



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 10 OF 2016

DENNIS ODHIAMBO SUNDIA.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal from the Judgment of Hon. Y.A. Shikanda, Senior Resident Magistrate, delivered on 1st April, 2016 in Malindi Chief Magistrate's Court Criminal case No. 20 of 2016)

JUDGMENT

1. The appellant, Dennis Odhiambo 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.
2. The particulars of the offence were that on the 10th January, 2016 at 1230 hrs at Matsangoni roadblock in Malindi sub-county within Kilifi County, was found conveying cannabis to wit 200 rolls (6.9 kgs) with a street value of Kshs. 20,000/= on board motor vehicle christened "Sabaki Coach" registration No. KCE 454T in contravention of the said Act.
3. The Hon. Magistrate found the appellant guilty of the offence he was charged with and convicted him of the same. He was sentenced to serve 8 years imprisonment. He was also ordered to pay a fine of Kshs. 20,000/= and in default thereof, he would serve a further 4 months in prison.
4. Although the typed proceedings indicate that the appellant was sentenced to serve 3 years imprisonment, the handwritten proceedings give a sentence of 8 years imprisonment. This court will take the sentence in the handwritten proceedings to be the applicable one.
5. The appellant being dissatisfied with the said sentence filed a petition of appeal on 12th April, 2016. The court granted leave to the appellant to amend his grounds of appeal on 17th April, 2018. He also tendered his written submissions to the court.
6. The respondent filed a notice of cross-appeal on 19th January, 2018 which it withdrew on 17th April, 2018 for failure to serve the appellant.
7. The appellant raised the following amended grounds of appeal:-
 - (i) That the Learned Trial Magistrate erred in law and fact by failing to consider that the trial was a nullity for failure by the prosecution witnesses to comply with the provisions of Section 74(A) and 75(1) of the Narcotic Drugs and Psychotropic Substance and Control Act No. 4 of 1994; and
 - (ii) That the Learned Magistrate erred in law and fact by failing to consider that the prosecution witnesses failed to prove their case beyond reasonable doubt as required by the law contrary to Section 109 and 110 of the Evidence Act.
8. In his written submissions the appellant expounded on the contravention of the provisions of Section 74(A) of the Narcotic Drugs and Psychotropic Substances Control Act, No. 4 of 1994 (the Act) by stating that seized narcotic drugs or psychotropic substances are supposed to be weighed and samples removed therefrom in the presence of an accused person, a designated analyst and an Advocate representing an accused person. It was submitted that in this case, the arresting officers were regular Police Officers and Military Police from the Kenya Defence Forces. It was contended that no seizure certificate was prepared containing all the items seized. It was argued that no Analyst was available to conduct the procedure under the provisions of Section 74(A) of the Act. The appellant relied on the case of **Kabibi Kalume Katsu vs Republic**, Mombasa High Court Appeal No. 90 of 2014 to emphasize on the importance of complying with the said provisions.

9. The appellant also submitted on the order issued for destruction of the drugs. It is this court's view that the said submission is not applicable as the order of the Hon. Magistrate was for the drugs to be destroyed if no appeal was lodged within the time required. The appellant was convicted on 1st April, 2016 and he lodged an appeal on 12th April, 2016 within the 14 days that set aside for filing an appeal.

10. The appellant stated that Dennis is a common name and therefore the fact that he had a receipt bearing the said name did not conclusively prove that he was the owner of the carton found containing the drugs. He further argued that the receipt in issue did not contain all the names on his "waiting identity card" serial No. [Particulars Withheld] The appellant submitted that he was not found in possession of the carton and that the evidence of PW1 who stated that the carton belonged to the appellant was that of a single witness.

11. It was contended that PW1's and PW3's evidence was at variance as to whether it was a battery charger which bore the name Dennis as stated by PW1 or whether it was a bus ticket that bore the said name as stated by PW3.

12. The appellant argued that the fact that the carton with narcotic drugs was found underneath the seat he had been sitting on does not mean that it belonged to him. He argued that any other passenger could have placed the luggage under the seat.

13. The appellant cited the case of **Abdallah Bin Wendoh and Another vs Republic** [1953] 20 EACA 166 to demonstrate the need for a court to warn itself of the dangers of convicting on the evidence of a single identifying witness. He submitted that the prosecution failed to prove its case beyond reasonable doubt and prayed for the appeal to be allowed.

14. The respondent filed its written submissions on 19th January, 2018 through Ms Mathangani, Prosecuting Counsel. The said Counsel analyzed the evidence tendered before the lower court against the appellant's defence and submitted that the prosecution proved that the appellant was trafficking in narcotic drugs by conveyance as seen by evidence of a series of bus tickets for Kisumu to Nairobi. It was submitted that in light of the evidence produced before the lower court, the particulars of the charge were properly framed, thus the charge sheet was not defective.

15. On failure by the prosecution to comply with the provisions of Section 74A of the Narcotic Drugs and Psychotropic Substances Control Act, the respondent's Counsel stated that the said provisions were fully complied with by the Investigating Officer. She cited the case of **Moses Banda Daniel vs Republic** [2010] eKLR where the Court of Appeal addressed the applicability of the said provisions.

ANALYSIS AND DETERMINATION

16. The duty of the first appellate court is to analyze and re-evaluate the evidence tendered before the lower court and to reach its own independent decision, bearing in mind that it neither saw nor heard the witnesses testify. In the case of **David Njuguna Wairimu vs. Republic** [2010] eKLR the Court of Appeal reiterated this duty as follows:-

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

17. The proceedings before the lower court are clear that the appellant was arrested at a road block at Matsangoni, that was under the control of Kenya Defence Forces (KDF) Officers and Kenya Police Officers. He was aboard motor vehicle registration No. KCE 454T that operates the Mombasa - Tana River route. At the said road block passengers were ordered to disembark from the bus with their luggage. According to evidence of PW1, a bag remained in the motor vehicle and no one claimed ownership of the same. PW2, PW3 and PW4 stated that some bags and carton remained in the bus. Passengers who had not picked their bags were asked to collect their bags but only 2 passengers did so. One bag and carton remained unclaimed.

18. It was the evidence of PW4 that PW1 pointed out the appellant herein as the owner of the luggage and that they had traveled in the same bus from Nairobi to Mombasa. The appellant on being asked about it denied that the luggage was his. On opening a side pocket of the bag, PW4 found a bus ticket for Prestige Classic Shuttle which bore the name Dennis for travel from Kisumu to Nairobi. He also found a waiting card for a national identity card bearing the name Dennis Odhiambo Sundia.

19. On the bag and carton being opened, rolls of dry plant material were recovered. These were tested by PW8, Yanya Hamisi Mangu, a Government Analyst who established that the plant material was cannabis. The appellant denied ownership of the bag and carton in which the cannabis was recovered. The evidence on record however shows that the appellant was in possession of the bag and carton that contained the cannabis. He had traveled with PW1 aboard Chania Prestige bus from Nairobi to Mombasa. PW4 on searching the bag that contained the cannabis found in a side pocket a bus ticket by Prestige Classic Shuttle in the name of Dennis who had travelled from Kisumu to Nairobi. A waiting card for a national identity card was also recovered in the same side pocket. It bore the name of Dennis Odhiambo Sundia. To corroborate the evidence that PW1 traveled with the appellant from Nairobi to Mombasa, PW5, Mary Njeri Mungai an Assistant Manager of the said company testified as PW5 and stated that on the request of a Police Officer from Malindi, She checked their manifest and confirmed the name Dennis was reflected thereon. He appeared as No. 6969 and had traveled from Nairobi to Mombasa on 9th January, 2016 aboard a Chania Prestige bus that left Nairobi at 8:30 p.m. On checking serial No. 6955 on their manifest as requested by the Police Officer, she found that it was registered in the name of Samuel (PW1). She therefore confirmed that the two passengers traveled in the same bus.

20. The evidence further revealed that PW1 told the Police that the bag and the carton belonged to the appellant, as they had taken the same Tuk Tuk from Sabasaba to the bus stage for Malindi buses. PW2 the Conductor of the bus confirmed that he assisted one passenger to carry a bag and a carton into the Sabaki Coach on 10th January, 2016. PW7, No. 83253 Cpl. Ezekiel Orodi was the Investigating Officer in this case. He produced the search certificate to show that the appellant was found in possession of the cannabis. He also produced the appellant's

waiting card for his identity card as well as the bus ticket that bore the name Dennis that was recovered in the bag that contained cannabis. PW7 also produced all the other exhibits save for the Government Analyst's report.

21. The appellant submitted that the provisions of Sections 74(A) and 75(1)(sic) of the Narcotic and Psychotropic Substances (Control) Act No. 4 of 1994 were not complied with, thus the trial was a nullity. Section 74A of the above Act states as follows:-

“(1) Where any narcotic drug or psychotropic substance has been seized and is to be used in evidence, the Commissioner of police and the Directors 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 authorized officers”) shall, in the presence of, where practicable –

(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.”

22. The Court of Appeal in **Moses Banda Daniel vs Republic** [2016] eKLR considered the said provisions and held that they would be more relevant where a large haul of drugs is concerned due to their value and that strong temptations are likely to occur thus the urge to interfere would be irresistible. The court in the said case stated thus:-

“We find for the purposes of Section 74A that it would not have been practicable to subject the drugs recovered from the appellant to that complex procedure involving a Magistrate, prosecutor, two analysts and an advocate. We come to the conclusion that section 74A was not violated.”

23. In this case the drugs recovered were 200 rolls of cannabis with a street value of Kshs. 20,000/=. It was not a large haul. The holding in the case of **Moses Banda Daniel vs Republic** (supra) with regard to the provisions of Section 74A of the Narcotic and Psychotropic substances Act therefore applies to the present appeal.

24. The appellant also made reference to the provisions of Section 75(1) of the Narcotic Drugs and Psychotropic Substances (Control) Act No 4 of 1994. The said provision is however non-existent. In the event that he intended to refer to Section 75 of the said Act, on storage of the property seized, in this instance, the narcotic drugs were stored safely and produced in court. The bus in which the drugs were being conveyed was seized and legally released to its owner, PW6, who proved to the Hon. Magistrate that he, the Driver and the Turn Boy of the bus were not aware that Narcotic drugs were being conveyed in the said bus. It is my finding that the Hon. Magistrate did not err by releasing the said bus to PW6.

25. The appellant challenged the inconsistency in the evidence of PW1 and PW3's evidence on whether what was recovered in the bag in issue was a battery charger bearing the name Dennis as stated by PW1, or if it was a bus ticket bearing the said name as stated by PW3. This court has considered the said variance and come to the conclusion that in the face of the strong evidence tendered by the prosecution, the said variance cannot be resolved in favour of the appellant.

26. Taking all the evidence into account, the prosecution proved its case beyond reasonable doubt. I find that the appellant's conviction was sound. In light of the evidence adduced against him, his defence cannot hold sway. The maximum sentence for trafficking in narcotic drugs is life imprisonment. The appellant was sentenced to serve 8 years imprisonment. Taking into account the quantity of drugs he was found in possession of and their street value, I find that the sentence of 8 years was on the higher side. I hereby set aside the said sentence which I substitute with a custodial sentence of 5 years. The appellant will also pay the fine of Ksh. 20,000/= and in default thereof, he will serve 4 months imprisonment. The said sentence will have effect from the date of the Judgment delivered by the lower court, which was on the 1st of April, 2016.

26. The appeal succeeds only to the above extent. The appellant has 14 days right of appeal, from the date of this judgment.

DATED and SIGNED at MOMBASA on this 6th day of September, 2018.

NJOKI MWANGI

JUDGE

DELIVERED, DATED and SIGNED at MALINDI on this 27th day of September, 2018.

W. KORIR

JUDGE

In the presence of:-