



IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 73 OF 2014

(FORMERLY KISII HCCR APPEAL NO. 35 OF 2013)

BETWEEN

GEORGE OLOO OKELLO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 397 of 2010 at Senior Principal Magistrate's Court at Migori, Hon. E. M. Nyaga, SRM dated on 17th April 2013)

JUDGMENT

1. The appellant, **GEORGE OLOO OKELLO** was charged with the offence of trafficking in narcotic drugs contrary to **section 4(a)** of the ***Narcotics Drugs and Psychotropic Substances Control Act, 2014*** (“the Act”). The particulars of the charge were as follows;

On the 6th day of May 2010 at about 1000 Hrs along Muhuru Bay-Migori Road at Got Kwer sub-location in Migori District, jointly with others not before the court, he was found trafficking 397 kilograms of bhang (cannabis sativa) valued at Kshs 397,000/= in a motor vehicle registration number KBL 467E make Toyota Fielder saloon in contravention of the said Act.

2. After hearing 9 prosecution witnesses and the defence, the appellant was convicted and sentenced to 20 years imprisonment. He now appeals against the conviction and sentence on the grounds set out in the petition of appeal on 19th April 2013. In summary, the appellant contended that the trial court did not consider which element of trafficking within the meaning of the offence he was accused of under the Act. He cited the case of ***Madline Akoth Barasa & Another v Republic KSM CA Criminal Appeal No.193 of 2005 [2007]eKLR*** to support his argument that the charge facing him was defective as it did not set out the manner in which he is alleged to have trafficked the illegal substance. He also contended that the prosecution failed to establish if he was part and parcel of the people who had hired the subject motor vehicle and that essential witnesses were not called. He also stated that the evidence against him was contradictory and could not support a conviction. The appellant relied on written submissions filed on 23rd June 2014 and 23rd September 2014 and oral submissions.

3. Ms Owenga, counsel for the State, opposed the appeal and urged the court find that there was sufficient evidence to support the conviction.

4. In order to deal with the grounds of appeal it necessary to outline the facts as they emerged from the witnesses in the subordinate court as it is the duty of the first appellate court to re-evaluate the evidence and make its own independent findings having regard to the fact that it never heard or saw the witnesses testify (see *Okeno v Republic* [1973] EA 32).

5. The prosecution case was that appellant was netted in an operation involving several police officers. PW 1, Sergeant Peter Mikisi, an officer with the Narcotics Department Nairobi, testified that on 6th May 2010 he was part of the operation in Migori District that followed a white Toyota Fielder KBL 467E which had two occupants and which was suspected of ferrying narcotics. The team comprising Judy Adhiambo, Corporal Ali Chilaga and PC Job Mwita followed the vehicle and near Kanga towards Kisii, they stopped the vehicle but it refused to stop. They gave chase but the police vehicle broke down so the officers had to hire motorbikes. They took different routes in order to intercept the vehicle. They also called for reinforcements. The vehicle was later found and the appellant arrested. PW 1 found the vehicle at Migori Police Station with the appellant. While there, he counted 2,280 stones of bhang weighing 397 kilograms in the appellant's presence. He prepared and signed the certificate of weighing which the appellant declined to sign.

6. PW 2, PC Job Mwita, confirmed that he was part of the team that followed motor vehicle KBL 467E. He testified that he was present at Migori Police Station when the stones of bhang were counted and weighed. He prepared the exhibit memo form and certificate of sampling which the appellant refused to sign. PW 3, Corporal Chilaga was also part of the operation trailing motor vehicle KBL 467E. He testified how they gave chase but the police vehicle broke down forcing them to take motor bikes. They caught up with the motor vehicle after it stalled. PW 3 stated that he was armed and he saw the appellant, who was seated at the driver's seat, come out of the vehicle with his hands up. He tied him and inspected the contents of the car which he noted was bhang. He was present when the vehicle was towed to Migori Police Station.

7. PW4, John Maina Wangombe, testified that he purchased motor vehicle KBL 467E from Yuasa Motors on 20th April 2010. He hired it to one Conrad Njagi Gatiga and they entered into an agreement on or about 23rd April 2010 where he would pay Kshs. 40,000.00 per month. He was later called by Yuasa Motors asking for the whereabouts of the vehicle as it had been arrested in Migori carrying bhang. He testified that he did not know the appellant. He called Conrad who told him that he had given the vehicle to his brother to ferry passengers to Migori. PW 8, Chief Inspector Samwel Otungo of Githurai, testified that on 19th May 2010 a complaint was received from one Conrad Gatiga regarding motor vehicle KBL 467E Toyota Fielder alleging that it was being misused. He stated that it had been hired to one George Okello on 5th May 2010 and he was to return it on 16th May 2010. He reported that the vehicle had not been returned and that the person has switched off his mobile phone. PW 8 produced an extract of the Occurrence Book to confirm the complaint.

8. PW 5, Richard Kimutai Langat, a Government Analyst, testified that on 13th May 2010, he received from PC Job Mwita a polythene bag containing 48 stones of dried plant material accompanied by an exhibit memo. He analysed the material and concluded that it was *cannabis sativa*. He prepared a report dated 14th May 2010 and signed it. PW 5 was later recalled to testify and he stated that on 9th August 2011 he received a large khaki envelope from PC Douglas Ongicho of Migori CID. It contained leaves and seeds of dried plant material. He examined it concluded it was bhang. He prepared a report dated 16th August 2011.

9. PW 6, Joseph Nzioka, was attached to the Flying Squad and was previously the Deputy DCIO at Migori Police Station. He stated that his role in the operation which was to show team the routes used to traffic narcotics within the area. He testified that he saw the appellant when he was arrested and the motor vehicle had bhang in stone form. He stated that he drove the vehicle with the bhang to Migori Police Station where the bhang was identified and counted.

10. PW 9, PC Douglas Ongicho of the CID Migori, recalled that on 6th May 2010, he was

informed by PW 6 that motor vehicle KBL 467E was suspected to be carrying bhang. He instructed him to use the station vehicle and proceed to the Migori-Sori road in order to intercept the vehicle. They patrolled the road but were later informed that the vehicle had been intercepted. He returned to the station where the vehicle was and the bhang was recovered, weighed and sent to the Government Analyst.

11. Upon the close of the prosecution case, the appellant was placed on his defence and he elected to give an unsworn statement. The appellant stated that he was a businessman dealing in second hand clothes at Gikomba. On 6th May 2010 at about 9.00 am he was with his wife at God Kweru when he saw three people approach his house. He recognised two of them as Mary Atieno Opondo and PC Ali Chelaga (PW 3). He was told that he was being arrested in connection with a fight between himself, Mary Opondo and PW 3 at Nyama Villa Bar in Kayole Nairobi. He was told to accompany them to Migori Police Station. He was booked at the station and arraigned in court for the offence.

12. The first issue raised by the appellant is whether the charge disclosed an offence of trafficking. **Section 2** of the **Act** defines “*Trafficking*” as follows-

Trafficking means 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.

13. The Court of Appeal considered the meaning and implication of the word trafficking in the framing of charges under the **Act** in **Madline Akoth Barasa & Another v Republic (Supra)**. It held as follows:-

It is evident from the definition of trafficking that the word is used as a term of art embracing various dealings with narcotic drugs or psychotropic substance. In our view for the charge sheet to disclose the offence of trafficking the particulars of the charge must specify clearly the conduct of an accused person which constitutes trafficking. In addition and more importantly, the prosecution should at the trial prove by evidence the conduct of an accused person which constitutes trafficking. In this case neither the charge sheet nor the evidence discloses the dealing with the bhang which constituted trafficking. The learned trial magistrate did not even deal with that aspect of the case.

14. In the present appeal, the charge sheet used the general word trafficking. It ought to have been added that the appellant was in fact doing any of the acts that constitute trafficking. I however note that as the Court of Appeal stated in the **Madline Barasa Case**, this court, may if this appeal is not allowed on any other ground, to invoke its powers under **section 361(4)** of the **Criminal Procedure Code** convict the appellant of a lesser but cognate offence by substituting the conviction for trafficking with that of possession and sentence the appellant accordingly.

15. I now turn to the substance of the appeal. The question before the trial court was whether the appellant was the person caught with the substance known as *cannabis sativa*. The evidence of PW 1, PW 2, PW 3 and PW 4 was consistent regarding the operation and how the appellant was captured. The appellant contends that there was inconsistency and contradictions in aspects of the testimony of the witnesses. PW 1 stated that after the appellant had been arrested, he drove the vehicle accompanied by an officer. PW 3 stated that the vehicle was towed to the station while PW 6 stated he drove the motor vehicle with the bhang to the Police Station while the appellant was taken in another vehicle.

16. The appellant cited the case of **Dinkenrai Ramkri Shan Pandya v R [1957] EA 336** where the court held that, “*It is trite law that where evidence is contradicted such evidence should not be relied upon.*” The approach to contradictions and inconsistencies was dealt with by the Court of Appeal stated as follows in **Erick Onyango Ondeng’ v Republic NAI CA No. 5 of 2013**

*Nor do we think much turns on the alleged contradictions on the time of commission of the offence. The trial court, after hearing all the evidence accepted that the offence was committed at “about 7 pm” in accordance with the evidence of PW2. As noted by the Uganda Court of Appeal in **Twehangane Alfred v Uganda, Crim. App. No 139 of 2001, [2003] UGCA 6** it is not very contradiction that warrants rejection of evidence. As the court put it: “With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.*

17. In my view, the prosecution case must be looked at as a whole. What is clear is that the appellant was arrested in motor vehicle that was ferrying a substance which was later identified to be bhang. Contradictions and inconsistencies may arise because people give their evidence of different ways or recall what they consider material. The events as explained by the various witnesses tell one continuous set of events that culminated in the case against the appellant. I do not find any facts which point to deliberate untruthfulness on the part of any of the witnesses. Furthermore, I have scrutinised the record and the reference to other vehicle KBC 467E released by the court and KBL 897E were spelling errors as the evidence on the registration number of the motor vehicle was consistent throughout. This point is fortified by the fact that the vehicle was produced as an exhibit during the trial.

18. The appellant’s defence was that he was framed as a result of a fight involving PW 3. PW 3 denied that he knew the appellant or that they had disagreed with him about a woman. His defence was threadbare in light of the prosecution evidence. If anything, he confirmed that he was with PW 3 on the morning of the material day and PW 3 was the arresting officer. I am therefore satisfied that the appellant was arrested in the motor vehicle registration KBL 467E which contained stones of bhang.

19. In view of my findings in paragraph 14 above on the issue of trafficking, the next issue for consideration is whether the appellant has the *cannabis sativa* in his possession. Possession can be either actual or constructive under **section 4 (a)** of the **Penal Code** which defines possession as follows;

‘be in possession’ or ‘have in possession’ includes not only having one’s personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person.’

20. The prosecution evidence was that the appellant was found in a vehicle carrying the bhang. He was in the driver’s seat when he was arrested and accordingly and within the meaning of **section 4(a)** of the **Penal Code** he was in possession of the *cannabis sativa*. Since he was in possession, it is unnecessary to prove the owner of the motor vehicle. However, the prosecution connected appellant to the vehicle. First, PW 4 testified that the vehicle was his and was leased to Conrad who informed him that his brother had given it to a third party to ferry people in Migori. PW 5 established that the said Conrad had lodged a complaint against the appellant with the police. I therefore find that there was sufficient evidence to connect the appellant with the motor vehicle. PW 5, the Government Analyst, confirmed that the samples he received were *cannabis sativa* which is proscribed by the **Act**. The chain of evidence established by the prosecution witnesses established that the stones of *cannabis sativa* were recovered in the vehicle where the appellant was arrested.

21. In the final analysis, although I find the charge defective, I reduce the charge to one of possession of being in possession of *cannabis sativa* contrary to **section 3(1)** as read with **section 3(2)** of the **Narcotic Drugs and Psychotropic Substances (Control) Act, 1994** and convict the

appellant accordingly.

22. As regards the sentence, the maximum sentence prescribed under **section 3(2)(1)(a)** is a maximum of 20 years imprisonment. The appellant admitted that he was not a first offender as he had been convicted in ***Nyeri Chief Magistrate's Court Criminal Case No. 887 of 2009*** for drug trafficking and sentenced to 11 years imprisonment on 13th July 2010. He was found in possession of a substantial amount of *cannabis sativa*. Given the amount of substance he was found with, I impose a sentence of 7 years imprisonment.

23. In summary the conviction and sentence are set aside and substituted with a conviction for the possession of *cannabis sativa* contrary to **section 3(1)** as read with **section 3(2)** of the ***Narcotic Drugs and Psychotropic Substances (Control) Act, 1994*** and sentence of 7 years imprisonment effective from 17th April 2013 when the appellant was convicted and sentenced by the trial court.

DATED and DELIVERED at MIGORI this 21st day of November 2014.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Owenga, Senior Prosecution Counsel, instructed by Office of the Director of Public Prosecutions for the respondent.