



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 63 OF 2015

JOSEPH ODHIAMBO OPIYO.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the conviction and sentence by Hon. E. M. Nyaga Principal Magistrate in Migori Senior Principal Magistrate's Court Criminal Case No. 168 of 2014 delivered on 29/06/2015)

JUDGMENT

1. **JOSEPH ODHIAMBO OPIYO**, the Appellant herein, faced the charge of trafficking in narcotics drugs contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act (*the Act*)**. The particulars of the offence were that:-

*“On the 9th day of February 2013 at Rakwaro area in Migori County within the Republic of Kenya, jointly with another not before court, were found Trafficking in Narcotic drugs namely bhang (*Cannabis sativa*) to wit 576 Kgs with a street value of Kshs. 5.76 Million in a motor vehicle registration number KBP 325M a Toyota Vexy black in colour in contravention of the said Act.”*

2. The Appellant faced a second charge of unlawful use of a motor vehicle contrary to **Section 294** of the **Penal Code**.

3. On denying the charges the prosecution availed four witnesses in support of the case. They were **No. 81784 PC(W) Isabel Ndana (PW1)** of the Anti-Narcotics Unit in Migori, **No. 56817 Corp. John Chemweno (PW 2)** from Kamagambo Police Station, **No. 79785 Corp. Vincent Rono (PW3)** from Isebania Police Station and one **Ronald Langat**, a Government Analyst as **PW4**.

4. Briefly the prosecution's case was that on 09/02/2013 at around 08:10 am, PW1 received a call from her colleague officer from the Criminal investigations Department one Corp. Bashir that there was a motor vehicle registration number KBP 325M make Toyota Voxy black in colour (*the vehicle*) that had been spotted along M'torabu - Mabera road which was suspected to trafficking some narcotics. The officer was chasing after that vehicle. PW1 and her colleagues quickly swang into action and used a private taxi to take part in tracking the said vehicle. As the vehicle was reportedly past Migori town PW1 called the OCS of Kamagambo Police Station and asked for a road block to be mounted it around Rakwaro area.

5. The road block was truly mounted but the it appears that the occupants therein became suspicious on seeing it and made a U-turn and returned towards Migori town. The officers at the road block including PW2 gave chase using a police car. On reaching around Rakwaro area the vehicle spotted some other

police officers coming towards them who were from Isebania Police Station including PW3 and diverted into a feeder road at Rakwaro Trading Centre. PW2 and his team pursued the vehicle that ended up landing in a ditch as the two occupants came out and fled. PW2 gave chase of the driver of the vehicle and without losing sight of him, arrested him in a sugar farm. PW1, PW2, PW3 and all the other officers who were in the chase then gathered at the scene and inspected the vehicle. They found that it had been stack with narcotics in several bags.

6. The vehicle and the driver were escorted to Kamagambo Police Station where the suspected narcotics were weighed and found to be 576 kgs stashed in 14 bags with a street value of Kshs. 5,760,000/=. The driver of the vehicle, who is the Appellant, was then charged accordingly. The vehicle as well as the suspected narcotics were produced in court upon PW4 confirming that the haul was *cannabis sativa*.

7. On being placed on his defence, the Appellant continued denying the charges and alleged that he was not the driver of the vehicle as he was arrested by one officer, Jack, who did not testify and that he was arrested as he was just taking a walk. He also contended that the charge sheet was defective.

8. The Appellant was found guilty of the first count of trafficking in narcotic drugs and accordingly convicted. He was sentenced to 20 years imprisonment. The Appellant was however not found guilty of the second charge and he was acquitted.

9. Being dissatisfied with the conviction and sentence, the appellant lodged an appeal and at the hearing he challenged the lower court findings on mainly the ground that the charge was defective. He filed written submissions. The prosecution relied on the record.

10. As this is the Appellant's first appeal, the duty of this court is well settled. It was so held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

11. I have carefully perused the lower court record including the judgment and the appeal before this Court together with the submissions. I will therefore deal with the main ground in this appeal as to whether the charge was defective. **Section 2** of the **Act** defines '**Trafficking**' as follows:

"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 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."

12. This very issue of the meaning and implication of the word '*trafficking*' in the Act was comprehensively dealt with by the Court of Appeal in the case of **Madline Akoth Barasa & Ano. vs. Republic (2007)eKLR** where my Lordships stated 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 substance," 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. In this case neither the charge sheet nor the evidence discloses the dealing with the bhang which constituted trafficking. The learned trial magistrate did not even deal with that aspect of the case."

13. Likewise in the case of **Wanjiku vs. Republic (2002) 1 KLR 825** Learned *Justice Onyancha* (as he then was) dealt with the said issue in the following manner:-

"...It is therefore logical and indeed sensible that a charge of trafficking should clearly specify the exact kind of trafficking to enable not only prosecution to know what evidence to lead to prove the charge but even more important, to enable the accused to know the actual elements of the charge the prosecution is out to prove by the evidence it will be adducing."

....The purpose of this is both obvious and fundamental. It is that the accused has a right to know the charge he is facing to enable him to fully prepare the defence. Failure to specify which one or more of the specific trafficking is charge is likely to embarrass or even confuse the accused in the preparation of his defence to the charge. It is also possible that failure to specify the actual act as aforesaid may as well possibly lead or mislead the trial court to convict the accused on the more serious charge of trafficking as defined under Section 4 of the Act instead of rightly convicting on a lesser or cognate offence under Section 5 or 6 of the Act, with the dire consequences in terms of the type of sentence that is done under section 4 of the Act. It is my view therefore that the charge as drawn in the lower court was erroneous in so far as it failed to specify the activity or act (as defined under relevant Act) that the prosecution embarked upon proving and the accused purported to defend. It cannot be easily argued that the trial did not therefore embarrass and or prejudice the appellant."

14. I have reproduced the charge and its particulars elsewhere above in this appeal. It is true the charge sheet used the general word 'trafficking' without adding what exactly the Appellant was doing that constituted trafficking.

15. That was however not the end of the matter in the case before the Court of Appeal (**Madline Akoth Barasa** (supra)). The Court stated further that if the appeal was not allowed on any other ground then the Court ought to invoke its powers under **Section 361(4)** of the **Criminal Procedure Code** and convict the Appellant of a lesser but cognate offence by substituting the conviction for trafficking with that of possession and sentence the Appellant accordingly.

16. Having said so, I wish to deal with the issue of the Appellant's identification since he denied that he was indeed the driver of the vehicle. The witnesses PW1, PW2 and PW3 gave well corroborated evidence on what happened from the time the vehicle was spotted and suspected to be conveying narcotics up to its arrest. They never lost track of it. Likewise when the occupants in the vehicle realized that they had come to the end of the road as they were being hotly pursued, they decided to flee. The Appellant came out of the vehicle through the driver's door and was pursued by PW2 who did not lose sight of him until his arrest. The incident happened during day time and the circumstances thereof leave no doubt that that the Appellant was indeed the driver of the vehicle. That ground therefore fails.

17. As to whether the Appellant was in possession of the *cannabis sativa*, **Section 4** of the **Penal Code**, Chapter 63 of the Laws of Kenya defines '**possession**' as follows:-

"Possession" -

(a) "being in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;

(b) If there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them"

18. The Appellant was the driver of the vehicle that carried the drugs. He therefore knew what he had carried in the vehicle such that when he saw that the police had mounted a road block he made a U-turn in order to avoid them. When he again saw a police car at Rakwaro he diverted into a feeder road where he was eventually arrested. That is not the conduct of someone who knows not to be on the wrong. The Appellant knew what was in the vehicle and as such he was in possession of the narcotic drugs that were

found in the vehicle, I so find.

19. Since the charge was defective, I hereby reduce the charge to that one of being in possession of cannabis sativa contrary to **Section 3(1)** as read with **Section 3(2)** of the **Narcotic Drugs and Psychotropic Substances Control Act** and do hereby convict him accordingly.

20. Turning to the issue of the sentence, I note that the drug haul was so huge such that one cannot allege that the same was for personal use. The same was definitely intended to be conveyed for use by others. The devastating negative effects of such drugs on the people generally and especially the young and vulnerable in our society today cannot be under estimated. It is now time that everybody in the society must join hands and stand against all such manner of drugs and say enough is enough. As **Section 3(2)(1)(a)** prescribes a maximum sentence of 20 years imprisonment in a scenario where the cannabis is not for personal use and in view of the amount involved I find that the sentence of 20 years is appropriate and is hereby affirmed.

21. It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this 23rd day of February 2017.

A. C. MRIMA

JUDGE