IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 85 OF 2012

ARCHIBALD GAD APONDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Patrick Odoyo Jabuya, Paul Tatizo Musa and Gad Archibald Apondi were jointly charged with the offence of trafficking in anti narcotics contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances (Control Act No.4 of 1994).** The 1st accused also faced a second charge of failing to stop when stopped by police officers in uniform contrary to **Section 52(c)** of the **Traffic Act Cap 403**, **Laws of Kenya**. The 2nd accused, Tatizo, jumped bail and was not arrested by the time the lower court determined the case.

This appeal is filed by Archibald Apondi (3rd accused) who after conviction, was sentenced to pay a fine of Kshs.1,000,000/- in default 5 years imprisonment and in addition he was to serve 15 years imprisonment. Being dissatisfied with the conviction and sentence, he filed the instant appeal.

Mr. Oumo applied to have the appeal of Apondi and the 1st accused new, Patrick Odoyo Jabuya, the appellant in Cr.91A/2012 to be heard separately. The State was not opposed to the application. Ideally the appeals should have been heard together because the two appellants were tried together for the same offence. Separation of the appeals gives the court double work.

Having said the above, I go ahead and consider the appeals as urged before me. The appellant raised a total of 10 grounds:-

1. The learned trial magistrate erred both in law and fact in convicting the appellant when the prosecutions case was not proved beyond any reasonable doubt;

2. The learned trial magistrate erred in fact in failing to find that the appellant was not involved in the sampling and weighing of the drugs/substance he is alleged to have been found trafficking;

3. The learned trial magistrate erred in law and fact in relying o the evidence of the recovery, sampling, weighing and analysis of the drugs/substance, the appellant was alleged to have been found trafficking in the absence of the officer who filled/or made entries in the exhibit memo form;

4. The learned trial magistrate erred in law and fact in failing to make a finding based on Section 74 of the narcotic drugs and psychotropic substance and Control Act No.4 of 1994;

5. The learned trial magistrate erred in law and fact in failing to find that the prosecutor's case was based on unreliable, inconsistent and contradictory evidence;

6. The learned trial magistrate erred in law and fact in failing to appreciate and make a finding that the substance examined/analysed and found to be cannabis sativa was recovered in Gilgil and in possession of the appellant;

7. The learned trial magistrate erred in law and fact in failing to sufficiently give reasons as to why she did not believe the evidence of the appellant that he was arrested while aboard a canter and not the subject motor vehicle;

8. The learned trial magistrate erred in law and fact in giving undue, unnecessary and unreasonable weight to the manner in which the appellant's friend one Njoroge departed from the scene of the alleged crime;

9. The learned trial magistrate erred in law and fact in shifting the burden of proof on the appellant;

10. The learned trial magistrate erred in law and fact in convicting the appellant in view of the fact that his defence was not adequately challenged.

Mr. Oumo urged the grounds as follows"- Grounds 1, 9 & 10; grounds 2, 3 and 4, and lastly grounds 6, and 7. The appeal was opposed on grounds 2, 3 and 4.

Mr. Ouma submitted that the burden of proof squarely lies on the prosecution to prove its case beyond any doubt but that based on the testimony of PW2 and PW8, it is not the appellant who called the owner of the motor vehicle KAZ 907F Toyota Rav 4, PW2, requesting to hire it out but one Osir did; that thereafter the owner of the vehicle PW2 Isabel Achieng Bodo signed a contract for hire with David Itatano, not the appellant; that PW2 never communicated with the appellant; that production of the contract offended **Section 63(1)** and **(2)** of the **Evidence Act** and should not have been admitted in evidence by the trial court; that the name **'Boss'** which was written on the contract, was not proved to belong to the appellant nor was the phone number in the agreement proved to be the appellant's. He questioned why the prosecution failed to call David Itatano and Samuel Osir as witnesses.

On grounds 6, 7, and 8, counsel submitted that under **Section 74A** of the **Act,** when a substance is found on any accused, it must be verified by an authorized officer in the presence of the accused or designated Government Analyst and that there is no evidence that the person who weighed the substance was authorized or that the appellant was present; that PC Kipruto who filled the exhibit memo form was never called as a witness and that production of the memo form offends **Section 63** of the **Evidence Act**. For this proposition, counsel relied on the decision in **Wanjiku v Rep (2002)1 KLR 825** where the court found that no reason was given for the failure to call the Government Analyst to produce the report.

In opposing the appeal, Ms Rugut argued that Samuel Osir hired the motor vehicle KAZ from PW2; that 'Boss', signed the contract, Boss being the nickname of the appellant; that it is the appellant who called PW2 to inform her of the arrest of the vehicle; that the substance recovered was weighed by PW8 in the presence of the suspects; that the appellants defence was a mere sham.

This is the first appellate court and I have the duty to review and analyse the evidence afresh, arrive at my own conclusion and determinations on the facts and the law. (see **Okeno v Rep (1972)**. Before I do that, I will summarize the evidence adduced before the trial court.

The prosecution called a total of 8 witnesses while the appellant gave a sworn statement in his defence. The prosecution case was as follows:-

PW1, PC Samuel Maina, PW3 PC Thomas Majala and PW4 PC Sospeter Mumira, then all of Gilgil Police Station were at a road block on Nakuru-Nairobi Highway at GIT on 22/11/2009, when at about

11.00 a.m., PC Maina received a call from Cpl Muya of Kasambara Road Block on the same Highway, requesting him to stop motor vehicle KAZ 907F – Rav 4 which had failed to stop at the said road block. They saw the vehicle approach, tried to block it using other vehicles but the driver attempted to pass and it is then PW4 fired at the vehicle to try and deflate the tyres of the vehicle. The vehicle stopped. It had 2 occupants. The police officers found the conductor who was accused 2, was hit with a bullet on the left shoulder while the driver was the 1st accused. They found 11 bags of bhang full in the vehicle. The vehicle and material found in it were taken to Gilgil Police Station, photographed by PW6 PC Sambu. He produced the photographs in court.

PW7, Cpl Frederick Muiya of Gilgil Police Station recalled having stopped motor vehicle KAZ 907F Toyota Rav at Kasambara Police Road Block but the driver refused to stop and he alerted the officers at the road block ahead and it was intercepted.

PW8, IP Painito Bera then of CID Anti Narcotics Nakuru, was the investigating officer. He said that he weighed the drugs in the presence of the accused persons 1 and 2. On 29/11/2007, he interviewed PW2 who claimed to have hired out the vehicle to Archibold Apondi, the appellant herein. PW2 passed to him the hire documents and on 30/11/07 he interrogated the appellant and preferred the charges.

Isabel Ochieng Bodo (PW2) told the court that she is a director of a car hire company, Town Reach Mombasa Services.. On 20/11/07, PW2 received a call from Samuel Osir who said that he wanted to hire her vehicle for 3 days for his British clients. He sent his driver to take the car and was paid Kshs.15,000/-. A contract between Town Reach and David Itatano was signed on behalf of Summit Car Hire and it bore the name 'Boss' (PEx.4). She further stated that the contract was for 3 days and on Friday she called the said Osir to find out if the vehicle was returned only to be told that the clients had extended the contract by 2 days. On Monday, she went to Summit, met the appellant and Osir who informed her that the vehicle was arrested at Gilgil whereas she had been told the vehicle had gone to Shimba. She did not know how the appellant was connected to the bhang.

In his sworn defence, the appellant stated that he does clearing and forwarding of vehicles in Mombasa. He admitted knowing the vehicle in question and that David Mwasia is his client who used to hire vehicles from his company. He said that he did not have a vehicle for hire and took David Mwasia to PW2 who did the same business and hired her vehicle. 3 days later, PW2 informed him that the vehicle had been arrested in Nakuru. Next day a police officer, PW8, informed him he was following up from Nakuru and it is then he called PW2 who informed her that her Rav 4 was arrested. He denied having organized for hire of the said vehicle.

I have considered all the prosecution and defence evidence, submissions by all counsel and it is not in doubt that the appellant was not arrested with the two others who were found in actual possession of the alleged cannabis sativa in motor vehicle JAZ 907F. He was charged with this offence as a principle offender under **Section 20** of the **Penal Code**.

According to PW2, he received a call from Samuel Osir of Summit Car Hire, who wanted to hire her car on 20/11/12. She went on to state that the said Osir signed a contract, which was between Town Reach, her company and David Itatano on behalf of Summit and on top, it was written 'Boss'. PW2 concluded that 'Boss' referred to the appellant. Nowhere in the picture did the name of the appellant appear or that he is the one who wrote on the alleged contract the word 'Boss'. It was the appellant's defence that he introduced David Mwasia to PW2 to hire her vehicle, clearly there is no evidence that PW2 either herself or her car hire company ever entered into a contract of hire with the appellant. There is no evidence that the appellant is the one who wrote the word **"Boss'** on the agreement nor was it established that the cell phone number on the agreement belonged to the appellant. It was also not established that the name 'Boss' belongs to the appellant. PW2 dealt with Osir all the time. Even when the vehicle was not returned after three days, PW2 called Samuel Osir who is Samuel Osir? Samuel Osir who was at the centre of the car hire transaction and who must have known what transpired between the parties was never called as a witness. Samuel Osir played such a central part in the contract yet the prosecution did not deem it important to call him. Although the trial magistrate noted that the Investigation Officer PW8 left gaps in the prosecution case, she did not address that serious omission. It is the duty of the

prosecution to call all witnesses whose evidence is relevant to the case and which will assist the court to fairly determine the case even if that evidence would be adverse to the prosecution case.

It seems the person who signed the contract was one David Itatono on behalf of Summit Car Hire. Again the police did not see it fit to call the said David as a witness. Although the appellant said that the said David was his friend and he did not know where he is, there is no evidence that the prosecution ever attempted to trace him neither did they intend call him as a witness. Failure to call David Itatano as a witness also left a big gap in the prosecution case as to who really contracted with PW2 for the hire of her motor vehicle. The prosecution never even attempted to link the appellant with Summit Car Hire for whom Osir acted. Was the court supposed to make assumptions? In **Bukenya v Rep (1972) EA 549**, the court said tht the prosecution has the duty of calling all relevant witnesses irrespective of the fact that their evidence was adverse to the prosecution case. the court said:-

> **"(i) …;**
>
> **ii. the prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent;**
>
> **iii. the court has the right, and the duty, to call witnesses whose evidence appears essential to the just decision of the case;**
>
> **iv. where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."**

In this case the prosecution failed to call two material witnesses and as a result, miserably failed to prove that it was indeed the appellant who hired the vehicle from PW2 and may have had knowledge of the business that the vehicle was hired for.

For the appellant to be liable, the prosecution should have established that if indeed the appellant had hired the vehicle, he knew exactly what businesses those who hired were going to do with it. The only link to the possession of the cannabis is in my view, suspicion. PW2 stated that on Monday the appellant called her about hire of the vehicle and she went to Summit and met both Samuel and the appellant and it is the appellant who informed her that the vehicle was arrested in Nakuru with bhang. Samuel Osir having been at the forefront in the transaction, could he not have received the said information from the hirers and why was he not made a suspect but instead the appellant became suspect alone? In cross examination of PW2, she could not tell how the appellant became a suspect.

The appellant was arrested after the two other suspects had been arrested. The material found with them must have been weighed immediately after arrest, as these are peculiar circumstances that would not have warranted the bhang to be weighed in the appellant's presence and I find no miscarriage of justice committed. **Section 74A** envisages such situations.

In my considered view, even without going into the other grounds raised, having found that the evidence linking the appellant to the offence was too weak to found a conviction, the offence was not proved to the required standard. The trial court erred in finding that the appellant was found in possession of the cannabis sativa or that he was a principal offender. For the above stated reasons, I allow the appeal, quash the conviction, set aside the sentence and the appellant is set at liberty forthwith unless otherwise lawfully held.

DATED and DELIVERED this 28th day of February, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Otieno holding brief for Mr. Ogola for the appellant

Mr. Mombi for the State

Appellant present

Kennedy – Court Assistant