



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 62 OF 2011**

*(From the original conviction and sentence in criminal case no. 370 of 2010 of the Principal Magistrate's Court at Kilifi before Hon. A. M. Obura – SRM)*

**JOHN OUMA ..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant, John Ouma was charged on 26<sup>th</sup> April, 2010 before the Senior Resident Magistrate Kilifi, with Being in Possession of Narcotic Drugs contrary to Section 3(1) as read with Section 3(1) as read with Section 3 (2) (b) of the Narcotic Drugs and Psychotropic substances Control Act (the Act) in that on the 23<sup>rd</sup> day of April, 2010 at Mtondia area in Kilifi District of the Coast Province, was found being in possession of Narcotic Drugs to hit 963 rolls of Cannabis Sativa in contravention of the said Act.

He denied the charge. He was unrepresented during the trial. The end of the trial he was convicted and sentenced to ten (10) years imprisonment on 10<sup>th</sup> May, 2011.

He has now appealed against both conviction and sentence. The amended grounds of appeal filed on 16<sup>th</sup> October, 2013 by the appellant can be restated as follows:

1. That the charge was defective for omitting the value of the drugs in the particulars
2. That the quantity of drugs in the particulars of the charge was not proved.
3. That the evidence on record did not support the element of possession at the hearing of the appeal, the appellant relied wholly on the home made written submissions filed together with the grounds on 16<sup>th</sup> October, 2013. Appearing for the State, Mr. Musyoki opposed the appeal and called his Section 382 of the Criminal Procedure Code regarding the alleged defect on the charge. He reiterated the prosecution evidence adduced in the Lower Court.

As required on first appeal, I have looked at the evidence of the trial and re-evaluated it afresh with a view to drawing my own conclusions. **(Okeno v R 1973) EA.**

The court has borne in mind that the trial court had the opportunity to hear and see the witnesses testify. An appellate court will not interfere with findings of fact by the trial court that were based on the credibility of witnesses unless the same are unreasonable (see **Republic v Oyier [1985] KLR 353.**

Briefly, the prosecution evidence was that on the night of 23<sup>rd</sup> April, 2010 APC Kazungu (PW1) and AP CPL Mohamed from Tezo AP Post were on patrol. They got a tip from a member of public that the appellant was storing bhanghi in a certain house at Mtwapa. They proceeded there and found several tenants including the appellant. Upon searching the appellant's house they found a total of 963 rolls of cannabis bhanghi packed in a bag and a gunny bag and concealed under a bed. They arrested the appellant and on the next morning handed him over together with the drugs to PC Omondi (PW4) of Kilifi Police Station. On 26<sup>th</sup> April, 2010 the appellant was arraigned before the court but it was not until 3<sup>rd</sup> December, 2010 that PW4 forwarded the drugs to the Government Analyst, George Lawrence Odubo (PW3) for analysis and confirmation as to the nature thereof.

In his defence the appellant stated that the police officer stopped him on the day of his arrest as he walked home. They allegedly claimed that members of the Luo Community had introduced cannabis in Mtondia. He was unable to pay a bribe of Shs. 20,000/- demanded of him so he was arrested and taken to Tezo AP Post and taken to Kilifi Police Station. He denied possession of the drugs.

The first ground of appeal can be disposed of straight away. Failure to include the value of the drug in the particulars of the charge does not necessarily render the charge sheet defective (see **Madline Okoth Barasa & Anor v R [2007] eKLR**). However the charge preferred against the appellant was brought under an inappropriate sections of the Act. The particulars of the charge and the evidence at the trial indicate that the appellant was charged in connection with 963 rolls of cannabis sativa. The proper Section therefore was therefore Section 3(1) as read with Section 3(2) (a) of the Act and not Section 3(1) as read with Section 2(b) of the Act. Section 2 of the Act is the interpretation Section and it does not create any offence.

For these reasons, rather than stated by the appellant, the charge was defective and the trial court ought to have invoked Section 214 of the Criminal Procedure code.

In **Jason Akumu Yongo v R [1983] eKLR** the Court of Appeal held:

**“In our opinion a charge is defective under Section 214(1) of the Criminal Procedure Code where:**

- a. **It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or**
- b. **It does not, for such reasons, accord with the evidence given at the trial; or**
- c. **It gives a misdescription of the alleged offence in its particulars.”**

Equally, the 2<sup>nd</sup> and 3<sup>rd</sup> grounds raised by the appellant were weighty. PW4 received the drugs from PW1 and PW2 on 24<sup>th</sup> April, 2010 but it took him until 3<sup>rd</sup> December, 2010 to forward the same to the government chemist. This unexplained delay raises the question of the claim of handling of the drug. Who had custody thereof in the interviewing period of eight months? Both PW1 and pW2 freely stated during the trial that rodents had “chewed” the drugs while stored in the police exhibit store. At the first hearing there were only 813 rolls and other loose substance before the court. These were marked for identification. However, by the date of the testimony of PW4 the number of the rolls had reduced to 807 and other loose substance “incapable of counting, according to the trial notes. This is totally unacceptable. The appellant is entitled to challenge the prosecution evidence on this score as he has done.

In the case of **Bernard Omondi Odullo v R Cr. App. No. 66 of 2000** the Court of appeal dealt with a similar situation. The court questioned the delay, in that case of two months in the delivery of the drug to the Government Chemist and observed:

**“...there is no evidence to show...why it (drug) took nearly two months to reach him (government chemist) who had the custody of the drug...from 7<sup>th</sup> March, 1998 to 5<sup>th</sup>**

**May, 1998...These factors print out that the claim of evidence as to custody of the heroin was not complete. That being so there is a doubt as to whether what was recovered from the appellant was heroin which was referred to in the Government Chemist's report. We must point out that greater care should be taken in future in providing the custody of exhibits and in the case of drug related offences the custody of the drug itself. This issue of the break in the chain of evidence as regards the custody of the offending drug not gone into by the learned magistrate; nor was it given into try the superior court. On this issue alone we have no alternative but to allow the appeal."**

In the instant case, the trial court merely observed that the exhibits had not been properly stored but did not question the delay or claim of handling of the drug since recovery to the trial. Secondly, the learned magistrate appears to have glossed over the discrepancy of the number of rolls in the charge sheet and during the trial. The state of the evidence on record is such that it created doubt as to the exact number of rolls recovered and whether in fact these were the same substances recovered from the appellant eventually sent to the Government Chemist.

For the foregoing reasons, this appeal must be allowed. The conviction against the appellant is hereby quashed and the sentence set aside. He is to be set at liberty unless otherwise lawfully held.

Delivered and signed at Malindi this **10<sup>th</sup>** day of **April, 2014**.

Court clerk – Samwel

**C. W. Meoli**

**JUDGE**