



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CRIMINAL APPEAL NO.5 AND 6 OF 2019

ABDULLAHINASSIR SAID CHUTE.....1ST APPELLANT

IBRAHIM ADAN JALDESA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from a conviction and sentence by Hon. MBAYAKI WAFULA Senior Resident Magistrate Marsabit Criminal Case No.244 of 2017 delivered on 27.5.2019)

JUDGMENT

The two appellants were charged with the offence of trafficking narcotic drugs Contrary to Section 4 (a) of the Narcotic and Psychotropic Substance Control Act No.4 of 1994. The particulars of the offence are that the two appellants on the 11th May, 2017 along the Moyale-Marsabit road jointly with others not before Court were found trafficking in bhang to wit (15kg) of street value of Ksh.1.5M by transporting in Motor cycle registration number KMDW 775C Ranger model in contravention of the said Act.

The trial court convicted the appellant to 10 years imprisonment and each to pay a fine of Ksh.4.5million. The 1st appellant was represented by Mr. Kelvin Nyanyire advocate. His ground of appeal are:-

- 1) THAT the trial court erred in law and fact by admitting the evidence of an intermediary without considering that the same was bad in law.**
- 2) That the sentence imposed is too harsh and excessive as to amount to a miscarriage of justice, and that the court acted upon wrong principle.**
- 3) That, the learned trial magistrate erred in law and facts by taking into consideration evidence by the prosecution witnesses thereby leading to a miscarriage of justice.**
- 4) That the prosecution did not prove its case beyond reasonable doubt.**
- 5) That the trial magistrate erred in law and in fact by failing to consider the defence by the appellant**

The Mr. Kiogora Ariithi appeared for the 2nd appellant **IBRAHIM ADAN JALDESA**. The grounds of appeal are: -

- 1) THAT the learned trial magistrate erred in law and fact by convicting the appellant for the offence of trafficking Narcotic Drug Contrary to Section 4 (a) of the Narcotic and Psychotropic Substance Control Act No. 4 of 1994 when there was no sufficient evidence before him to sustain the charge and conviction.**
- 2) THAT, The learned trial magistrate erred in law by failing to find that no expert was called by the prosecution to testify in court and establish the alleged value of the drugs.**
- 3) THAT, The learned trial magistrate erred in law and fact by completely failing to find that the prosecution did not prove its case against the appellants beyond reasonable doubt as required by the law and further failed to consider the contradictory evidence of the prosecution witness.**

4) THAT The learned trial magistrate erred in law and fact by imposing a custodial sentence against the appellant despite having ordered the probation officer to prepare a pre-sentence report which was favorable to the appellant but the court failed to sufficiently consider and rely on the same.

5) THAT The learned trial magistrate erred in law and fact in that he failed to find that the police officers intentionally shot the appellant and as a cover up they implicated the appellant with the subject matter, drugs.

6) THAT The learned trial magistrate erred in law and fact in that he failed to consider the omission by the police officers to book the appellant at the police station immediately after arresting him in an attempt to cover their wrongful acts.

7) THAT The learned trial magistrate erred in law and fact by completely disregarding the appellant's defence and convicted him on unreliable evidence.

8) THAT The learned trial magistrate erred in law and fact in that he failed to consider the appellant's submissions and the judicial authorities which were cited.

9) THAT The learned trial magistrate erred in law and fact by imposing a harsh and excessive sentence against the appellant when the value of the alleged drugs was not availed to court.

10) THAT The judgement and conviction of the appellant by the learned trial magistrate is bad in law and the same is against the weight of evidence on record.

11) THAT The learned trial magistrate erred in law by failing to consider and give the appellant an alternative non-custodial sentence.

Mr. Kiogora argued all the grounds of appeal jointly. It is submitted that the drugs were not found with appellants. Apart from PW5, the rest of the witness are Police officers. It came out during the hearing that the police shot at the appellant and P3 forms were produced. The police then implicated them with the drugs. Chief Inspector NZIOKO who was a witness testified that no inventory on recovery was done. Section 74A of the anti-Narcotic Act was not complied with. The section is couched in mandatory terms. The appellants were hospitalized. Corporal KITANYI only did the exhibit memo to the government chemist but did not do an inventory. The appellants were not accorded the right to know their charges contrary to Article 49 of the constitution. Initially, the charge was of 30 kilograms of drugs. The charge sheet was amended and it was reduced to 15kgs. No expert was called to confirm that figure of 15 kilograms or the weight. Counsel further submit that the trial court did not consider the defense evidence including their submissions. The court called for a probation report. The report favored the appellant but it was ignored. It is contended that the prosecution did not prove its case beyond reasonable doubt. Counsel relies on the case of **SAMSON THUO MUTHONI VERSUS REPUBLIC, MARSABIT CRIMINAL APPEAL NO. 1 OF 2019**, the case of **BILOW ALI GURACHA VS REPUBLIC, MARSABIT CRIMINAL APPEAL NO. 26 OF 2015**.

Mr. Nyenyire associated himself with the submissions Mr. Kiogora. It is submitted that under Section 74A samples of the drugs were to be analyzed in the presence of the appellants or their representative. No notice of seizure was given contrary to the Provisions of Section 77 which is also couched in mandatory terms. Further, Section 86 of the Act requires that valuation be done and a certificate be produced. The value of the drugs could have been over stated. The appellants rights under Articles 49 and 50 of the constitution were violated.

Mr. Mwangangi, prosecution counsel, opposed the appeal. Counsel maintains that there was no ill will or malice that necessitated the shooting by the police. There is no evidence to that effect. There is no dispute that sample of the drugs were forwarded to the government analyst. At that time the drugs were weigh again and found to be lower than the initial weight. The wording under section 74 is that it should be practical to weight the drugs. If it is not practicable then the need is obviated. It is true that there is no valuation certificate. However, the street value is given. There is no fixed way and means of determining the value. The appellants defense was merely a denial. It is the trial Court which determine the sentence. The Court has discretion to follow a probation officers report which is merely a guide and the court cannot be bound by it. Section 4A of the Act gives the guidelines on the sentencing. The sentence is within those guidelines.

This is a first appeal and the court has to re-evaluate and re-assess the evidence afresh before drawing its own conclusion. The prosecution case is grounded on the evidence of six witnesses. **PW1 PC DANIEL RONO** was attached to the Turbi police station. On 11/5/17 at about 6.00 pm he was at the Turbi barrier with other officers. They were given instructions by **CHIEF INSPECTOR PETER NZIOKA(PW4)** that they should search motor bikes from Moyale as they were being used to carry aliens, drugs and illegal firearms. At about 9.25pm a motor bike that was behind a lorry refuse to stop. It had the rider and two passengers. A Police vehicle was dispatched with some police officers and followed the motor bike. They apprehended the motor bike about 30km away. The motor bike had a Kenyan rider and two foreigners. While at the scene with the three suspects, **PC MOLU** called and informed them that another motor bike with one passenger had failed to stop and was carrying a consignment at the back. They blocked the road using the station motor vehicle. The motor bike appeared after 25 minutes and they signaled it to stop. The rider swerved and did not stop. The OCS had his own private vehicle. Toyota mark 2 and they left other police officers in the GK vehicle together with the three suspects. They chased the second motor bike, Ranger registration no KMDW 775C which had the two appellant. They were carrying two sacks. One had two yellow bundles while the second sack had one bundle. They chased them for about 10km. He was ordered to shoot in the air to try and stop them. He shot twice in the air but the appellants did not stop. He again shot twice aiming at the tires aiming to deflect them. The motor bike moved for about 50metres and stopped. The 1st appellant could not disengaged himself from the motor bike but the 2nd appellant had disengaged himself. Each of the appellants were bleeding. The 1st appellant was bleeding profusely and they administered first Aid. The appellants told them that they were carrying 30 kilograms of bhang. He tore the sacks and confirmed the consignment was bhang. The appellants were arrested and taken to Turbi police Station. They were again taken to Sololo mission hospital where they were admitted. The appellants were later charged with the offence.

PW2 APC LEONARD KABERIA was also attached to the Turbi police Station. On the 11/5/2017 he was with PW1 at the Turbi barrier. They saw the first Motor bike which refused to stop and Police officers followed it using a GK vehicle. The second Motor bike appeared after about 10 minutes and defied a signal to stop. The two were carrying two sacks which had the drugs.

PW3 PC MICHAEL MOLU who was also attached at Turbi Police Station. On the 11/5/17 at about 6.00 pm he was at the Turbi road block with PW1, PW2 and other officers. At about 9.30 pm a lorry approached from Moyale followed by a motor bike. The motor bike passed in between the barrier and failed to stop. The OCS dispatched the station land cruiser to pursue the motorbike. Shortly another motor bike with two people refused to stop while carrying a consignment. He called PW1 and informed him that another motor bike had defied signal to stop and was heading towards Marsabit. He remained at the road block and later saw five civilians two of whom were aliens being brought by the station Vehicle. Two of them had injuries. The five suspect were arrested and two of them were the appellants and the aliens were charged in court the following day.

PW4 CI PETER NZIOKO was the OCS Turbi Police station. He deployed Police officers at Turbi road block on the 11/5/17. At about 9.30pm PW1 informed him that a motor bike with three people had failed to stop. He dispatched the station Land Rover to pursue them. He followed them in his own personal vehicle. PW1 called to inform him that they had arrested the three suspects. He caught up with them and the rider told him that he was ferrying the aliens to Marsabit from Moyale. While they were with the three suspects, they were informed that another motor bike had defied signal to stop. After about 25 minutes the said motor bike approached. And they flagged it down using a torch but it sped through the barricade. Together with **PW1** they pursued the motorbike using his personal vehicle. PW1 fired two warning shots in the air but the rider did not stop. Then PW1 aimed at the tyres. The motorcycle stopped. The rider was badly injured. They administered first aid and called for the station vehicle. There were two sacks on the Motor cycle with three bundles of bhang. The two suspects were taken to Sololo Mission Hospital. They were later charged.

PW5 GEOFERY MOGAKA ANYONA is a government analyst. On 12/6/2017 he received three yellow bags from **CORPORAL KIPLAGAT KEITANYI** of Turbi Police station. His task was to ascertain whether the samples were cannabis. His analysis confide that the samples were indeed cannabis under the Narcotic and Psychotropic Substances Act. The report was signed by his colleague.

PW6 SGT KIPLAGAT KAITANYI was stationed at Turbi Police Station and investigated the case. He was not at the road block on the 11/5/17. He took possession of the exhibits. The 1st appellant was transferred to Kiirua hospital for specialized treatment while 2nd appellant remained at the Police Station. He weighed the consignment of the three yellow parcel and found that it was 15 kilograms with street value of Kshs.1.5Million. The 1st appellant escaped from Police custody while undergoing treatment at Kiirua. A warrant of arrest was issued but the appellant appeared by himself. He took the samples to the government analyst and they were confirmed to be cannabis sativa(bhang). The appellants were charged with the offence.

DW1 DR. DUB HALAKE is attached to the Marsabit Referral Hospital. He examined the 2nd appellant **IBRAHIM ADAN JALDESA** and filled a P3 form on 16/5/17. The patient had a gunshot wound on the right thigh above the knee.

DW2 ABDULLAHI ADAN NASSIR SAID is the 1st appellant. He is a scrap metal dealer. He knows the 2nd appellant. On the 11/5/2017 he had gone for a wedding in Moyale and had given the 2nd appellant lift on his motor cycle. They were not carrying anything. They reached Turbi Police road block at about 2.30pm and saw police officers. Near Kambi ya Nyoka a saloon vehicle approached from behind and someone shot at them. He was pushed off the road and managed to stop the motor cycle. Two civilian Police officers approached them. He was not able to move his right leg and the 2nd appellant was also limping. The Police searched and asked them to produce the guns they had. They responded that they had no guns. The two civilian officers called other Police officers and a land cruiser with two other officers arrived. He fainted and later found himself at Sololo mission hospital. Nothing was found on them and he does not know the source of the drugs that were produced. The case is a fabrication and is a scapegoat because the police shot at them. Their phones and documents were taken away. They tracked the phone to a police officer but were asked to ignore the case because the officer could not be charged. They were shot at allegedly because they were transporting firearms, ammunition and aliens.

DW3 IBRAHIM ADAN JALDESA, is the 2nd appellant. He too attended a wedding in Moyale on 11/5/2017. The 1st appellant is his former classmate and gave him a lift. They had no luggage. On their way to Marsabit past Turbi but before Bubisa police Officers in private vehicle overtook them and without any warning to stop shot at them. The motor bike veered off the road for about 50metres. The two police officers were in civilian clothes. They started demanding that they hand over the gun. A Police vehicle went to the scene and they were taken to Turbi Police Station. They were later taken to Sololo mission hospital. He was later treated at Marsabit Referral Hospital and had a P3 form filled. He did not know where the drugs came from.

The prosecution Called a further **witness Chief TIMOTHY KIHARA** of Marsabit police Station. His evidence is that the P3 form for the 2nd appellant was not issued at the Marsabit Police Station.

The appeals mainly raises the issue as to whether the prosecution proved its case beyond reasonable doubt and if so whether the sentence is excessive. The Prosecution evidence is quite clear. It is that on the 11th of May, 2017 police officers were deployed at the Turbi road block along The Moyale – Marsabit road. PW4 who was the Officer Commanding Turbi Police Station (OCS) had information that motor bikes were being used to transport aliens, arms and ammunition. The Police officers at the road block had strict instructions to search all motor cycles.

It is the Prosecution case that at about 9.30pm one motor bike approached while hiding behind a lorry. It meandered in between the iron spikes and sped off while having the rider and two passengers. PW4 dispatched the station vehicle and he followed behind in his personal vehicle. The three suspects were apprehended about 30 kilometres ahead on their way towards Marsabit. Two were aliens. Another motor bike passed the road block without stopping while carrying a consignment. This is the motor bike that was carrying the appellants. Since PW4 and his team were already ahead, they were informed and decided to block the road using the station vehicle. The motor bike managed to escape. PW1 and PW4 pursued them leading to the shooting and arrest of the appellant.

The defence evidence is that it is true the appellants were travelling along the Moyale-Marsabit road. They were from a wedding in Moyale. After passing the Turbi Police road block, two Police officers in civilian clothes appeared in a private vehicle. The Police overtook them and started shooting at them. They were injured and were taken to Turbi mission hospital.

Counsels for the appellants contend that section 74A of the Act was not complied with. Section 74A(1)(2) and (3) 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 (herein referred to as “the authorised officers”) shall, where practicable in the presence of

(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 purpose of analysing 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.

(3) Upon receipt of the designated analyst’s certificate and the samples analysed in accordance with the foregoing subsections the authorized officers shall, where the drug is found to be a narcotic drug or psychotropic substance within the meaning of this Act, arrange with a magistrate for the immediate destruction by such means as shall be deemed to be appropriate of the whole amount seized (less the sample or samples taken as evidence at any subsequent trial or any contemplated trial particularly where the accused person’s identity is not yet known or the accused person is outside the jurisdiction of Kenya at the time of taking such samples).

The circumstances of the case are that the incident occurred at around 9.30pm. The appellants were injured and were bleeding. They were both admitted that night at the Turbi mission hospital. The record shows that the second appellant appeared in Court on 15.6.2017 and took plea. The Court was informed that the 1st appellant had escaped while undergoing treatment at Meru hospital. On 20.7.2017 the 1st appellant appeared in court and the warrant of arrest was lifted.

Given the circumstance of the case I do find that it was not practicable to weigh the drugs either at the scene or at the Police station in the presence of the appellants or their representative. The Police did their best and took the appellants to hospital for treatment. In my opinion, failure to weigh drugs or issue a certificate cannot be a licence to automatic acquittal. The bottom line is whether drugs were found and whether there is evidence to prove that those drugs fall within the Narcotic and Psychotropic Substance Control Act No.4 of 1994. This proof is ordinarily established through analysis by the Government chemist. I do find that this ground of Appeal fails.

Mr. Nyenyire made reference to Section 77 of Act number 4 of 1994. It is contended that no notice of seizure was issued. Section 77 (1) of the Act states as follows:-

Where any narcotic drug or psychotropic substance, motor vehicle, aircraft, ship, carriage or other conveyance or any other article or thing liable for forfeiture is seized under this Act, notice of the seizure shall be given by the person seizing the same as soon as possible to the owner or to the person in charge thereof if such person is not the owner.

Under section 77 (2) the notice under section 77(1) is to be given to the owner or the person in charge. The Section is in relation to Seizure of drugs and the chattel that was being used to carry the drugs. This can be a motor vehicle, ship, aircraft or the motor cycle in this case. The presumption is that once the drugs have been taken in as exhibits, they have been seized. Although a notice of seizure is required under Section 77, lack of notice does not disprove the seizure of drugs. All what the court should do is consider the sequence of events and the facts of the case. If the claim is fabricated and it appears that no such drugs were seized then the Court will deal with the specific case according to the evidence adduced before it. One cannot seek to be acquitted simply because he was not served with a notice of seizure of the drugs.

The appellants mainly contend that they were simply shot at and told to produce guns. The prosecution evidence is that the appellants defied a signal to stop and sped off. Despite PW1 shooting on the air, the appellants defied and kept on speeding away leading to the shooting of the motor bike.

Counsels have raised the issue of the weight of the drugs. According to PW1 it is the appellants who told the Police that the consignment weighed 30kgs. It is not clear why the Police did not weigh the consignment themselves to confirm the weight before preparing the charge sheet. However, there is evidence that the drugs were later weighed and found to be 15 kilograms. PW6 did testify that he weighed the contents and found them to be 15 kilograms. The weight is crucial as it determines the value of the drugs. The fines imposed by the courts are pegged on the value of the drugs. The more the weight the more the value and in turn the more the fine.

From the evidence on record, I am satisfied that the prosecution proved its case beyond reasonable doubt. There is no reason as to why the Police would shoot at the appellants. The appellants were not the only ones on the road. This is a public road. The first motor bike passed through the road block. It was pursued and no shooting occurred. I do find that the appellants were carrying the drugs and knew that if they were to stop voluntarily their drugs would have been recovered. They tried to escape but were not successful. The police had to do their best

to apprehend the appellants as they did not know why the appellants were escaping and what they were carrying. It could have turned out that what was being carried was firearms. The Police had to apprehend the appellants and I do salute them for their effort. I do find that the conviction is proper.

The next issue is the sentence. It is submitted that the trial Court called for pre-sentencing reports which were favourable to the appellants but ignored them. The sentence is being attacked as excessive. Each appellant is serving ten(10) years imprisonment and is expected to pay a fine of Ksh.4.5.million.

The probation officer's report for the 1st appellant indicate that he is 29 years old. The report is dated 3.6.2019. His parents do business in Marsabit and he comes from Mountain location. He completed class eight. He joined form one but dropped out. He started engaging in scrap metal business. He is also in the business of buying and selling goats. He is married and his wife was expectant. He was limping from the gunshot wound. He does not admit committing the offence. He has no criminal records. He pleaded for leniency. The Probation officer found him suitable for non-custodial sentence.

The second appellant Ibrahim Adan Jaldesa is 28 years old. He owns electronic shop at complex building in Marsabit and is the chairman of Nanyuki cab stage. He finished form four in 2011. He has ulcers and has eye sight problems. The society returned favourable report on both appellants. The appellant is a first offender and come from Shauri Yako village. The Probation officer recommended a non-custodial sentence.

Section 4(a) of Act No.4 of 1994 states as follows:-

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.

There has been tendency of Courts imposing prison sentence and penalising convicts to pay fines at the same time. Assuming the appellants serve the ten (10) years imprisonment, will they be held in custody until they pay the fine of Ksh.4.5. million each. Where will they get the money to pay the fine while they are in prison. There are situations where the court is of the view that the convict is a drug dealer and must pay fine. There are cases where the court should only impose a prison sentence without the fine or simply impose a prison sentence in default of payment of a given fine. It is equally proper to impose both fine and prison sentence but this should not be seen as mandatory. Serving a Prison sentence is one form of punishment and topping it up with hefty fines is tantamount to cutting into pieces a dead body.

It is also important to have a proper valuation of the drugs as the fine depends on the value of the drugs. This valuation normally present the proper value of the drugs. In my view the one million shilling fine under Section 4 of the Act undermines the powers of the Court to impose appropriate and proportionate sentence. If it is followed blindly even those convicted of being in possession of two rolls of bhang valued at Ksh.1000 will have to be sentenced to a fine of Kenya shillings One million because that amount is greater than Kshs.3000 being three times the value of Ksh.1000. This provision has made trial courts impose Kenya shillings one million fine as the standard minimum fine even for minor drug offences leading to several appeals to the High Court. Trial Courts should be at liberty to impose the sentence they deem appropriate in any given case. The one million fine under section 4(a) is not mandatory the wording of that section notwithstanding. The word "**liable**" in Section 4 makes the sum of Kenya shillings one million to be the maximum in case the value of the drugs is less than that amount.

Given the fact that the appellants were shot at during their arrest and suffered injuries, I do find that the sentence imposed by the trial Court is excessive. I do agree with Mr. Mwangangi that the court is not bound by the Probation officer's report. However, where there is possibility of the accused being reformed through the supervision of the probation officer, the Court should, depending on the circumstances of the case, allow the Probation department take over the convict and make him/her a better person in society. Not all convicts should end up serving prison sentences. Serving on probation is also part of sentencing and this does not in any way belittle the efforts of Police officers in apprehending and charging criminals in courts. A conviction is one thing and the sentence to be served is another totally different aspect of the Justice system.

I do hereby set aside the sentence imposed by the trial Court. The appellants were convicted on 10.6.2019 and have been in custody for over three months. I do order that apart from the three months imprisonment, each of the appellants shall serve six(6) months Probation under the Supervision of the Marsabit Probations officer. The appellants shall be released to the Probation Officer and are hereby warned that should they fail to abide by the probation terms they will be called upon to complete their sentence in Prison.

DATED, SIGNED AND DELIVERED AT MARSABIT THIS 24TH DAY OF SEPTEMBER, 2019

S. CHITEMBWE

JUDGE