REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 201 OF 2012

BETWEEN

MICHAEL SYLVESTER OIMA ……..……. APPELLANT

AND

REPUBLIC ……..…….....…….…..… RESPONDENT

(Being an appeal from original conviction and sentence of Hon. D.K. Kemei, SPM,

delivered on 14th August 2012 in Migori SPMCRC No. 695 of 2011)

JUDGMENT

Introduction

1. The appellant herein Michael Sylvester Oima was the accused in criminal case No.695 of 2011of the SPM's court at Migori. He was charged with being in possession of narcotic drug contrary to **Section 3 (1)** and **3 (2) (a)** of the **Narcotic Drugs and Psychotropic Substances Control Act No.4 of 1994**. The particulars of the charges were that on the 2nd day of December 2011 at Nyasare Water Supply area along Migori-Kisii road in Migori County within the Republic of Kenya was found in possession of a narcotic drug namely cannabis sativa (bhang) to wit 218 rolls with a street value of Kshs.34,680/= in contravention of the said Act.

The Prosecution Case

2. The appellant pleaded not guilty to the charge and the prosecution called 4 witnesses. PW1 was Number 2008110 249 APC Charles Otieno Ogada of DC's Office Migori. He testified that on 2nd December 2011 at about 7.00 a.m., he was performing road block duties at Kimaiga area along the Migori-Kisii Road. He was in the company of 3 other officers. They stopped a Nissan Matatu being Reg. No. KBK 142 U which was travelling from Sirare to Kisii. Inside that vehicle, was the appellant. There were several pieces of luggage in the vehicle, one of which was a black suit case and a small grey bag. The suit case and the grey bag were searched and found to be stashed with rolls of bhang.
3. PW1 asked for the owner of the suit case to come forward but when nobody volunteered, the crew of the motor vehicle was ordered to drive the vehicle to Migori police station. At the police station, the conductor of the matatu (who was not called as a witness) pointed to the appellant as the owner of the two bags containing bhang. The appellant was handed over to the police.

4. During cross examination, PW1 told the court that whereas the black suitcase was placed in the vehicle's boot, the appellant had in his possession the small grey bag which contained 25 rolls of bhang. The witness identified the black suitcase - **PMF1-1** and the small grey bag – **PMF1-2**.
5. PW2, Number 64819 Police Constable Pius Kiprop of Migori police station Radio Room corroborated the testimony given by PW1 saying that while the small grey bag was found on the appellant, the black suitcase was in the boot of the vehicle. He also testified that at the police station, the appellant as well as the driver and conductor of the matatu were placed in police cells.
6. PW3 was Richard Kimutai Langat, a Government Analyst based at Kisumu. He said he examined exhibits sent to him under the escort of IP David Terer and that after analysis, he established that the five sticks (rolls) of cannabis fell within the first schedule of the Narcotic Drugs and Psychotropic Substance Control Act, No.4 of 1994. The witness told the court that it was not his duty during the analysis to establish the owner of the cannabis.
7. PW4, Number 81085 Police Constable Daniel Kimuyu, of CID Migori testified that at about 07.40 hrs on 2nd December 2011, he received a telephone call from IP David Terer asking him to proceed to Migori police station to see some suspects who were being held there in connection with this case. On arrival at the police station, he conducted a search on the matatu and recovered one black suitcase containing 218 tariffs in rolls as well as a small navy blue bag from the appellant who had the small bag on his lap. After taking statements from the driver and conductor of the matatu, he arrested the appellant. The black suit case was produced as **P. Exhibit 1** while the grey bag containing 25 rolls of bhang was produced as **P. Exhibit 2**.
8. PW4 confirmed to the court during cross examination that during the search, the appellant had the grey bag (**P. Exhibit 2**) on his lap. He also said that the other people who were placed in cells alongside the appellant were released after interrogation.

The Defence Case

9. When the appellant was put on his defence after the trial court found that the prosecution had established a *prima facie* case against him, the appellant said, **"I elect to remain silent in defence."**

Judgment of the Trial Court

10. After carefully analyzing the evidence that was placed before

him, the learned trial magistrate found that the prosecution had proved its case against the appellant beyond any reasonable doubt. He found the appellant guilty as charged, convicted him and sentenced him to 20 years' imprisonment.

The Appeal

11. The appellant being dissatisfied with both conviction and sentence preferred the instant appeal. In his home made petition of appeal filed in court on 16th August 2012, the appellant set out the following grounds:-

1. *That he pleaded not guilty to the offence of being in possession of Narcotic Drugs C/Section 3 (1) and 3 (2) of the Narcotic drugs and Psychotropic substances control Act No.4 of 1994.*
2. *That the trial magistrate erred in both law and facts in that he never profoundly investigated the incredible and suspicious circumstances in which the appellant was arrested and subsequently charged for being in possession of narcotic drugs that were allegedly found in the boot of the vehicle he was travelling in as a passenger.*
3. *The trial magistrate erred in both law and facts that he sentenced the appellant to serve 20 years despite the fact that he was not found in possession of the exhibit.*
4. *That the trial magistrate erred in both law and facts in that the owner of the said vehicle never even stepped in court to adduce his evidence.*
5. *That the trial magistrate erred in both law and facts in that he disregarded the exonerating evidence adduced by the conductor and the driver stating very clearly that the appellant was not*

the owner of the luggage in which the Narcotic drugs were found.

6. *That the trial magistrate erred in both law and facts in that he did*

   not find out circumstances under which the driver and the conductor and the vehicle were released immediately on the same day even before the investigation officers conducted thorough and conclusive investigation over the alleged crime.

7. *That the trial magistrate erred in both law and facts in that none of the occupants of the said vehicle propounded corroborating evidence before the court.*
8. *That the trial magistrate erred in both law and facts in that the weighing of the alleged cannabis was not even done in the appellant's presence neither was the weighing certificate made nor the appellant's attention drawn to the same document for ratification.*
9. *That the trial magistrate erred in both law and facts finding the appellant to go through a long trial since the year 2011 for the offence dived of a firm basis, if what were said before the court were anything to go by then the trial magistrate was to set me free during the ruling without any conditions attached to the acquittal order.(sic)*
10. *That the trial magistrate erred in both law and facts in as much as he never investigated the scenario in which the owner of the vehicle paid police some money and I was ordered to be held at the station since I was not able to raise Kshs.15,000/= in exchange of my freedom.*
11. *The decision and punishment advanced by the trial magistrate has indeed put the status of my family, my late brother's kids and my sickling [sickly] and aged father into a complicated and deplorable condition since I was responsible for their well being.*
12. *That he humbly implores the honourable Court intervenes; quash the conviction and sentence imposed on him since it is overly harsh and furthermore based on evidence devoid of any little probative value to secure conviction.*

12. The appellant prays that the appeal be allowed, the conviction be quashed and the sentence of 20 years imprisonment be set aside.

The Submissions

13. At the hearing of this appeal, the appellant put in very detailed written submissions which I have carefully read. He submits that the fact that he was not represented by an advocate was an affront to his constitutional rights under **Article 50 (2) (h)** of the **Constitution**; that his fundamental rights under **Article 49 (1)** and **(2)** were violated, *inter alia*, he was not taken to court within the 24 hours as stipulated in the constitution and that during the first court appearance, he was not informed of the reason for his arrest.
14. The appellant also submits that he was arrested without a warrant and that in any event the evidence adduced by the prosecution during the trial fell far below the threshold for proving the charge beyond any reasonable doubt.
15. The appeal is opposed. Counsel for the Respondent submits that all the evidence adduced by the first three prosecution witnesses point to the fact that the appellant had in his possession both **P. Exhibit 1** and **2**, which evidence remained unshaken throughout the trial. Counsel urged the court to dismiss this appeal on both conviction and sentence.
16. In reply, the appellant says that since he was only one of the passengers in the subject motor vehicle, it was not clear from the evidence that the two bags belonged to him. He urged the court to allow his appeal.

The Duty of this Court

17. This is a first appeal. While remembering that I do not have the benefit of seeing and hearing the witnesses who testified during the trial, I have a duty to reconsider and evaluate the evidence afresh with a view to reaching my own conclusions in this matter. See **Okeno –vs- Republic [1972] EA 32**; **Ngui –vs- Republic [1984] KLR 729** and **Koech & another –vs- Republic [2004[KLR 322**.

Findings and Conclusions

18. After carefully analyzing the evidence given, the following are the issues for determination in this appeal:-

1. *Were the appellant's constitutional rights violated contrary to Articles 49 and 50 of the Constitution?*
2. *Was the appellant found to be the one in possession of Exhibit 1 and 2?*
3. *Was the appellant's sentence too harsh?*

19. With regard to the first issue, **Article 49 (1) (f)** of the **Constitution** stipulates:-

"(a)An arrested person has the right :-

i. **to be brought before a court as soon as reasonably**

possible, but not later than:-

- **twenty-four hours after being arrested; or**
- **if the twenty four hours ends outside ordinary court hours, or**
- **on a day that is not an ordinary court day, the end of the next court day."**

20. It is an undisputed fact that the appellant was arrested on 2nd December 2011 and charged in court on 5th December 2011. There would be a violation of his right under **Article 49 (1) (f)** if these dates fell within ordinary court days. However, I have looked at the calendar for 2011. The 2nd of December 2011 fell on a Friday which was an ordinary court day but the circumstances under which the appellant was arrested in this case meant that the police had to do some investigation to ascertain the owner of the exhibits and accordingly it was not possible for the appellant to be arraigned in court on the same day. Thus it follows that the next available ordinary court day was 5th December 2011 (a Monday) the day on which the appellant was arraigned in court for the purposes of plea. This was clearly in conformity with the requirements of **Article 49 (1)** which stipulates **"if the twenty four hours ends outside ordinary court hours or on a day that is not an ordinary court day, the end of the next court day."** In any event these complaints by the appellant do not even form part of the grounds of appeal and must be treated as mere afterthoughts.
21. With regard to the second issue of whether or not the appellant was the person found to be in possession of the suit case and small grey bag whose contents were cannabis sativa, the evidence adduced by the prosecution witnesses, PW1, PW2 and PW4, who all arrested the matatu which was carrying the suit case, and the passengers including the appellant, said that none of the passengers admitted to be the owner of the black suit case. However PW1 during examination in chief stated that the conductor of the said van pointed out the appellant as the owner of the suit case. His testimony was corroborated by PW4 who stated that the driver and the conductor told them that appellant was the owner of the suit case.
22. However, both the driver and conductor were never called to adduce any evidence in court. The investigating officer PW4 on cross examination on why the driver and the conductor were not availed as witnesses stated thus:-

"Yes, I have not been able to reach the other witnesses through their mobile phones."

23. According to the evidence of PW2, it is clear that the appellant was placed in police cells with the conductor who was later released. Once the conductor pointed out that the appellant had possession of the suit case, he should have been released and bonded as a witness for the prosecution. The part of the testimony implicating the appellant as the owner of the suit case in

my view remains hearsay evidence. Under **Section 63** of the **Evidence Act**, hear say evidence is inadmissible save in well known exceptions under **Section 33** of the **Evidence Act** which were not applicable here. **Section 63** of the **Evidence Act** is in the following terms:-

"63 (1) Oral Evidence must in all cases be direct evidence;

(2) For the purpose of subsection (1), direct evidence means :-

a) with reference to a fact which should be seen the evidence

of a witness who says he saw it;

b) with reference to a fact which could be heard, the evidence

of a witness who says he heard it.

c) with reference to a fact which could be perceived by any

other sense or in any other manner, the evidence of a

witness who says he perceived it by that sense or in that manner.

d) with reference to an opinion or to the grounds on which is held

the evidence of the person who holds that opinion or, as the

case may be, who holds it on those grounds."

24. After evaluating all the above circumstances which qualify as direct evidence, the evidence adduced by PW1 and PW4 concerning the ownership

of the suit case remains hear say evidence, and therefore inadmissible.

25. However, even if we apply the doctrine of inference as the trial court did to conclude the fact that since the appellant already had in his possession a small grey bag containing 25 rolls of bhang and similar bhang was found in the suit case, the most rational conclusion would be that the appellant was also the owner of the bag. According to PW1, PW2 and PW4's evidence, none of the other passengers implicated the appellant as the owner of the suit case. It was only the conductor and driver who stated that the black suit case belonged to the appellant but as already pointed out, these two witnesses did not testify in court and no sufficient reason was given by the prosecution as to why they did not testify.
26. It must be remembered that in criminal trials the accused will be presumed innocent until proven guilty and that the burden of proof in criminal cases is much higher than that of in civil cases.
27. In **Miller –vs- Minister of Pensions [1947] 2 All ER 372, 373**, Lord Denning had this to say on proof beyond a reasonable doubt:-

"That degree is well settled. It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed by a sentence of course, it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short will suffice."

28. Thus, after evaluating the above evidence, it is my view that the appellant should not have been convicted and sentenced of being in possession of narcotics contained in the suit case (**Exhibit 1**) containing 218 rolls of cannabis sativa.
29. However, as regards the small bag, there was direct evidence showing that

    the appellant was in possession of the small grey bag on his lap (**Exhibit 2**)

    containing 25 rolls of cannabis sativa. This was stated by PW2 and PW4 in their examination in chief and also during cross examination.

30. The appellant was charged with being in possession of narcotic drug contrary to **Section 3(1)** and **3 (2) (a)** of the **Narcotic Drugs and Psychotropic Substances Control Act No.4 of 1994**.
31. Under **Section 3 (2) (a)** it states:-

    "A person found guilty of an offence under subsection (1) shall be

    liable:-

a. **in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years."**

32. As I have stated above, ownership of the black suit case (**Exhibit 1**) was not established and since the amount of Narcotics contained in **Exhibit 2** was only 25 rolls the proper sentence to be meted out to the appellant should be 10 years imprisonment since his possession of **Exhibit 2** was proved beyond reasonable doubt.
33. In the premises, and for the reasons above given, the appeal on conviction is dismissed. The appeal on sentence is allowed to the extent that the term of 20 years imprisonment is reduced to 10 years imprisonment. R/A to the Court of Appeal explained.
34. Orders accordingly.

Dated, signed and delivered at Kisii this 27th day of February, 2014

R.N. SITATI

JUDGE.

In the presence of:

Present in person for the Appellant

Mr. P.O. Ochieng for the Respondent

Mr. Bibu - Court Clerk