



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APEPAL CASE NO. 282 OF 2010

JAMES THUO WAKABU alias JIMMY.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 1233 of 2007 in the Chief Magistrate's Court at Nairobi – Mrs. T. N. Ngugi (SRM) on 19/03/2010)

JUDGMENT

1. The Appellant, James Thuo Wakabu *alias* Jimmy was charged with the offence of trafficking in narcotic drugs contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994**. The particulars were that on the 23rd July 2007 at 7.00 a.m. at Waithaka, Langata Division Nairobi within Nairobi he trafficked in Narcotic Drugs by storing 72 sacks of cannabis weighing 2,490 kg with a market value of Kshs.4,980,000/= in contravention of the Act in count I.
2. He was also charged with permitting premises to be used for the purpose of sale or distribution of Narcotic Drugs, contrary to **Section 5(1) (c) (ii)** of the same Act in count II. The particulars were that on 23rd July 2007 at 7.00 a.m. at Waithaka, Langata Division Nairobi within Nairobi, being the owner, occupying or concerned in the management of a building under construction, permitted the premises to be used for the purpose of sale or distribution of Narcotic drugs to wit 72 bags of cannabis weighing 4,980 kg with a market value of Kshs.4,980,000/= in contravention of the Act.
3. At the close of the trial the Appellant was sentenced to serve 7 years imprisonment, in addition to a fine of Kshs.100,000/= (one hundred thousand). In default of the fine the appellant would serve an additional one year in jail.
4. The prosecution case is that on 23rd July 2007 **PW2**, No. 2002084 APC Clifford Kimathi **PW5**, No.81012030 CPL Nicholas Kamonyi and **PW3** APC Outa all of DO's office Waithaka, were on normal patrol duties along Jerusalem road in Waithaka when they received information from a police informer that there were some people trapped in a borehole in a nearby home. They proceeded to the scene and came upon a house under construction. They forced their way in. In

- the house they found a bunker/manhole in one of the rooms and recovered 72 bags of plant material they suspected to be cannabis sativa. They also found one dead body some 100 metres from the scene. Four persons who appeared to be in critical condition had already been rushed to hospital by **PW8**. The appellant was arrested later and charged.
5. In his unsworn defence the appellant raised an alibi defence, in which he denied the offence and stated that he was away in Tanzania on a business engagement at the time of the alleged offence.
 6. At the end of the trial the appellant was convicted in the first count and sentenced to seven years imprisonment. The appellant filed an appeal and advanced eleven grounds which in sum, mainly complained that the appellant was convicted on circumstantial evidence that did not meet the required standard of proof.
 7. I have considered the evidence what was presented before the trial court by both the prosecution and the defence a fresh, to draw my own inferences and reach my own conclusions. It is not disputed that 72 sacks of cannabis sativa weighing 2,490 kg, and with a market value of Kshs.4,980,000/= were recovered, at the time and place stated in the charge sheet. It is also not in dispute that four people died in un-explained circumstances at the general scene where the said drugs were recovered. The issue for determination is however, whether the appellant before court trafficked the said drugs and whether he permitted his premises to be used for purposes of sale or distribution of the said narcotic drugs.
 8. The appellant was charged with four others. I note that none of the accused persons including the appellant were arrested at the scene where the cannabis sativa was recovered. The four co-accuseds were arrested at Kikuyu hospital and **PW8** the driver of the motor vehicle that took the injured people to hospital, identified them as those who got into the motor vehicle at the scene to help escort the sick people to hospital.
 9. The appellant was arrested at the funeral of one of the persons referred to in paragraph 8, by the police acting on information that he was wanted for trafficking in Narcotic drugs and permitting his premises for use of sale and distribution of Narcotic drugs. The appellant was charged with the offences he now faces because he was said to be the owner of the house under construction, in which the exhibits were recovered. I therefore assessed the evidence on record to establish whether there was sufficient nexus between the appellant and the said house to sustain a conviction.
 10. Learned counsel M/s. Rashid in her written submissions, contended that there was no evidence that the appellant was the owner of the premises in question. That the evidence from the prosecution amounted at best, to hearsay evidence which should not have been used to convict the appellant. M/s. Rashid argued that the trial magistrate noted in her judgment that there were no documents of ownership of the house but that it belonged to the appellant's father who is deceased. In her view the court should have been told whether the deceased's father, was the one who had started the construction of the unfinished house, and whether he had other children besides the appellant.
 11. Miss Maina learned counsel for the state opposed the appeal. She urged that the government Analyst had tested and confirmed that the plant material in the 72 sacks contained cannabis sativa. She submitted that the investigations of **PW11** had confirmed that the house in which the bags of cannabis sativa were found belonged to the appellant and that this was corroborated by **PW8**. That **PW8** testified that he picked some sick people from one Jimmy's place. In Miss Maina's view the prosecution case had been proved against the appellant and she urged the court to dismiss his appeal.
 12. I have assessed the evidence on record and observe that no single witness testified that the house from which the exhibits were recovered belonged to the appellant. The person who directed **PW8** told him to go "Kwa Jimmy" to pick the injured men. She however did not testify to state whether

the house was connected to the appellant or not or whether the name Jimmy referred to the appellant. **PW11** who testified that investigations established that the house belonged to the appellant, did not elaborate how this was so. In any case no documentary evidence was tendered to prove ownership.

13.The appellant on his part testified that he lived in Ngong and produced a title deed to his home in Ngong as proof. He also raised an alibi defence in which he stated that he was in Tanzania at the time of the offence. Had it been established that the house in which the exhibits were recovered belonged to him or that he had control thereof, his alibi defence would not have availed him much. I am constrained to find that for such serious offences, the investigation was conducted in a very shoddy manner indeed. From the record there is absolutely no demonstration of a connection between the appellant and the unfinished structure in which the exhibits were recovered. After all ownership is a matter of fact and not conjecture.

14.In view of the foregoing I am satisfied that the appeal has merit. I therefore allow the appeal, quash the conviction, and set aside the sentence. I order that the appellant be set at liberty forthwith, unless otherwise lawfully held.

SIGNED DATED and **DELIVERED** in open court this **23rd day of July 2014.**

L. A. ACHODE

JUDGE