



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY
CRIMINAL APPEAL NO. 36 OF 2015
CONSOLIDATED WITH
CRIMINAL APPEAL NO.37 OF 2015

BETWEEN

EMMANUEL OCHIENG AWUONDO alias SAMUEL OCHIENG

OTIENO alias ISMAEL ODONGO OCHIENG 1ST APPELLANT

ISAAC NDIRA OSORE 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being appeal from original conviction and sentence of PM's Court Mbita in Criminal

Case No.646 of 2014 dated 7th October, 2015 – Hon. S.O. Ongeru, SRM)

JUDGMENT

1. EMMANUEL OCHIENG AWUONDO alias SAMUEL OCHIENG OTIENO alias ISMAEL ODONGO OCHIENG (1st Appellant) and ISAAC NDIRA OSORE (2nd Appellant) were jointly charged with the offence of trafficking in narcotic drugs contrary to **Section 4 (A) of the Narcotic and Psychotropic Substances Control Act No.4 of 1994, and upon determination of the trial they were both convicted and each sentenced to life imprisonment.**

2. Both appellants had denied the charge whose particulars stated that on 28th March 2014 at around 1615 hours along Nyagwethe – Sindo road in Suba District, Homa Bay County, they were jointly trafficking in narcotics to wit 339 kilograms of cannabis sativa with an estimated street value of Kshs.3,390,000/= by transporting in motor vehicle registration No.KBL 669F Toyota Fielder, grey in colour, in contravention of the said Act.

3. The evidence presented at the trial was that on 28th March 2014, at about 4.00 p.m., **CPL PAUL KOECH (PW3)** received information that a vehicle from Nyagwethe heading to Sindo was suspected to be trafficking bhang. PW3 together with other police officers proceeded to Nyagwethe – Sindo road, and at **ROO TRADING CENTRE**, they saw motor vehicle registration KBL 669F approaching and they tried to stop it, but the vehicle did not stop. The officers gave chase in their motor vehicle (a Land Cruiser) all the way up to the suburbs of **SINDO CENTRE**. The vehicle took a sharp corner heading to

an unnamed road which had no way through.

4. **APC BRIAN UGWUNA** (PW1) who was in the chase team opened fire, and the occupants surrendered. He identified them as the two appellants. Upon searching the vehicle they found it packed with bales of bhang everywhere except the front seats. They also noticed that the motor vehicle front number plates differed from the front one as the rear registration read KBE 669 E. PW1 took the names of the persons they apprehended as **ISAAC NDIRE OSORE** and **SILVAN OCHIENG OTIENO**, but physically he was certain the people were the two appellants saying he spotted them at the scene and that ISAAC (2nd Appellant) was the one driving the car. This was confirmed by PW3 who gave the names of the persons they arrested as **ISAAC NDILE OSORE** and **SAMUEL OCHIENG OTIENO** and pointed at **ISAAC** as the person who was driving and **SAMUEL** as the co-appellant saying those were the names shown in the identification documents recovered from them at the scene, although at some point the 1st appellant also used the names **IMMANUEL OCHIENG AWUONDO**. PW3 explained on cross examination that the names may have been different but the persons they arrested were only two and were the appellants.

On re-examination he states:-

“despite the names I can point out the suspects who are before court”

5. SGT ROBERT MUTAHI (PW5) who received the accused persons at Magunga police station told the trial court that police officers arrived with 4 prisoners in their police land cruiser, as well as motor vehicle Reg. KBL 669F (Toyota Fielder) which was loaded with bhang.

6. He inspected the contents of the car which was in form of stones and in gunny bags. He also noted that a bullet had shattered the rear left windscreen. He explained:-

“prisoners were four in number. Other two were to be charged with being in possession of changaa and the rest trafficking narcotics.”

7. With the assistance of OCS Magunga, PW5 weighed the substance and established it was 390 kg, and each kilogram was worth Kshs.10,000/= giving a total value OF Kshs.3,390,000/=. The two officers signed the weighing certificate but the appellants refused to sign. Records from Kenya Revenue Authority showed that the motor vehicle details were registered in the name of **KARIMA SALUN**, and the registered motor vehicle was a Toyota Corolla. The recovered substances was examined by the Government analyst (PW4) and found to be cannabis sativa. The actual number of stones was 1500 and the six gunny bags had 1000 stones. He explained that the appellants were the suspects who were delivered at the police station, but one kept changing names from **SAMUEL OCHIENG OTIENO** to **EMMANUEL OCHIENG AWUONDO**. He also clarified on cross examination that **NDIRE** (recorded as **NDILE**) was the one driving the car.

8. The first appellant said that his names are **EMMANUEL OCHIENG AWUONDO** and he is a carpenter running a workshop at **SINDO** market.

9. On 28th March 2014 he was at his workshop when he saw a saloon car coming at high speed. It suddenly stopped in front of his workshop and the occupants opened the door and ran in all directions. Members of the public gathered and surrounded the car. Later a land cruiser came and the occupants who were policemen jumped out of the vehicle and surrounded the whole area. One police officer hit him with a gun saying he was not obeying orders. He fell down and was arrested and frog marched to the land cruiser. The officers searched him and took away his national identity card, his mobile phone and some money which was in a wallet. The police began beating those they had arrested while demanding to know the whereabouts of a gun.

10. He was then taken to the police station where police accused him of failing to lie down when so ordered. The 1st appellant expected to be charged for the offence of creating disturbance and saw his co-

appellant for the first time when they appeared in court. He maintained that he knew nothing about the cannabis.

11. The 2nd appellant in his sworn defence said he had gone to drink changaa on 20th March 2014 and was seated next to a shop when he saw a vehicle driving fast, then it suddenly stopped. He saw two occupants jump out, then heard gun shots and everyone was ordered to lie down.

12. He was among those arrested but all along he thought he would be charged with drinking changaa like those others who were arrested and charged with being drunk and disorderly.

13. The 1st appellant's main contention was that the person police arrested was **SAMUEL OTIENO** and that there was no proof that **SAMUEL OTIENO** and **IMMANUEL OCHIENG** were one and the same person.

14. The trial magistrate observed that the issue of the names featured prominently in the defence, but noted that PW5 had pointed out that the 1st appellant kept changing his names and noted thus:-

“This is manifest even with the charge sheet as 1st appellant was charged using different names. An explanation was given and this court is satisfied that the confusion did not prejudice the accuseds' defence.”

15. The trial magistrate also noted the concerns raised by the appellants over the documents, especially 1st appellant who had submitted that police gave different dates about the incident – some saying it was 21st March 2014 and others saying it was 28th March 2014.

16. The trial magistrate also considered the defence offered by the appellants and held that all the prosecution witnesses were very consistent regarding the identity of the occupants of the escaping vehicle and that their defences were afterthoughts which had not been tested during cross examination of the prosecution witnesses.

17. The trial magistrate also held that confusion as to who was driving the motor vehicle was not fatal as what was fundamental was whether the appellants were in the said vehicle which was found standing with bales and stones of cannabis sativa. The trial magistrate found that appellants were the occupants of the offending vehicle and their defences were thus rejected.

18. The appellants challenged these findings on grounds that the charge was defective because it omitted the mode of trafficking. Further that nothing was presented at the trial to confirm that the Government Analyst was a duly gazetted officer and valuation of the bhang was not done by a qualified person.

19. The first appellant maintains that the persons arrested was **SAMWEL OTIENO** (which are not his names) and that no evidence was led to prove that **IMMANUEL OCHIENG** was the same as **SAMWEL OTIENO** saying the claims that he kept changing his names were a fabrication intended to misled the court.

20. He further argued that there was no evidence proving that he was one of the occupants of the offending motor vehicle and that since it was a market day, police could easily have mixed up the identities of the motor vehicle's occupants who were fleeing as there were very many people within the vicinity. Further that in any evidence the total number of people were more than two people and prosecution did not prove who among the arrested persons was in the car.

21. At the hearing of appeal the 1st appellant submitted that the charge was defective because of the use of the word **“transporting”** in the particulars of the charge instead of the word **“conveying”**, and that the mode of transport was not described.

22. He also argued that identification was based on suspicion and the owner of the motor vehicle was

never brought to court to clarify who had his vehicle.

23. The 2nd appellant lamented that some people were listed as witnesses yet they never testified at the trial. Both appellants claimed that documents presented in court were doctored. In opposing the appeal Mr. Oluoch submitted on behalf of the state that the appellants did not state any fact in their possession by way of documentary evidence to demonstrate that documents presented in court were doctored and described the issue as an afterthought after realizing that the documents produced proved the allegations against them.

24. As regards the claims about defects in the charge sheet, Mr. Oluoch submitted that this does not form a ground of their appeal, but in any event there was no such defect and the trial magistrate had no reason to make such a finding – at worst if such defect did exist then the same was curable under **Section 382 CPC** and also through the evidence of three prosecution witnesses.

25. Counsel argued that the report by the Government Analyst was properly presented to court under **Section 77(2) of the Evidence Act**.

26. As concerns the identity of the occupants of the motor vehicle, Mr. Oluoch pointed out that the conduct of the occupants of the motor vehicle, when signalled by police to stop, the flight and subsequent surrender was incumbent with innocence and he urged this court to be guided by the decision in **Hammon Njoroge Njau –Vs- R. Criminal Appeal No.139 of 1986**. Further that the attempt to change the motor vehicle's rear registration number exhibited a guilty conscience.

27. It was counsel's contention that the appellants were chased and arrested, without the officers losing sight and were caught red handed – drawing from the decision in **Njoroge Ndungu –vs- R. – Criminal Appeal No.31 of 2000**.

28. Counsel argued that the appellants were found in possession of the narcotic substance within the meaning of **Section 4 of the Act**, and there was corroboration in the evidence of PW1 and PW3 regarding the appellants' conduct – defying police order to stop, taking off at a high speed, police pursuing them without losing sight of them and leading to their arrest, and recovering of the drug in the car.

29. Counsel submitted that the 1st appellant kept deliberately changing his name to create confusion, and the circumstances of this arrest leave no doubt that the person police arrested were the appellants as they never lost sight of them.

30. Mr. Oluoch further argued that prosecution proved that the appellants by their conduct were definitely trafficking in drugs.

31. The 1st appellant in response says that **Section 382** does not provide a cure for the defect they complain of.

32. At the hearing of the appeal, the appellants asked for the OB22/28/3/2014 from Magunga police station, statements of PLW1 and PW3, and finger prints of both appellants to be presented. What was eventually presented to court were a copy of the OB abstract, finger prints of **SAMUEL OCHIENG OTIENO** and statements of **PAUL KOECH** (PW3) and **OMONDI SYLVESTER**. The prosecuting counsel explained that **ISAAC NDIRE's** finger prints had mysteriously disappeared from the police records.

33. These were the materials provided to court and which the 1st appellant said were edited and doctored to the extent that some parts were deleted.

34. The only difficulty I have with these allegations is that both appellants have not specified what part of the documents presented were edited or doctored nor have they pointed out what they perceive to have originally been the allegedly doctored and/or edited portions – it therefore remains speculative.

35. There was no dispute that a motor vehicle arrived at **SINDO TRADING CENTRE** in apparent flight from police officers who were in hot pursuit using their Land Cruiser. It was also common ground by both the State and the appellants that there were only two occupants of the motor vehicle, who immediately got out of the motor vehicle. The bone of contention is who were those occupants, and did police arrest more than two people and end up charging the wrong persons in relation to the charge.

36. I also note that the appellants do not dispute that the material recovered from the fleeing motor vehicle was cannabis sativa, their only contention is that the person who purported to have examined and analysed the recovered material was not a gazetted officer.

37. Since the appellants also took issue with the manner in which the charge sheet was drawn, I will address it first. The particulars of the charge stated that:-

“On the 28th day of March 2014 at around 1615 hours along Nyagwethe – Sindo road in Suba District within Homa Bay County were jointly found trafficking in narcotic drugs to wit 339 kilogrammes of cannabis sativa with an estimated street value of Kshs.3,390,000/= by transporting in a motor vehicle registration number KBL 669 Toyota Fielder grey in colour, in contravention of the said Act.”

Under **Section 2** of the **Act** trafficking is defined to mean:-

“Conveyance, deliver or distribution by any person of a narcotic drug or psychotropic substance.”

38. The charge sheet here refers to transporting – I refer to past decision (see **Wanjiru –vs- R (2002) 1 KLR 825**, the court pointed out that the charge must specify clearly the conduct of an accused person which constitutes trafficking. I fail to detect the omissions alluded to which would render the particulars of the charge defective – the charge as drawn clearly conveys even to a lay person, and certainly to the persons charged that the element of trafficking in issue was transportation of the drug using a specific motor vehicle.

39. There was no embarrassment or confusion occasioned to the appellants in the manner the charge was drawn so as to make it difficult for them to prepare their defence. Conveying is an English word whose definition I shall refer to in the later part.

40. Surely which other word should the drafter of the charges have used so as to clearly communicate the conduct of the appellants which offended the Act?

41. The appellants now say that there is no word such as transport under the Act and the appropriate term ought to have been conveying.

42. Black’s Law Dictionary Ninth Edition page 383 defines conveying as:-

“To transfer or deliver (something, such as... ppty ...) ... a means of transport, a vehicle.”

The concise Oxford English Dictionary Twelfth Edition edited by Angus Stevenson and Maurice Waite page 313 defines convey as to transport or to carry to a place.

Section 2 of the **Act** defines conveyance to mean **“any description used for the carriage of persons or goods and includes a vehicle.”** This is what has been referred to in the charge sheet.

43. I hold the view that the use of the word transport did not cause prejudice to the appellants so as to render the charge defective and they are simply splitting hairs.

44. The appellants do not deny being arrested, but they say they were mixed up with other persons who were arrested at the scene, and they were not the occupants of the motor vehicle. This is where the 1st

appellant emphasizes that the person who was arrested in connection with the drugs was **SAMUEL OTIENO** and not him as he is **IMMANUEL OCHIENG**, and that police simply substituted him for the actual culprit. This was an issue raised at the trial and each police officer who testified referred to the two names but insisted that it was in reference to the same person – namely the 1st appellant. 1st appellant was emphatic that the name **IMMANUEL OCHIENG** was never entered in the OB and that **OTIENO** was released and he was substituted with him so as to cover up the mischief.

45. I have perused and re-examined the record – although two persons who were in the motor vehicle were arrested, police ended up taking four people to Magunga police station as confirmed by PW5.

46. At no time did police lose sight of the fleeing vehicle, which they were able to catch up with once it reached a dead end. They also did not lose sight of its occupants who upon realizing that they had been cornered (what with the several gunshots which rent the air) surrendered. PW1 told the trial court that he wrote down the names of the persons he arrested as **ISAAC NDIRE OSORE** and **SAMUEL OCHIENG OTIENO**. PW1 was certain that he spotted the two appellants at the scene and that he personally saw the appellants alight from the fleeing motor vehicle as they surrendered. These were the same names alluded to by **CPL PAUL KOECH** (PW3).

47. On cross examination PW3 explained that there was confusion in the names and although the names differed **“the suspects are the ones we arrested.”** He also explained that he first wrote the names of the suspects in his statements before confirming their identity cards and it was later that he realized the 1st appellant’s names were **IMMANUEL OCHIENG AWUONDO**.

48. So were there two different people? I think not, because PW3 was categorical in re-examination when he stated:-

“Despite the names I can point out the suspects who are before court. The names in my statement were written before I confirmed with their identity cards but the correct names were written on the charge sheet.”

49. PW5 (**SGT ROBERT MUTAHI**) explained that police brought in four prisoners, but two were to be charged with being in possession of changaa while the others were to be charged with trafficking narcotic drugs – and pointed at the appellants in court as the ones who were connected to the drugs. He also explained that:-

“The 1st accused kept changing names from SAMUEL OCHIENG OTIENO and EMMANUEL OCHIENG AWUONDO. He is the one who gave us those names.”

50. I think as the trial magistrate correctly pointed out, the police officers never lost sight of the persons who were occupants of the fleeing car. The 1st appellant kept changing names, which is why the charge sheet has many aliases. PW5 stated that 1st appellant had initially given false names as **SAMUEL** which was why the name in the charge sheet was later amended.

51. One may ask what is in a name? As Shakespeare said **“A rose is a rose by any other name.”**

52. Although the appellant requested for the OB extract and were instead given an investigation diary, they did not disclose what it was in the records that they wanted the court to see. I can only guess that 1st appellant wanted the court to see that no one by the name **IMMANUEL** was booked in the OB – which would in fact confirm what the police officers said about his constant change of names. It would be different if he claimed that there were two different people entered in the OB – one under the name **SAMUEL OTIENO** and the other **IMMANUEL OCHIENG** – the same goes for the finger prints – the appellant does not say that the finger prints presented as belonging to **SAMUEL OTIENO** are different from his own finger prints, albeit under the name **IMMANUEL**.

53. I am satisfied that the trial magistrate duly considered the evidence and arguments raised and resolved

that the 1st appellant was one of the occupants of the fleeing motor vehicle despite the different names that were used. Further that although there appeared to be a contradiction as to exactly who was the driver between the two, one factor was consistent – that both appellants were in the said motor vehicle.

54. As for the qualification of the Government Chemist PW4, I can do no better than to refer to the evidence recorded on 8th January 2015 before the trial court as follows:-

“I am Richard Chumutai Lengat and I am a Government Analyst relying (sic) with Government Chemist Department Kisumu and I am a gazetted officer under Gazette Notice No.1873 of 18/03/2005.”

55. I need not say more on the matter as the record speaks for itself. That limb of the appellants’ argument has no leg to stand on.

56. The upshot is that the conviction was safe and I find no reason to interfere with it. It is upheld. The sentence is legal and is confirmed. The appeal is dismissed in its entirety.

Delivered and dated this 19th day of **August, 2016** at Homa Bay.

H.A. OMONDI

JUDGE.