IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 91A OF 2012

PATRICK ODOYO JABUYA ……...…….APPELLANT

VERSUS

REPUBLIC……...……RESPONDENT

JUDGMENT

Patrick Odoyo Jabuya, the appellant herein, was charged along with Paul Tatizo Musa and Gad Archibald Apondi for 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 appellant 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**. Paul Tatizo Musa jumped bond during the trial. After the full trial, the appellant and Apondi were found guilty and sentenced to pay a fine of one million shillings in default to serve five years imprisonment and in addition to serve ten years imprisonment. The appellant is aggrieved by the said conviction and sentence and preferred this appeal relying on the following 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 on 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 Substances 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 requested to argue his appeal separately from that of Archibald Apondi and the State had no objection.

When urging the appeal, Mr. Oumo argued the grounds as follows 1, 5 & 9; 2, 3, 4, 7, 8 and lastly 6, 7, 8 and 10. The appeal was opposed.

On grounds 2, 3 and 4, Mr. Oumo submitted that **Section 74(A)** of the **Anti Narcotic Act** provides that the suspected substances must be weighed in the presence of the suspect and that the person verifying the drugs must be an authorized person; That there is no evidence that the appellant was present or that PW8 was authorized to weigh the drugs; He also urged that there is no evidence that what was found with the appellant is what was taken to the Government Analyst and he relied on the case of **Wanjiku v Rep (2002)1 KLR 825 (CRA 139/02)** where the court acquitted the appellant for reasons that the prosecution had not proved that what was recovered from the appellant is what was taken to Government Chemist. He further submitted that weighing of the substance aids in ascertaining the nature of the sentence to be meted. Reliance was also made on the case of **Hamayun Khan v Rep** CRA 159/200 where the Court of Appeal acquitted the appellant when the prosecution failed to adduce any evidence on the value of the heroin recovered.

Counsel also took issue with authenticity of the exhibit memo form. On grounds 6, 7, 8 and 10, counsel submitted that there was no evidence to prove that the substances produced as exhibits were found in Gilgil with the appellant. He urged the court to consider the appellant's defence that he was arrested elsewhere. Counsel also submitted that the court dismissed the appellant's defence without giving reasons and it remains unchallenged. He faulted the prosecution's case for its failure to call David Itatano and Samuel Osir to whom the vehicle was hired to.

In opposing the appeal, Ms Rugut submitted that the evidence of PW1, PW3 and PW4 on how they arrested the appellant who was the driver of the vehicle with the cannabis was unchallenged. She also submitted that PW2 weighed the drugs in the presence of the appellant at the Provincial CID offices. As respects the appellant's defecne, her stand is that it was an afterthought.

This is the first appellate court and it behoves me to review and evaluate the evidence and the law afresh. In doing so, I bear in mind the fact that I did not have a chance to see the witnesses who testified before the court, a privilege that the trial court had. (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 is 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 22/11/2007, when at about 11.00 a.m., PC Maina received a call from Cpl Muya of Kasambara Road Block on the same Highway asking him to stop motor vehicle KAZ 907F – Rav 4 which had failed to stop at the said road block. The witnesses 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. They found the conductor who was accused 2, had been hit with a bullet on the left shoulder while the driver was the appellant. They found 11 full bags of bhang in the vehicle. The vehicle and material recovered 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 the vehicle was stopped.

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, 3rd accused. PW2 passed to him the hire documents and on 30/11/07 he interrogated the 3rd accused and preferred the charges.

Isabel Ochieng Bodo (PW2) told the court that she is a director of a car hire company by name Town Reach Mombasa Services. On 20/11/07, she received a call from Samuel Osir requesting to hire her vehicle for 3 days for his British clients. Osir sent his driver to take the car and PW2 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'. She further stated that the contract was for 3 days and on Friday she called Osir to find out if the vehicle was returned only to be told that the clients extended the contract by 2 days. On Monday she went to Summit, met the appellant and Samuel who informed her that the vehicle was arrested at Gilgil whereas she had been told the while had gone to Shimba.

In his sworn defence, the appellant stated that he was in Nairobi on 20/11/07. His wife who lives at Gilgil, told him there was a family issue to attend to. On the evening of 21/11/07, his friend Njoroge was going to Gilgil to carry maize from Nakuru in motor vehicle canter KAH 464D. They travelled together to Gilgil on 22/11/07 where they arrived about 7.00 a.m. He went to see his wife while Njoroge proceeded to Nakuru and was to pick him up at 10.00 a.m. He went to the road at 11.30 a.m. He boarded the vehicle about 200 metres before the road block. They were stopped at the road block, he was asked to alight and his friend Njoroge was told to proceed with the journey. He was put in the same vehicle with an injured person whom he came to know to be Tatizo, accused 2 while he met the 3rd accused in court.

Having considered all the evidence of PW1, PW3 and PW4, I have no doubt in my mind that the appellant was the driver of motor vehicle KAZ 907F Rav 4 which was stopped at the road block by PW1, PW3 and PW4 on 22/11/07. PW8 recalled that he collected the appellant and his co-accused from the Gilgil Police Station. The evidence on arrest was overwhelming and the appellant's defence was a mere afterthought. At no time during the hearing of the prosecution case did he mention Njoroge. Although he claimed to have been in a Mitsubishi canter KAH 464D, he never mentioned that he had been given a lift by a friend by name Njoroge when cross examining PW1 and PW3. It is interesting that his friend never bothered to know what happened to the appellant nor did the appellant bother to call him as a witness. Not that the court would be shifting the burden on the appellant but given that Njoroge had not been mentioned before and it is only the appellant who knows him, it is only the appellant who could have called him. PW1, PW3 and PW4 explained in detail how they had been informed of the vehicle, that had failed to stop and the vehicle tried to get away but one of the officers shot at it and the occupants who were the appellant as driver and accused 2 who got short at and was injured came out. The trial court found that the evidence placed the appellant at the scene where the recovery of the drugs was found in KAZ 907F and his defence was an afterthought.

I have no reason to disagree with the trial court's finding as to where the appellant was arrested. I am in agreement with the trial court that the defence was far fetched.

Whether **Section 74(A)** of the **Act** was complied with; the said **Section** requires that the drugs (substance) be weighed by an authorized officer before samples are released to the Government analyst for analysis. In this case, it is PW8 of CID Anti Narcotics Nakuru, who was instructed to go to Gilgil where police had intercepted suspects with drugs. PW8 was supposed to comply with the provisions of Section 74(A) of the Act which provides as follows:-

> **"Section 74A(1). Where any narcotic drug or psychotropic substance has been seized and is to be used in evidence, the Commissioner of Police and Director of Medical Services or a police or medical officer respectively authorized in writing by either of them for the purposes of this Act (herein refered to as the authorized officers) shall where practicable in the presence of –**

a. **any person intended to be charged in relation to the drugs (in this Section referred to as "the accused person");**
b. **…;**
c. **…;**
d. **….**

> **Weigh the whole amount seized and thereafter the designated analyst take and weigh one or more samples of such narcotic drug or psychotropic substances and take away such sample or samples for the purpose of analyzing and identifying the same."**

PW8 admitted in his evidence that he did not record anywhere that the drugs were weighed in his presence and that of the accused. **Section 74(A)** being specific that the authorized officer do take part in the exercise of weighing, it was expected and was prudent that the officer who weighed the drugs specifically state that fact.

Section 74A provides that the weighing of the drugs be done by an **'authorized officer'**. Who is an **'authorized officer'** in terms of this **Act**. **Section 86** of the Act provides that answer. It reads:-

> **"(6) where in any prosecution under this Act any fine as to be determined by the market value of any narcotic drug, psychotropic substance or prohibited plant, a certificate under the hand of the proper officer of the market value of such narcotic drug or psychotropic substance shall be accepted by the court as prima facie evidence of the value thereof.**
>
> **(7) In this section 'proper officer' means the officer authorized by the Minister by notification in the Gazette for the purposes of this Section."**

PW8 did not provide any evidence to the court that he was a gazetted officer nor did he provide any evidence in writing that he was an authorized officer to carry out the exer5cise. The charge states that the appellant was found trafficking in 351kgs of cannabis sativa with a street value of Kshs.351,000/-. Nowhere in the evidence adduced by the prosecution was there any attempt to demonstrate how PW8 arrived at this value placed on the recovered drugs upon which the sentence could have been based. The Court of Appeal is the case of CRCA 84/2004 **Kolongei v Rep (2005)KLR**, observed that there is no express provision in the **Act** as to how to calculate the value of the prohibited drugs except **Section 86** of the **Act**. In that case the court accepted the evidence of the **'proper officer'** or **'authorized officer'** who gave the value based on intelligence and his association with drug addicts. The authorized officer told the court as follows:-

> **"The heroine was worth 27.8m. We got the street value from intelligence – from street addicts etc. 1 gram of heroin on the street goes for Kshs.1,000/-. I am a gazetted officer to value drugs. I have experience having been in anti narcotics for 2½ years. We interact with addicts and also have our intelligence net work. That is how we know the value. The business is illegal and so that is why we call it street value."**

After considering the issue of the value of the drugs the Court of Appeal said:-

> **"The solutuion therefore in our view, where the trial court is faced with scanty material on valuation, is not to throw one's hands and dismiss the valuation, but to do their best to find the willing seller willing buyer price, or simply the market value."**

In the instant case, the prosecution did not even attempt to ascertain how much the street value or market value was save for what was stated in the charge sheet. For that reason, this case falls on all fours with the decision in **Hamayun Khan v Rep** CRA 159/2000, where the Court of Appeal allowed on appeal on the basis that no evidence was adduced at the trial as to the value of the drugs upon which the sentence was pegged and the sentence was therefore invalid.

It was also the duty of the authorized officer to take samples of the drugs and send them to the Government analyst for investigations. PW8 claimed to have instructed one PC Kipruto to do so. The exhibit Memo Form (PEx.6) did not indicate who carried out that exercise. It cannot be certain that the substance intercepted was the same one sent to the Government analyst.

Although the court has no doubt that the appellant was found in possession of narcotic drugs, I find that PW8 was very casual in the handling of the case and omitted to carry out very vital procedures in the handling of the case. Failure to comply with Section 74(A) of the Act is fatal to the prosecution case. I therefore quash the conviction, set aside the sentence and he 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