements of the crime. The appellant was convicted and sentenced of the offence of drug trafficking in violation of section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act which states that "**any person who traffics 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.**"

17. The concept of trafficking in; section 2 - the definition "**trafficking**" 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, but does not include –**

(a) The importation or exportation of any narcotic drug or psychotropic substance or the making of any offer in respect thereof by or on behalf of any person who holds a licence therefore under this Act in accordance with the licence;

(b) The manufacturing, buying, sale, giving, supplying, administering, conveying, delivery or distribution of any narcotic drug or psychotropic substance or the making of any offer in respect thereof, by or on behalf of any person who has a licence therefore under this Act in accordance with the licence; or

(c) The selling or supplying or administering for medicinal purposes, and in accordance with the provisions of this Act, or any narcotic drug or psychotropic substance or the making of any offer in respect thereof, by a medical practitioner or veterinary surgeon or dentist or by any other qualified to do so on the instructions of the medical practitioner or veterinary surgeon or dentist; or

(d) The selling or supplying in accordance with the provisions of this Act, of any narcotic drugs or psychotropic substances by a registered pharmacist.

18. Going by the foregoing definition, the offence requires proof of possession and the intention to traffic. In the case of *Maldine Akoth Barasa & Another v Republic [2007] eKLR 193 of 2005* the Court of Appeal dealt with the interpretation of what constitutes the offence of trafficking in narcotic and observed as follows:

“It is evident from the definition of trafficking that the word is used as a term of art embracing various dealings with narcotic drugs or psychotropic substances. In our view for the charge sheet to disclose the offence of trafficking the particulars of the charge must specify clearly the conduct of an accused person which constitutes trafficking. In addition, and more importantly, the prosecution should at the trial prove by evidence the conduct of an accused person which constitutes trafficking.”

19. According to the charge sheet, the particulars of the offence that the Appellant was charged with indicates that the trafficking in narcotic drugs was by transporting it in a motor boat. Transportation can fall under **“conveyance”**. Conveyance is part and parcel of transportation. Conveyance in the Act is defined as-

“a means of conveyance of any description used for the carriage of persons or goods and includes any aircraft, vehicle or vessel.”

20. Thus, conveyance and transportation therefore are interconnected. The prosecution in this case ought to have proved by way of evidence that the Appellant or his agents or servants was caught in the process of conveying the narcotics from point A to point B. in this case the conveyance was by boat. The prosecution case was that the Appellant entered the boat at Mokowe Jetty while holding a yellow 20 litre jerrycan. That while on the way to Lamu, the jerrycan toppled over to one side, they saw “kunde” seeds pour out of it.

21. It is alleged that when they arrived at Lamu, the Appellant disembarked from the boat but they did not see how did so and that they only realized that he was missing when the police asked for the owner of the jerrycan. Two issues emerge in the foregoing facts. The First one is that the Appellant was not caught in possession of the narcotics in question. Secondly, he was not arrested in the ambush conducted by the police on the material date.

22. On the former issue of the Appellant not being caught in possession of the narcotics, that raises question as to whether he was indeed the owner of the jerrycan. The evidence linking the Appellant to the narcotics is that of PW1 and PW2 who claimed to have been on the boat the Appellant.

23. Besides their testimony, there is no other evidence to show that he travelled on that very day. These aforesaid prosecution witnesses were also in trouble as they had been arrested for having transported the narcotics. PW1 told the Court that the Police Officers told him that he could only secure his release after the owner of the jerrycan was caught. Thus, there was huge risk that in pursuit of this freedom, he was in a position to mention anybody’s name. Which makes the link between the Appellant and the narcotics doubtful.

24. There is also evidence that PW1 was arrested and arraigned before the trial court on the same charges. The circumstances under which he was released are not very clear. The record of proceedings herein has not spoken on how PW1 came from being an accused person in the matter to become a star witness in support of the prosecution case. Further, the testimony of PW1 and PW2 was heavily relied upon by the learned magistrate particularly in linking the Appellant herein with the alleged offence. These are factors which makes the prosecution evidence less credible.

25. The standard of proof in criminal cases is beyond reasonable doubt. It is the view of this Court that the evidence adduced by the prosecution case was not strong enough to sustain conviction and sentence considering the length of the sentence which the offence attracts. The conviction of the Accused was undoubtedly unsafe.

26. I therefore quash the conviction and set aside the sentence imposed on the Appellant. He shall be set at liberty forthwith unless he is otherwise lawfully held. Those shall be the orders of this Court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF MARCH, 2019.

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R. NYAKUNDI

JUDGE