



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 2 OF 2017

LAWRENCE MITELIAN NGALUMA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case Number 190 of 2015 in the Senior Principal Magistrate's Court at Voi delivered by Hon E.G. Nderitu (SPM) on 3rd June 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Lawrence Mitelian Ngaluma, was tried and convicted by Hon E. G. Nderitu, Senior Principal Magistrate for the offence of trafficking in narcotic drugs contrary to Section 4a(sic) of the Narcotic Drugs and Psychotropic Substance (Control) Act No 4 of 1994. He was sentenced to serve five (5) years imprisonment.

2. The particulars of the offence were as follows:-

“On the 22nd day of March 2015 at Mwakitau Road Block within Taita Taveta County trafficking by conveying using a motor vehicle registration number KBY 115G TOYOTA Noah, narcotic drugs, namely cannabis to wit 360kgs with a street value of KSH 360,000/=(three hundred and sixty thousand) in contravention of the said act.

3. Being dissatisfied with the said judgment, on 16th January 2017, the Appellant filed a Notice of Motion application seeking leave to file his appeal out of time which application was allowed and the Petition of Appeal deemed as having been duly filed and served. His Grounds of Appeal were as follows:-

1. THAT the learned trial magistrate erred in law and facts failing(sic) to consider that the prosecutions (sic) adduced evidence was contradictory c/sec 163(i)(c) (sic) of the evidence act.

2. THAT the pundit trial magistrate erred in both conviction and sentence was founded on the evidence of a single witness which was not sufficient to sustain a conviction.

3. THAT the learned trial magistrate erred in law and facts by failing to find that there was no cogent reason to link him the appellant to alleged offence in question(sic).

4. THAT the learned trial magistrate erred both in law and fact by failing to consider that the prosecution had failed to discharge the burden of proof to (sic) their case beyond reasonable

doubt as required by the law.

5. THAT the learned trial magistrate erred in law and facts by failing to adequately consider his defence which was un-rebutted and was enough to create doubt on the prosecution case.

4. On 16th February 2017, the Appellant was directed to file his Written Submissions. On 9th March 2017, he filed his Written Submissions along with Amended Grounds of Appeal. The Amended Grounds of Appeal were as follows:-

1. THAT the pundit trial magistrate erred both in law and facts by failing to comply with the provisions of Section 74 (A) and Section 75(4) of the Narcotic Drugs and Psychotropic Substance and (sic)Control Act No 4. of 1994 which rendered the resultant trial a nullity.

2. THAT the learned trial magistrate erred in law and facts by failing to consider both conviction and sentence were against merits of the prosecution case.

3. THAT the learned trial magistrate erred in law and facts by failing to consider that the prosecution herein failed to prove their case beyond reasonable doubt as required by the law contrary to Section 109 and 110 of the Evidence Act.

4. THAT the learned trial magistrate erred in law and facts by failing to consider that the trial court had no jurisdiction to try him and (sic)in breach of Section 78(1) of the CPC.

5. THAT the learned trial magistrate erred in both law and facts by failing to adequately consider his defence.

5. The State's Written Submissions were dated and filed on 5th April 2017. The Appellant's response to the State's Written Submissions was filed on 4th May 2017. He added the following Grounds of Appeal:-

1. THAT the learned trial magistrate erred in law and facts by failing to consider that the trial court had no justice (sic)to try the Appellant in breach of Section 78(1) of the CPC and Section 79 of the C.P.C.

2. THAT the pundit trial magistrate erred both in law and facts by failing to comply with the provisions of Section 74 (A) and Section 75(4) of the Narcotic Drugs and Psychotropic Substance and (sic)Control Act No 4 of 1994 which rendered the conviction unsafe.

3. THAT the learned trial magistrate erred in law and facts in failing to consider his defence.

6. When the matter came up on 19th April 2017, both the Appellant and counsel for the State asked this court to rely on their respective Written Submissions in their entirety, which submissions were not highlighted. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. Being the first appellate court, this court is under a duty to re-examine the evidence that was adduced in the lower court as was held by the Court of Appeal in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where it was stated that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

8. Although the Appellant filed three (3) sets of Grounds of Appeal, it appeared to this court that from the

respective parties' Written Submissions, the issues that had been placed before it for determination were:-

- a. Whether or not the Trial Court had jurisdiction to hear and determine the matter herein;**
- b. Whether or not the Prosecution had proved its case beyond reasonable doubt;**
- c. Whether or not the Learned Trial Magistrate considered his defence..**

9. The court therefore dealt with the said issues under the separate headings shown hereinbelow.

I. JURISDICTION OF THE TRIAL COURT

10. Amended Ground of Appeal No (4) in the Amended Grounds of Appeal that were filed on 9th March 2017 was the same as Ground of Appeal No (1) of the Grounds of Appeal filed on 4th April 2017. Consequently, they were dealt with under this head.

11. The Appellant argued that the Learned Trial Magistrate did not have jurisdiction to hear and determine the matter as the offence was said to have occurred in Mwakitau which was under the jurisdiction of Wundanyi Law Courts and consequently, she acted contrary to the provisions of Section 78(1) of the Criminal Procedure Code. It was his contention that the arresting police had no authority to transfer him to Voi.

12. He relied on the case of **Daniel Burure vs Republic (2006) KLR** in which he stated that the appellate court therein held that the learned trial magistrate had no jurisdiction to impose a sentence of 45 years. Clearly, this case was irrelevant in the circumstances of the case as the same related to the legality or lawfulness of the sentence that was imposed on the appellant therein by the learned trial magistrate therein and not the jurisdiction of a court to hear and determine a matter.

13. It was his submission that the Learned Trial Magistrate ought to have stayed the proceedings and transferred the case to Wundanyi Law Courts as provided in Section 79 and Section 80 of the Criminal Procedure Code.

14. On its part, the State submitted that the Appellant was arrested within Mwatate Sub-County and this being a central point of location, the Learned Trial Magistrate did not err when she heard and determined the matter at Voi. It added that in any event, the Appellant never complained about the place of trial and consequently he did not suffer any prejudice.

15. According to the evidence of No 98994 PC Edwin Shem (hereinafter referred to as "PW 6", he was on his way to Taveta for an assignment accompanied by their driver when he was instructed by the DCIO Voi to go to Mwakitau Police Station as a person had been arrested trafficking narcotic drugs. On his part, No 92295 PC John Muli (hereinafter referred to as "PW 4") testified that they were manning a road block along Taveta- Voi Road when they arrested the Appellant trafficking narcotic drugs. His evidence was corroborated by that of No 99023362 APC Patrick Mwangema (hereinafter referred to as "PW 3").

16. There was no doubt that this matter fell within the jurisdiction of Wundanyi Law Courts. However, Voi Law Courts could also lay claim to jurisdiction to try the said case as the offence occurred along the Taveta- Voi Road as was stated by PW 4. In addition, there was little doubt that the Appellant would have passed through Voi. He himself testified that he was *en route* to Mombasa to organise how his grandmother who was very ill would be transferred from Taveta to Mombasa.

17. His evidence was clear that he was on a continuous journey traversing several court jurisdictions and the Learned Trial Magistrate did not therefore err when she tried him at Voi Law Courts and it was not necessary for her to have transferred the case to Wundanyi Law Courts as provided for under Section 78(1) of the Criminal Procedure Code.

18. Notably, Section 74 of the Criminal Procedure Act Cap 75 (Laws of Kenya) provides as follows:-

“When an offence is a continuing one, and continues to be committed in more than one local areas; it may be tried by a court having jurisdiction over any of those local areas”

19. In the premises foregoing, Amended Ground of Appeal No (4) in the Amended Grounds of Appeal that were filed on 9th March 2017 and Ground of Appeal No (1) of the Grounds of Appeal filed on 4th April 2017 were not merited and the same are hereby dismissed.

II. SAMPLING AND DESTRUCTION OF THE NARCOTIC DRUGS

20. Amended Ground of Appeal No (1) in the Amended Grounds of Appeal that were filed on 9th March 2017 and Ground of Appeal No (2) of the Grounds of Appeal filed on 4th April 2017 were dealt with under this head as they were the same.

21. The Appellant argued that the procedure to sample and destroy the narcotic drugs was not followed hence rendering his case a nullity. It was his submission that the sampling of the narcotic drugs in his absence gave the police an opportunity to fix him. He relied on Section 74A of the Narcotic Drugs and Psychotropic Substance Control Act that requires that where practicable, the following persons be present where narcotic drugs have been seized:-

a. The Commissioner of Police; and

b. Director of Medical Services; or

c. A police; or

d. A medical officer authorised by the Commissioner of Police and Director of Medical Services;

e. Accused person;

f. His advocate, if any, representing the Accused person;

g. An analyst appointed by the Accused person.

22. The same Section gives the procedure of sampling and destruction of drugs and adducing evidence. The same is as follows:-

a. The designated analyst weighs the whole amount seized;

b. The designated analyst then weighs a sample which he takes for analysing and identification;

c. The designated analyst then returns to the authorised officers his certificates for production at the trial of the accused person;

d. Where the sample is found to have been a narcotic drug, the amount seized, except the sample, is destroyed in the presence of the Magistrate and the accused person and his advocate (if any), where practicable, whereafter the magistrate shall sign a certificate in the prescribed form relating to such destruction.

e. The sample or samples together with the designated analysts' certificates are produced in trial by the authorised officers;

f. The magistrate's certificate of destruction is the conclusive proof as to the nature and quantity of the narcotic drug or psychotropic substance concerned and of the fact of its

destruction in accordance with the provisions of this section.

23. On its part, the State submitted that the Appellant never raised in his Cross-examination, that PW 6, 238150 APC Joseph Malasi (hereinafter referred to as “PW 7”) and Tahaya H Maingu (hereinafter referred to as “PW 8”) were not authorised to seize the drugs. It referred to the case of **Alex Njuguna Kimani vs Republic [2014] eKLR** where Kasango J rejected a similar argument because the appellant therein had not raised the issue of the competency of the officers.

24. It also placed reliance on the case of **Moses Banda Daniel vs Republic [2016] eKLR** where the Court of Appeal held that it was not mandatory that an accused person be present when seized drugs are destroyed. The said court emphasised that the use of the word “**where practicable**” in Section 74 A of the Narcotics Drugs and Psychotropic Substance (Control) Act conveyed the meaning that the presence of an accused person was not mandatory when the designated analyst was weighing the seized drugs and sample for identification and analysis.

25. Appreciably, the Appellant was a lay person. He would ordinarily not have been expected to have been aware of the very technical procedures contained in Section 74A of the Narcotics Drugs and Psychotropic Substance (Control) Act. Had the said section made his presence at the time of weighing the seized amount and the sample and the destruction of the seized amount compulsory, this court would have not hesitated in concluding that he suffered prejudice, the maxim, ignorance is no excuse, notwithstanding.

26. This is because where a lay person is representing himself or herself, the trial court has a huge burden in ensuring that it complies with mandatory provisions as a lay person would not be able to detect the omission of mandatory provisions of the law.

27. Be that as it may, the Appellant in this case appeared to have been aware of the requirement of this presence at the time of sampling as he did Cross-examine PW 7 and PW 8 regarding his absence during the sampling. He cannot therefore have been said to have suffered any prejudice in this regard.

28. Notably, Section 74A (2) of the Narcotics Drugs and Psychotropic Substance (Control) Act stipulates as follows:-

“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 analysts’ certificates for production at the trial.

29. Having looked at the proceedings, it was evident that PW 7 took a sample of the drugs from each of the nine (9) sacks and took them to the Government Chemist Mombasa, which PW 8 analysed and identified as having been cannabis sativa. However, PW 7 did not adduce in evidence the samples as required by the law but he instead produced in evidence the nine (9) sacks of bhang.

30. Further, it was clear that the Learned Trial Magistrate did not also strictly adhere to the procedure of destruction of the drugs. In fact, the nine (9) sacks of the drugs were destroyed on 29th July 2016, over a month after the Appellant had been sentenced.

31. It was evident from Section 74A (3) of the Narcotic Drugs and Substance Act that the drugs were supposed to have been destroyed after the designated analyst had prepared his report and way before the trial as the Magistrate’s Certificate as well as the designated analysts certificate were to be conclusive proof of the nature and quantity of the narcotic drug or psychotropic substance concerned and of the fact of their destruction in accordance with the provisions of the said Section.

32. The above notwithstanding, whereas the trial court did not adhere to the procedure of destroying the drugs that were seized as provided for under Section 74 A of the Narcotic drugs and Psychotropic Substance Control Act and in fact acted in a haphazard manner in destroying the drugs, this court did not, however, note any prejudice that was occasioned to the Appellant.

33. In the case of **Moses Banda Daniel v Republic [2016] eKLR**, the Court of Appeal at Malindi rendered itself as follows:-

“Although that may be immaterial we find, for the purpose of section 74A that it would not have been practicable (sic) 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 74 A was not violated.”

34. Going further, whereas PW 8 did not produce a Certificate as envisaged in Section 74A of the Narcotic drugs and Psychotropic Substance Control Act, this court was satisfied that the Government Analyst Report dated 30th April 2015 sufficed as a certificate as it had certified what the drugs the Appellant had been arrested with were. It clearly indicated that the dry plant material was found to have been Cannabis.

35. Appreciably, the Narcotics Drugs and Psychotropic Substance (Control) Act does not prescribe a particular format for the certificate to be adduced during trial. If the legislators had intended that there was to be a specific certificate then, nothing would have been easier than for them to have prescribed a particular format as a Schedule in the said Act.

36. It was therefore the view of this court that the Appellant's submissions that the trial was a nullity as he was not present at the time of weighing the seized amount and sample or at the time the drugs were destroyed or that no certificate was adduced by PW 8 were not persuasive as there was no miscarriage of justice. The procedural flaws did not go to the root of the substantive case.

37. In the circumstances foregoing, Amended Ground of Appeal No (1) in the Amended Grounds of Appeal that were filed on 9th March 2017 and Ground of Appeal No (2) of the Grounds of Appeal filed on 4th April 2017 were not merited and the same are hereby dismissed.

III. PROOF OF THE PROSECUTION'S CASE

38. Amended Grounds of Appeal Nos (2), (3) and (5) filed on 9th March 2017 and Ground of Appeal No (3) filed on 4th May 2017 were dealt with under this head as they were the same.

39. The Appellant argued that the Learned Trial Magistrate failed to re-evaluate and re-analyse all the evidence that was adduced in the Trial Court as was held in the case of **Okeno vs Rep (Supra)(sic)** (sic) as a result of which he was prejudiced. He contended that the standard of proof in the case herein was far below the required standard set by the Narcotics Drugs and Psychotropic Substance (Control) Act. He tied his arguments to the fact that he was not present at the time the sample was being weighed, analysed and destroyed, an issue that was dealt with in great detail hereinabove.

40. On its part, the State averred that Henry Mwangela Mutiku (hereinafter referred to as “PW 1”) and Hamed Mohamed Ismael (hereinafter referred to as “PW 2”) confirmed that the Appellant was the one who rented Motor Vehicle Registration Number KBY 115 from which PW 3 and PW 4 seized the drugs from. It added that No 6175 Sergeant David Chege (hereinafter referred to as “PW 5”) also adduced in evidence the photographic evidence showing the Appellant, the said Motor Vehicle and the nine (9) sacks of drugs.

41. A perusal of the proceedings shows reveals that PW 2 who was in the business of renting out motor vehicles, introduced the Appellant to PW 1 for the hire of a big vehicle. The Appellant executed a Car hire Agreement dated 20th March 2015. He was to return the rented Motor Vehicle on 22nd March 2015. PW 1 adduced in evidence a copy of the said Car Hire Agreement, the Appellant's Identity Card and Driving License.

42. On 24th March 2015, PW 2 was informed that his Motor Vehicle had been impounded as the driver had been trafficking nine (9) sacks of bhang. PW 3 and PW 4 arrested the Appellant after a random check

at Mwakitau Road block and recovered the said sacks of bhang, the Appellant's Identity Card and Driving License which he also adduced in evidence. These were the originals of the copies PW 1 also produced in court. Both PW 3 and PW 4 were categorical that they arrested the Appellant driving the said Motor Vehicle in which he was trafficking drugs.

43. PW 8's evidence was clear that the drugs the Appellant was found trafficking were Cannabis (bhang). He confirmed having seen the Exhibit Memo that PW 7 presented to the Government Chemist. In his Cross-examination, he stated that the Report was a public document. This court found that he was permitted by the law to adduce in evidence the said Report on behalf of Mr Njenga as it was a public document.

44. Notably, the Appellant confirmed having been present at the time the said Motor Vehicle was stopped and the bhang found therein. He therefore placed himself at the scene of the crime. Having analysed his defence, it did not sound plausible and appeared to have been merely a denial to acquit himself of the said offence.

45. Indeed, this court could have accepted his defence save for the fact that his Identity Card and Driving License that were found in the Motor Vehicle matched the copies of the same documents that PW 1 submitted in court. His assertions that he saw PW 1 for the first time in court sounded far far-fetched as PW 2 did confirm that he was the one who introduced him to PW 1.

46. This court was therefore in agreement with the Learned Trial Magistrate that the Prosecution did in fact prove their case beyond reasonable doubt as the Appellant was in fact caught red-handed trafficking bhang in the aforesaid Motor Vehicle. His defence did not therefore displace the evidence that was adduced by the Prosecution witnesses who had no grudge against him, a likely motive for framing of charges against him.

47. In the premises foregoing, Amended Grounds of Appeal Nos (2), (3) and (5) filed on 9th March 2017 and Ground of Appeal No (3) filed on 4th May 2017 were not merited and the same are hereby dismissed.

IV. CONCLUSION

48. The Appellant was sentenced to five (5) years imprisonment. This was indeed a slap on his wrist considering that his offence attracted a sentence of upto life imprisonment. Section 3(2)(b) of the Narcotics Drugs and Psychotropic Substance (Control) Act provides as follows:-

“A person guilty of an offence under subsection (1) shall be liable—

in respect of a narcotic drug or psychotropic substance, other than cannabis, where the person satisfies the court that the narcotic drug or psychotropic substance was intended solely for his own consumption, to imprisonment for twenty years and in every other case to a fine of not less than one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, or to imprisonment for life or to both such fine and imprisonment.

49. This court therefore saw no justification of interfering with the sentence as the same was lawful.

DISPOSITION

50. The upshot of this court's Judgment therefore was that the Appellant's Appeal that was lodged on 16th January 2017 was not merited and the same is hereby dismissed. For the foregoing reasons, this court hereby affirms the conviction and sentence that was imposed upon the Appellant herein as it was safe to do so.

51. It is so ordered.

DATED and DELIVERED at VOI this 27TH day of JULY 2017

J. KAMAU

JUDGE

In the presence of:-

Lawrence Mitelian Ngaluma-Appellant

Miss Anyumba- Respondent

Josephat Mavu- Court Clerk