



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 70 OF 2014

(FORMERLY NAKURU CRIMINAL APPEAL NO. 139 OF 2014)

*(Being an appeal against conviction and sentence in Narok Criminal Case No. 970/2013 – Z. ABDUL
RM)*

MERESA ADHIAMBO ACHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. Meresa Adhiambo Achieng, the Appellant herein, was tried before the Chief Magistrate's Court in Narok for the offence of Trafficking in Narcotic drugs Contrary to Section 4(a) of the Narcotic Drugs and Psychotropic substances Control Act.
2. The particulars in the charge sheet were that on the 4th day of August 2013 at Mwamba area along Mulot-Narok road in Narok North District within Narok County, she trafficked in 82 kilogrammes of cannabis with a street value of ksh164,000/= by transporting it in a motor vehicle Registration number KBT 447W Isuzu Bus in contravention of the said Act.
3. At the conclusion of the trial, the Appellant was found guilty and convicted. She was sentenced to serve 5 years imprisonment and to pay a fine of sh200,000/-.
4. She now appeals to this court against the conviction. In her petition of appeal filed through Agure Odero Advocates on 4th July 2014, the Appellant has raised 6 grounds of appeal, as follows:

“1. That Trial Magistrate had negative attitude towards the Appellant from the onset of the proceedings up to judgment hence trashing out even the probation report that considered the very fundamental issues in favour of the Appellant.

2. **That the Trial Magistrate before the delivery of judgment incarcerated the Appellant in police custody despite the Appellant having been on bond all based on negative attitude and prejudice hence robbing the Appellant fundamental freedom set out in the constitution 2010.**
3. **The Trial Magistrate failed in both law and in fact when the prosecution only relied on the evidence of PW1 and PW2 and failing to call an independent witness from the**

alleged Motor Vehicle Registration KBT 447W Isuzu.

4. **The Trial Magistrate trashed the evidence of the defence witness DW1 and DW2 despite both narrating the episode of the day.**
 5. **The Trial Magistrate failed to note inconsistency and contradictions of prosecution witnesses.**
 6. **The Trial Magistrate failed to consider whether the cannabis produced were in stone form, coil form of what form and whether the evidence produced and the charge sheet were intendem.”**
5. In arguing grounds 1 and 2, Mr Odera for the Appellant cited Articles 49, 50 and 159 of the Constitution in alleging bias on the part of the Trial Magistrate allegedly exemplified by the interruption of the Appellant by the court thereby hindering the advancement of her defence; the incarceration of the Appellant before the judgment being an indication that the court had prematurely made up its mind; and the dismissal by the trial court of a favourable report by the Probation Office regarding sentence.
 6. Regarding grounds 3, 5 and 6, Mr Odera contended that the prosecution evidence was riddled with inconsistencies and contradictions and that no independent witness was called by the prosecution to support the evidence of **PW1** and **PW2**. In this connection, it was argued that the trial court did not satisfy itself whether the cannabis sativa was in stone or other form. Finally, the Appellant’s counsel complained that the defence evidence was dismissed unfairly.
 7. Miss Waweru representing the DPP opposed the appeal and asserted that the trial was conducted according to the law. Reiterating the evidence adduced at the trial, she submitted that all elements of the charge were proved and that the defence did not dislodge the prosecution evidence. She thus urged the court to dismiss the appeal.
 8. The first Appellate court is obligated to re-evaluate the trial evidence and to draw its own conclusions; bearing in mind always that the trial court had the advantage of seeing and hearing the witnesses first hand. Thus the Appellate court will not interfere with findings of fact by the Trial Court which are based on the credibility of witnesses, unless the findings are plainly wrong and no tribunal properly applying itself could have made them. [see **Okeno v Republic 1922 EA 322**].
 9. A summary of the prosecution evidence in the lower court is as follows. The Appellant boarded a bus registration number **KBT 447W** that was headed to Nairobi at 9.00am at Sondu. She paid for the ticket and her luggage comprising of two cartons wrapped with nylon bags and tied with ropes. She was assisted by the conductor, **Stephen Onchonga Obongo (PW1)** and the driver **Zebedeo Okemwa Machuki (PW 2)** to place the luggage in the right side boot of the bus having informed **PW1** that the packages contained fish.
 10. On reaching a place called Mwamba in Total area of Narok, the bus was flagged down by Cpl **Joseph Kipruto (PW4)** who was in the company of other police officers. Upon inspecting the cargo in the bus, **PW4** suspected that the two pieces of luggage contained narcotics. He demanded to be shown the owner of the luggage by the bus crew. They called the Appellant out of the bus. **PW4** took her ticket and instructed the crew to drive to Narok Police Station where **PC Kiboma (PW5)** took photographs of the bus and the two pieces of contraband luggage. The same was weighed and confirmed to be 82kgs. The bus was released.
 11. **PW4** later extracted samples of the plant material from either package and took them to the Government Analyst. The samples were analysed and confirmed to be cannabis sativa, a narcotic drug prohibited under the Narcotic Drugs and Psychotropic Substances Control Act. The Appellant was subsequently charged.
 12. Through her sworn defence and a witness (**DW2**), the Appellant confirmed that she purchased a ticket and boarded the bus in question on 4/8/13 at Sondu headed for Nairobi. Only a handful of

- passengers were in the bus at the time, but others were picked along the way. She only carried a handbag and sat near **DW2**. Soon, the two were conversing.
13. On reaching Mwamba, the vehicle was stopped and all passengers were ordered out. At this point, an argument arose between the Appellant and **PW1** over the bhangi which police had found in the boot, the Appellant denying it be her luggage. The defence position was that no luggage was loaded onto the bus at Sondu and that the offending packages did not belong to the Appellant.
 14. The key prosecution witnesses whose evidence tended to connect the Appellant with the contraband luggage were **PW1** and **PW2** being the conductor and bus driver respectively. There was no dispute that the Appellant boarded the bus early in the morning at Sondu. **PW1** and **PW2** maintained in their evidence that the two packages were brought by the Appellant when she boarded the bus. **PW1** said he loaded the luggage with the driver. For his part, **PW2** said that having stopped at Sondu stage, he alighted and saw the Appellant's luggage and told **PW1** to charge shs200/= for it.
 15. The witnesses admitted that other passengers were picked along the way after the Appellant had boarded. The Appellant's defence that **PW1** and **PW2** falsely implicated her is difficult to accept in light of the fact that none of them knew her before the material date and secondly, that there were many other passengers in the bus. Also **DW2** confirmed that upon being stopped by police, the conductor identified the owner of the luggage as the Appellant, hence an argument arose between them.
 16. It is unlikely that **PW1** and **PW2** randomly picked on the same person out of many other passengers, to blame her for the offending cargo. Besides, according to **PW4**, the bus driver immediately notified him that he could identify the owner of the luggage even before the Appellant stepped outside the bus.
 17. From the evidence of **PW1** and **PW2**, both had engaged sufficiently with the Appellant at Sondu stage to identify her and her luggage. Indeed when first questioned by **PW4**, **PW1** said the luggage contained fish, repeating what the Appellant had told him at Sondu stage. The suggestion made in the defence that the said goods were in the bus before Sondu stage was not put to **PW1** or **PW2** during cross-examination. Equally, it is hard to tell how the Appellant confirmed the presence of the goods at Sondu when she denied that she had any luggage and would therefore not be expected to have seen the contents of the boot.
 18. The complaint in ground 3 has no basis. There was no requirement in this case for the prosecution to call a certain number of witnesses in proof of their case – **see Section 143 of the Evidence Act**. There were no significant differences between the testimony of the driver and the conductor of the bus (**PW1** and **PW2**) regarding the key issues. Minor contradictions such as the time of departure from Sondu do not detract from the main thrust of the testimony of **PW1** and **PW2**.
 19. In **Twehangane Alfred vs. Uganda, Criminal Appeal No. 139 of 2001, [2003] UGCA**, where it was observed:

“with regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”
 20. The Trial Magistrate correctly observed that **DW2** had already boarded the bus when the Appellant came on board. Thus **DW2** had no real opportunity to see whether or not the Appellant had put any luggage in the boot whose door was located on the exterior of the bus.
 21. In my own assessment of the evidence, the trial court was entitled to believe the evidence of **PW**

- 1, 2 and 4 and to find that the same dislodged the Appellant's defence. Hence grounds 3,4 and 5 have no merit.
- 22.The 6th ground was also raised during submissions in the lower court. The trial court correctly stated that there was no legal requirement for the charge sheet to state the form in which the narcotic drug is presented; at any rate, the cannabis was presented as an exhibit in court. The photographs taken reveal that the package consisted of plant material (**Exhibit 2h**) and samples taken also consisted of plant material (**Exhibit 6 and 4**). The drug was further weighed and certified to be 82kgs. The real question was whether the substance whatever its presentation was a prohibited drug.
- 23.Under Section 134 of the Criminal Procedure Code, a charge should contain “**such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.**” The Appellant clearly understood the charges facing her as evidenced by her own examination of witnesses. Indeed, her defence at the trial was that even though she was travelling in the bus from whose boot the bhang was found, the same was not part of her luggage. There is no evidence that the failure to indicate the actual form in which the drug was presented – whether stones or coils – in any manner prejudiced the defence. There is no merit in ground 6 of the appeal.
- 24.Several complaints are raised in grounds 1 and 2 regarding the process of the trial. It is true as stated that the trial court having noted the probation report which favoured the Appellant, went ahead to mete out a custodial sentence. The trial magistrate gave her reasons, evidently taking into account the Appellant's circumstances, before awarding the sentence in accordance with the law. Sentencing is a discretion of the trial court and unless it is shown that the sentence was excessive and or harsh, the Appellant cannot insist that she deserved a different or more lenient sentence in light of the favourable probation report.
- 25.Moreover, the Appellant has not challenged the sentence in her grounds despite complaints that the sentence is evidence of the court's “negative attitude towards the Appellant.” Nothing turns on that complaint in the circumstances of this case. Ditto, the second ground.
- 26.The fact that the Appellant was placed in custody pending judgment is not necessarily evidence that the court had already made up its mind regarding the case. This speculation is possibly based on the fact that no reasons were given for the order which amounted to revoking the Appellant's bond. This court, however, having reviewed the evidence on record and the judgment of the court, is satisfied that the court's judgment was based on actual, credible evidence and not driven by any “negative attitude” towards the Appellant.
- 27.However, in my view, it is advisable that courts give reasons for decisions to withdraw bail granted to accused persons before them. Needless to say, it is important that both the DPP and the accused be heard before such a decision is made. Failure to do so and/or to give reasons easily exposes the court to accusations of arbitrariness and bias. Be that as it may, the alleged violation of the right to bail in this case as alleged has no bearing on the trial, which in my view was properly conducted.
- 28.The Appellant instructed an advocate to act for her towards the close of the trial. No application was made by counsel Mr Odero, also representing her on appeal, with regard to the alleged violation of the right to fair trial under Article 50 of the Constitution. It is therefore this court's view that the Appellant's complaints in ground 1 and 2 lack substance capable of vitiating the trial. In the result, this appeal has no merit and is accordingly dismissed.
- 29.The Appellant was sentenced on 1/7/14 and has been out on bail pending appeal since 6/8/14. I have on my own accord reviewed the probation officer's report on record and the mitigation raised at the trial. The quantity of drugs proved in this case was rather large. I do not consider this an appropriate case for a non-custodial sentence. However, considering mitigating factors, I would vary the sentence imposed in the lower court by substituting the same with a sentence of 2 years imprisonment and a fine of shs100,000/= and in default thereof a further term of 1 year

imprisonment. The Appellant is to commence serving the sentence forthwith.

Delivered and signed at Naivasha on this **23rd** day of **June, 2016**.

In the presence of:-

For the DPP : Mr. Koima

For the Appellant : Mr. Njuguna holding brief for Mr. Agure for Appellant

Appellant : present

Court clerk: : Barasa

C. MEOLI

JUDGE