REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO. 01 OF 2019

SAMSON THUO MUTHONI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No. 84 of 2018 of B.M. OMBEWA Principal Magistrate at Marsabit delivered on 21st February, 2019)

JUDGMENT

The appellant was charged with the offence of trafficking 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 are that the appellant on the 10th day of February 2018 at Merille Police Barrier along Marsabit Isiolo road within Marsabit County was found trafficking by transporting 20kgs and 19 sticks of Narcotic drugs (bhang) with street value at ksh.600,000/= in a motor vehicle registration number KCN 809E Toyota Probox which was not in medicinal preparation form.

The trial Court convicted the appellant and sentenced him to pay a fine of Kshs.1,800,000 and in addition to serve twenty five (25) years imprisonment. The grounds of appeal are THAT:

1. ***That the appellant pleaded not guilty before the trial Magistrate.***

2. ***That the learned trial magistrate erred in law and facts in failing to make a finding that the prosecution witnesses tendered uncorroborated and contradictory evidence.***

3. ***That the trial suffers some procedural irregularities***,

4. ***That despite being a first offender before any court the trial magistrate passed a sentence that was hash and excessive.***

5. ***That the trial court refused to consider the mitigation.***

6. ***That the magistrate who pronounced the judgement did not give adequate consideration to the evidence to the of the defense.***

Mr. Kiogora appeared for the appellant. Counsel maintain that the prosecution evidence is both contradictory and uncorroborated. There are procedural irregularities. **Section 74A** of the Narcotic Drugs Act was not complied with. The Government analyst report was prepared in the absence of the appellant. This is contrary to rule 16(i) of the Narcotic Act Rules. The rule requires that the accused be present when analysis is being done.

It is further submitted that the charge sheet was defective. The particulars of the offence are that the appellant transported 20kgs of bhang. No certificate or report was produced to ascertain the particulars on the charge sheet. The offence occurred on 10th February, 2018 while PW4, the Government analyst received the exhibits on 26.2.2018 which is almost one month later and by then the appellant had already been charged. Counsel contend that the charge had been predetermined as no analysis had been made Contrary to rule 16. The analysis report was signed on 27.7.2018 after all other witnesses had testified. The exhibits where not produced. No civilian witness testified. The appellant's defence was not considered.

Mr. Ochieng, prosecution Counsel, opposed the appeal. Counsel contend that three Police officers testified for the Prosecution. They are all Police officers. The evidence is cogent, and flawless. The absence of the appellant at the time of the anlaysis is not fatal. This was observed by the trial court. The delay to compile the analysis report was due to pressure of work on the part of the Government analyst. This did not prejudice the appellant. All the exhibits were produced by the investigation officer. The appellant admitted that the items were found in his car but belonged to a third party. The sentence is lawful but the court has the discretion to review it.

This is a first appeal. The Court has to evaluate the evidence afresh and make its own conclusion. Four witnesses testified for the prosecution. **PW 1 PC. GIDEON ROTICH** was based at the Laisamis Police station. On 10.2.2018 he was at the station when he received a call from Corporal Hassan from the Directorate of Criminal Investigation (DCI) informing him that he had information that there was a vehicle ferrying bhang. Together with other colleagues they went to the Merille barrier point. A Probox motor vehicle registration number KCN 809E driven by the appellant had been stopped. It had three sacks of charcoal in the boot. They inserted a sharp object into the sacks and detected that there was bhang inside. The appellant was arrested and taken to Laisamis Police station. The sacks were opened and 4 bales of bang each weighing about 20kgs were recovered. The appellant was also searched and 19 sticks of bhang were recovered from his pockets. The appellant informed them that he was alone in the vehicle.

PW2 Corporal LOTOLO LEYONAI JOASH was attached to the Laisamis Police station. On 10.2.2018 he was at the Merille barrier with colleagues. At but 10.30am he received a call from Corporal Hassan who informed him that there was a vehicle heading towards Isiolo direction carrying contraband goods. They were asked to detain the vehicle. They were given the registration number of the vehicle as KCN 809E Toyota Probox. It is PW2's evidence that the vehicle approached the barrier section at Merille and they stopped it. There was only one occupant who was the driver. The appellant opened the boot and they found three sacks of charcoal. PW1, Corporal Hassan and PC Mohamed arrived at the scene. PW2 inserted a road into the sacks and they found greenish substance which they suspected to be cannabis sativa. The appellant was arrested and taken to Laisamis Police Station. One sack was found to have two bundles of about 5kg each of bhang while the other two sacks contained one similar bundle each. The appellant was searched and 19 rolls of bhang were recovered from his trouser pocket.

PW3 Chief Inspector of Police PETER MAMU investigated the case together with **Corporal Hassan**. On 10.2.2018 at between 9-10a.m he received a call from the County Criminal Investigations officer (CCIO) Mr. Kisalle informing him that a motor vehicle registration number KCN 809E was suspected of ferrying bhang. PW3 called Corporal Hassan and asked him to notify the Police officers at Merille road block. The vehicle was intercepted and taken to the Laisamis Police station. There were three sacks of charcoal in the vehicle. They recovered four bundles of bhang each weighing about 5kgs. An exhibit memo was prepared and sent to the Government analyst. The four bales were sent to the Government Chemist for analysis. It was confirmed that the substance was cannabis sativa. The appellant was charged with the offence.

PW4 JAMES MICHAEL MEDIMO works with the Government chemist in Nairobi. He is a gazetted Government Analyst. On 26.2.2018 he received from PC Leonard Kizito four bundles weighing 20kgs together with an exhibit memo. The substance was analysed and found to be cannabis, a narcotic drug under the Act. PW4 signed his report on 26.7.2018.

The appellant gave sworn evidence. On 10.2.2018 he was travelling from Moyale. He was alone in his motor vehicle number KCN 809E, Toyota Probox. He had gone to Moyle on 8.2.2018 to supply vegetable, potatoes and mangoes. He reached the Turbi road block and was stopped. The police asked him to assist one of their colleagues who was travelling to Isiolo. He was told the Police officer he was to assist had charcoal. He had three sacks of charcoal. They travelled well upto the Merille road block. He told the Police that he was carrying charcoal. He was arrested while the Police officer he was carrying in his vehicle disappeared. He was arrested and taken to Laisamis Police Station. Police officers pierced the sacks. He informed the Police that he was with a Police officer by the name corporal Musa from Turbi. The Police officer had left his coat in the vehicle and 19 sticks of bhang were recovered from the coat. Corporal Musa had told the appellant that he was going home and was ferrying the charcoal to his wife. He did not have an opportunity to take the bhang for analysis. It was about 10.00an when the incident occurred.

Section 74A (1) and (2) of the Narcotic Drugs and Psychotropic Substance (Control) Act, 1994 states as follows:-

> **74A Procedure upon seizure of narcotic drugs**
>
> **(1) Where any narcotic drug or psychotropic substance has been seized and is to be used in evidence, the Commissioner of Police and the Director of Medical Services or a Police or a Medical officer respectively authorized in writing by either of them for the purposes of this Act therein referred to as "the authorized officers") shall, where practicable in the presence of –**
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> > **(a) The person intended to be charged in relation to the drugs (in this section referred to as "the accused person"):**
> >
> > **(b) A designated analyst;**
> >
> > **(c) The advocate (if any) representing the accused person; and**
> >
> > **(d) The analyst, if any, appointed by the accused person (in this section referred to as "the other analyst), weigh the whole amount seized, and thereafter the designated analyst shall take and weigh one or more samples of such narcotic drug or psychotropic substance and take away such sample or samples for the purposes of analys ing and identifying the same.**
>
> **(2) After analysis and identification of the sample or samples taken under subsection (1), the same shall be returned to the authorized officers together with the designated analyst's certificate for production at the trial of the accused person.**

Rule 16 of the Narcotic Drugs Rules states as follows:

> **Persons to be charged entitled to have sample analysed**
>
> **(1) Where— a person is or is intended to be charged with**

(a) an offence in relation to a seized substance;

(b) evidence of that substance is to be used in proceedings against that person in respect of that offence;

(c) the seized substance, less any minimum amount and any samples, has been destroyed pursuant to the Act or these Regulations;

(d) weighing, sampling, analysis and destruction of the whole of the seized substance cannot be carried out in relation to that person under section 74A of the Act, because at the time, that person has not yet been identified or located, or if so identified and located the person is not in Kenya, that person shall, when ultimately arrested and charged, be entitled to have a sample or samples that provide a true representation of the nature of the substance taken and analysed, <u>at his own cost, by an analyst chosen by him, if there is a sufficient quantity of the seized substance remaining in the custody of the Seizures Registrar to enable the sample or samples to be analysed</u>.(emphasis added**)**

(2) A police officer shall make all reasonable attempts to serve on each person referred to in paragraph (1), notice of his entitlement under paragraph (1) to have a sample or samples of the seized substance taken and analysed at that person's own cost.

(3)A person referred to in this regulation may apply in writing to the Seizures Registrar for the release, into the custody of an analyst appointed by him of a sample or samples of the seized substance.

The totality of submissions by counsel for the appellant is that the law relating to the offence was not complied with before the appellant was charged in court. Further , the charges were preferred against the appellant even before the Government analysist's report had determined that what was alleged to have been recovered from the appellant was cannabis sativa (bhang).

Under section 74A(1), the recovered drugs are to be weighed in the presence of the person to be charged where it is practicable to do so. Thereafter an analyst is supposed to take away samples for purposes of analysis and identification of the recovered items. In my view it is quite impracticable to implement section 74A in relation to the requirement that an analyst be present whenever suspected drugs are being weighed and samples taken for analysis. This calls for analysts being present in every Police station. That is why section 74A uses the words "**where practicable**". It is not practicable to call an analyst to a Police station for purposes of weighing and taking samples of the suspected drugs. The Government analysts are trained for analyzing and identifying the nature of the suspected drug. The Police have the duty of taking samples to the Government analyst just like in other cases for purposes of examination. The expenses involved in calling an analyst to a Police station for purposes of complying with section 74A(1) can be prohibitive. It is illogical to summon a Government analyst to go to a Police station located over 50km away only to weigh and take sample of a single roll of bhang. Given the many cases involving drugs, it is not possible for Government analyst to attend the weighing of recovered drugs exercise and taking of samples. In some cases the suspects ran away and are arrested after some time. Under such circumstances it cannot be practical to weigh the drugs in the presence of the suspect. The law allows the suspect under rule 16 to appoint his own analyst and at his own costs have some samples of the recovered drugs analysed. The law does not require the presence of the suspect during the analysis.

Under section 74A(2), the samples are to be taken away for analysis as provided under section 74 A(1) and the sample is to be returned to the authorized officer for production together with the analysis's certificate. Section 74 A(2) does not require that the accused be present when the Government analyst is conducting his analysis. If the suspect has to be present, then all those who are charged with drug related offences have to be transported to the Government chemist for purposes of witnessing how the analysis is done. That is not the intention of the law. Do such people have the technical knowledge of understanding the analysis process?

Similarly, the contention that the appellant was arraigned in court and witnesses testified even before the analysis results were out cannot be a good ground of appeal. Apart from chemical analysis, the Police through experience know through physical experience what cannabis sativa is. The Police are entitled to have the suspect charged in court while the sample is being analyzed. Article 49(f) of the Constitution provides for the right of an arrested person to be brought before the court as soon as reasonably possible but not later than twenty four hours after being arrested unless the 24 hours fall outside the ordinary court hours. How practicable is it to have the drug sample analyzed and a certificate issued confirming the identity of the drug before one is charged? The practical way out is to comply with the constitution and have the suspect charged in Court while awaiting the Government analyst's report. Should the report prove that the suspected substance is not a drug under the Act then the charges can be withdrawn.

Mr. Kiogora contends that the charge sheet is defective. The appellant was charged under Section 4(a) of the Act. Section 4 states as follows:

4. Penalty for trafficking in narcotic drugs, etc.

Any person who trafficks 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 any narcotic 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 the greater, and, in addition, to imprisonment for life; or

(b) In respect of any substance other than a narcotic drug or psychotropic substance, which he represents or holds out to be a narcotic drug or psychotropic substance to a fine of five hundred thousand shillings, and, in addition, to imprisonment for a term not exceeding twenty years.

Section 4 provides for the offence of trafficking in any narcotic drug as well as the penalty for the offence. Section 2 interprets what

trafficking means. It is not proper to have one charged under the interpretation section. The particulars of the offence are clearly stated in the charge sheet. The charge sheet is therefore not defective.

The prosecution evidence is that the accused was stopped at the Merile road block. His car was searched and three sacks of charcoal were found in the boot. The Police inserted something in the sacks and found what they suspected to be cannabis. The appellant was alone in the vehicle. The substance was weighed and found to be about 20kgs. Samples were taken to the Government analyst and was found to be cannabis.

In his defense, the appellant concedes that he had three sacks in the boot. His main contention is that the drugs belonged to a Police officer by the name Corporal Musa who disappeared at the Merile road block. The 19 sticks of bhang were also recovered from Copl Musa's coat. PW2 testified that the appellant was alone in the car. The appellant was represented by counsel before the trial court and the issue of Copl Musa only emerged during the defence hearing. I am satisfied that the accused was found in possession of the drugs. The drugs were analysed and found to be cannabis. The prosecution did prove its case beyond reasonable doubt. The conviction is proper.

Mr. Kiogora contends that the sentence is excessive. The Probation officer's report by Mr. Sales Tuye was filed in Court on 25.2.2019. The report indicate that the appellant is a first offender and recommends the imposition of a fine. The appellant is 52 years old. He has a wife and seven (7) children. One of the children is in class one.

Section 4(c) of the Narcotic Drugs and Psychotropic Substance (Control) Act provides for a punishment of a fine of one million shillings or three times the market value of the narcotic drugs as well as life imprisonment. The operating word under section 4 is "**liable**". The effect of this word is that the sentence is not mandatory. It is not mandatory that the court imposes life imprison or load a fine in addition to the prison sentence. The court can sentence the accused to pay a fine and in default serve a given prison sentence. It can as well imprison the accused without an option of a fine and also without penalizing the convict to pay one third the value of the narcotic drugs.

The pre-sentence report indicate that the applicant is a first offender. He has a wife and six children. He was sentenced on 25.2.2019. He has been in custody from that time to date. The recovered drugs were estimated to have a street value of Ksh.600,000. The trial Court imposed life imprisonment sentence. I do find that the life imprisonment sentence is quite excessive given the circumstances of the case. I do set aside the sentence and replace it with the period already served and, in addition, a fine of Ksh.50,000/= in default to serve an additional three months imprisonment.

In the end, the appeal on conviction fails. The appeal on sentence is allowed. The life imprisonment sentence is hereby set aside and replaced with the period already served. In addition to the period served the appellant shall pay a fine of Ksh.50,000 in default to serve a further three months prison sentence.

Dated, Signed and Delivered at Marsabit this 25th day of June 2019

S. CHITEMBWE

JUDGE