



No.352/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 58 OF 2012

CHRISTOPHER ANTONY MAPUNDAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Kajiado Senior Resident Magistrate's Court Criminal Case No. 1605 of 2010 by Hon. W.N. Kaberia, SRM on 29/2/2012)

JUDGMENT

1. The appellant was 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**. Particulars of the offence being that on **19th day of December, 2010** along **Namanga Nairobi** road in **Kajiado District** within the **Rift Valley Province** jointly with others not before court was found trafficking in narcotic drugs namely cannabis sativa (bhang) by transporting to wit **582 kilograms** valued at **Kshs. 582,000/=** in a motor-vehicle **Registration Number T969 AHU** make **Mitsubishi Lorry** and **Trailer Registration Number T 914 AHK** in contravention of the said Act.
2. He was convicted and sentenced to serve **20 years** imprisonment. In addition he was to pay a fine of **Kshs. 1,746,000/=**.
3. Being aggrieved with the conviction and sentence, he now appeals per his amended memorandum of appeal, on the grounds that:-
 - i. The trial magistrate convicted irrespective of the fact that the trial contravened the provisions of **Section 207(1)** of the **Criminal Procedure Code**.
 - ii. The trial magistrate convicted the appellant irrespective of the fact that the evidence adduced was contradictory and exonerated him from the alleged crime.
 - iii. That the defence that was plausible should have been resolved in the appellant's favour.
4. According to the evidence adduced on the **19th December, 2010** at about **3.00pm**, Motor vehicle **Registration Number T969 AHU/7914 AHK** carrying sun craft papers underwent the verification process by customs officers. Subsequently they were cleared by officers who worked under the supervision of PW2, **Martin Ojiambo Naboye**.
5. At about **6.00pm**, Administration Police Officers acting on information received, pursued the motor-vehicle. **PW3 No. 2007125445, APC Robert Korir Kipkorir** and **PW4, No. 200517206 APC Peter Muiruri**, inspected it and recovered some **sixteen (16) bags** of suspected cannabis

- sativa. The appellant who was the turn-boy in the motor-vehicle was arrested. The substance recovered was submitted to the Government Chemist for analysis. It was found to be cannabis sativa which is a narcotic drug. The appellant was charged.
6. In his defence the appellant stated that he was assigned duties by his employer to go to Nairobi in a lorry that was being driven by **Jumanne Hassan Nasoro**. The motor- vehicle was inspected by Customs Department Tanzania at the Kenyan border with the assistance of one **Manthi**. The motor-vehicle was cleared at the Kenyan Border. After driving some 2 kilometres away from Namanga border the motor-vehicle was stopped and impounded. He was placed in cells. Thereafter he was charged.
 7. In his submissions the appellant contends that no plea was taken in the matter when he appeared in court. He was held in custody for **2 months and six (6) days** prior to being produced in court which was in breach of his rights. The driver of the motor-vehicle having escaped was evidence that he was unaware of the prohibited goods that were being carried. Evidence adduced by the prosecution was contradictory and his defence was not considered especially so that his driver disappeared mysteriously after the vehicle was driven back to the Police Station.
 8. In a response thereto, **Ms Maingi**, State Counsel opposed the appeal. She argued that prosecution witnesses who did not know the appellant had no reason to frame him up. She called upon the court to uphold the conviction and sentence.
 9. This being the first appeal I am duty bound to subject the evidence on record to a fresh review and scrutiny and come up with my own conclusions bearing in mind that I neither saw nor heard witnesses who testified (*see Pandya versus Republic [1957] E.A. 336; Okeno versus Republic [1972] E.A. 32*).
 10. Having subjected the Lower Court record to scrutiny (*both original handwritten record and typed proceedings*). It is apparent that the first page is the charge sheet. The second page is proceedings of **25th February, 2011** by **Kaberia, SRM**. Further scrutiny however, reveals that on the **21st December, 2010** after being arrested on the **19th December 2010** the appellant was produced before **Itaya, RM** whereby the plea was taken and the case fixed for hearing before court No. 2. It is therefore not right to state that no plea was taken in the matter and that the appellant was held in custody for **two (2) months and six (6) days**.
 11. In reaching the decision to convict the appellant, the trial court stated thus :-

“From the above evidence there is no doubt that the accused was a turn-boy of motor-vehicle registration number T969 AHU T914 on the 12th day of December 2010 when it was impounded. There is also no doubt that the plant material the prosecution claims to have been found in the motor vehicle was cannabis sativa which is a narcotic drugs... on the issue PW1, PW2, PW3, PW4 and PW5 were emphatic that they were present when the vehicle was searched at the KRA yard at Namanga and they saw the 16 bags of the plant material in the rear part of the trailer...directly flowing from the foregoing is the issue whether accused was aware of the 16 bags of plant material... he was a turn-boy of this vehicle and there is no way he would have been unaware of it. I thus find him guilty”.

12. A presumption of fact was drawn that the accused had knowledge of the presence of the plant material in the motor-vehicle having been the turnboy. Trafficking is defined by the narcotic Act as:

“the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance or making of any offer in respect thereof, but does not include—“

“Conveyancing” is defined as an action or process of transporting someone or something from one place to another.

13. The question to be answered is whether the appellant was transporting the substance as stated.

Was it within his knowledge that the substance was in the motor vehicle?

14. In his defence he stated that he was called by his employer and told that they were to go to **Nairobi** with a lorry destined for **Nairobi**. He went to work and they left with the driver for **Nairobi**. The prosecution did not call one of the owners of the lorry as a witness. However after testifying and closing the defence's case and the case reserved for judgment, one **Jadhu Mondi** who described himself as one of the **Directors of Dodoma Transporters** having been duly sworn stated that the accused was his employee. He stated that the accused was a helper in **Track Registration Number T969 AHU/T914 AHK**. He stated that they never used to carry unauthorized cargo and that the motor vehicle was ferrying papers to Nairobi.
15. No witness was called by the prosecution to state the duties of the accused and the driver. That would have been the only way it would establish that prior to the motor-vehicle embarking upon the journey, the turn-boy participated in loading the motor-vehicle and he must have had the knowledge that the cannabis was fixed in between rolls of craft paper as stated by PW1. I say so because he alleged he was simply called and told to go to **Nairobi** with the driver and he obliged. This evidence was not challenged.
16. This was a motor-vehicle that went through mandatory clearance by the **Kenya Revenue Authority**. Goods carried were verified. According to PW2, he delegated duties of verification to **Josephine Wachira** who did verification of the cargo and cleared the vehicle. The verification was done in the presence of **Kephis Police** and a **Kenya Bureau of Standards Personnel**. They cleared and released the motor-vehicle. The appellant claims that the driver asked him to see **Martin** who advised him to wait at Customs as the vehicle was being cleared. PW5 confirms his story and states that he processed the documentation.
17. The motor-vehicle on being impounded by the police, more than three (3) Administration Police Officers, **Kephis Police, KEBS (KBS) personnel**, its driver disappeared mysteriously. His name is given as **Jumanne Hassan Nassoro**. A copy of his driving licence was produced in evidence. The prosecution was not able to render any explanation as to what actually happened.
18. The question to be asked is whether the plant material was put in a conspicuous place such that any person could see it. Did **Josephine Wachira** who cleared the motor-vehicle see it? The conduct of the driver clearly implies that he was aware of the plant material that was inside the lorry as part of cargo. For, the accused who was just called and told to travel with the driver, did he know that the motor-vehicle was carrying some cargo that was different from what was being transported? These are questions the prosecution failed to answer.
19. Evidence adduced by PW1 that he later weighed the substance which weighed **582 Kgs** with a street value of **Kshs. 582,000**. According to the law after narcotic drugs are seized, and are to be used in evidence, the consignment is weighed to establish the weight. The police officer or any other person who is authorized to weigh the substance carries out the exercise if practicable in the presence of the person intended to be charged in that respect.
20. PW1 did not state why it was not done in the presence of the appellant. It was evidence that he took samples of exhibits to the government Chemist for analysis. According to the exhibit memo form, the exhibits were marked **CA- 1 to CA 16**. The exhibits were examined by **S.N. Songuti** who noted that what was received was **378 grams** of plant material. This was found to be cannabis that falls within the schedule of the **Narcotic Drugs and Psychotropic Substances (Control Act 1994)**.
21. The report was produced by PW6, **Simon Ndubi** who stated that he had worked with **Sunguti** for **15 years**. No leave was sought to have him produce the document under **Section 77** of the **Evidence Act**. The appellant was not notified of his right of either object to its production or not. In his cross-examination, the appellant sought to know whether the witness had participated in examination of the drugs. What is evident is the fact that the process adopted by the court was irregular.
22. Having re-evaluated the evidence adduced it is apparent that the trial court did not take into consideration the evidence given in defence. Had he done so he may have reached a contrary view?
23. In the premises, the appeal succeeds. The conviction is quashed and the sentence imposed set

aside. The appellant shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at MACHAKOS this 24TH day of JULY, 2014.

L.N. MUTENDE

JUDGE