



REPUBLIC OF KENYA

High Court of Kisii

Criminal Case 113 of 2011

PETER MAGIO ALANG'O APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of Hon. E.N. Maina, Chief Magistrate at

Kisii on 31st May 2011 in Kisii CMC Criminal case No.527 of 2010)

JUDGMENT

1. The appellant was charged with trafficking in narcotics contrary to **section 4** as read with **section 4 (a)** of the **Narcotics Drugs and Psychotropic Substances Control Act No.4 of 1994**.
2. The particulars were that the appellant Peter Magio on the 4th day of March 2010 along Masongo Menyinkwa road in Kisii Central District within Nyanza Province, jointly with another not before court was found trafficking Narcotic drugs namely Cannabis in six sacks weighing 210 Kilogrammes valued at Kshs.350,000/= in a motor vehicle registration Number KBP 994 B Toyota Caldina.
3. He pleaded not guilty to the charge and the case commenced on 23rd June 2010. However, due to the transfer of the chief magistrate presiding over the matter, Hon. E.N. Maina, Chief Magistrate (as she then was) took over the case on 24th November 2010 and under **section 200** of the **Criminal Procedure Code** the accused requested that the 3 witnesses who had testified be recalled. At the *de novo* hearing the appellant was represented by Mr. Kiseru advocate.
4. Briefly the prosecution's case was that on the material day police officers from CID Kisii among them Corporal Richard LANGAT (PW1) and Cpl. George Kalama (PW2) were on mobile patrol when they spotted motor vehicle registration No. KBP 994 B which appeared suspicious. They moved closer to the motor vehicle which on noticing a police vehicle in the vicinity made a u-turn and it sped off towards Christa Marianne. They gave chase but after a while motor vehicle registration Number KBP 994B lost control and fell into a ditch. The driver immediately got out and fled. However the appellant who was allegedly in the passenger seat was not so lucky. He was arrested as he tried to flee from the vehicle. Inside the motor vehicle were 6 sacks of what PW1 and PW2 suspected to be bhang. They called the station and soon the motor vehicle and the suspect were taken to the Kisii police station. An exhibit memo was then prepared and the 6 sacks of the plant material suspected to be cannabis were sent to the

Government analyst in Kisumu.

5. Dennis Owino Onyango (PW3) a Government Analyst based in Kisumu confirmed to the trial court to have received 6 sacks of plant material from PW1 on 22nd June 2010, the same were marked A1 to A6 and upon analyzing the plant material he found it was bhang. He then marked the 6 sacks GCK 393/2010/BOO, compiled a report which was marked as **Exhibit P2** and further told the court that although all the sacks were returned to the CID Kisii he could only identify 5 sacks and that those 5 sacks were not in the same state they were in when they were initially taken to Kisumu. He contended that by then they were full. The explanation given for this by PW1 and PW2 was that the plant material had been eaten by rats in the store.

6. The trial court also held a session outside the CID office where PW1 and PW2 identified the motor vehicle alleged to have trafficked the cannabis. Its registration plates had been removed. According to PW1 and PW2 removing of registration plates was done to all vehicles parked outside the CID office so as to discourage their abuse. The front and rear registration plates were however exhibited. The motor vehicle and the 5 sacks of cannabis were produced in evidence together with the Exhibit Memo form (**Exhibits 1, 2 (a) and(3)**).

7. At the close of the prosecution case the appellant was put to his defence. He chose to give a sworn statement with no witnesses. He stated that on 4th March 2010 at about 9 a.m., he arrived in Kisii to visit his friend Ken Abuom. He did not find him and on his way to town, he saw a motor vehicle approaching at high speed. It lost control and fell into a ditch. A group of about 12 people including himself gathered around the vehicle. Its occupants came out and fled when suddenly another vehicle came. He heard people saying it was the flying squad and as he tried to flee the people who came out from that other motor vehicle threatened to shoot him if he did not stop. He stated that the person who ordered him to stop was a police officer who testified in this case. He was then put in the motor vehicle which had 6 sacks in it and he was told that he had been in the vehicle. He denied that he knew the vehicle and contended that he lives in Migori and sells second hand clothes (mitumba) there.

8. After carefully analyzing all the evidence that was before her, the learned trial magistrate found that the charge against the appellant had been proved beyond reasonable doubt. He was found guilty of trafficking in narcotic drugs and accordingly convicted. The appellant was ordered to pay a fine of Kshs.1 million and in addition to serve 10 years imprisonment.

9. The appellant was dissatisfied with both conviction and sentence hence the present appeal.

10. In his Petition of Appeal filed on 23rd March 2012 the appellant Peter Magio Alango through his advocate Omonde Kisera and Co. Advocates he sets out 6 grounds of appeal, *inter alia* that there was a variance between the particulars in the charge sheet and the prosecution evidence, that the trial magistrate erred in sentencing without certificate of value and the appellant's defence was credible and believable.

11. When the appeal came before me for hearing on 27th March 2012, Mr. Kisera learned counsel for the appellant submitted to court that the particulars of the charge sheet were incurably defective as they did not disclose any offence known to **section 4** as read with **section 4 (a) of Act No.4 of 1994** and that the law requires that the charge sheet disclose the particular ingredients of trafficking as set out in **section 2**. He relied on the case of **Madeline Baraza v-s- Republic – Criminal Appeal No.193 of 2008**.

12. Secondly counsel submitted that the prosecution did not prove its case beyond reasonable doubt as the case was based on contradiction and inconsistencies. That there was no tangible linkage established between the appellant and the offence in question, that the police ought to have left the number plates of the motor vehicle alleged to have contained narcotics intact to avoid suspicion that the narcotic drugs were not preserved as recovered thus creating a variance between allegations in the

charge sheet and evidence given in court.

13. Finally he submitted that no certificate of value of the narcotic drugs was availed in court which information was an important ingredient to sentencing and that the trial magistrate did not give due weight to the appellant's credible evidence. He therefore urged the court to quash the conviction and set aside the sentence.

14. The appeal was opposed by the state. Mr. Mutai, learned counsel for the state submitted that the charge was not defective for it disclosed all the ingredients of the offence stipulated under **section 4** of the **Act** in that the appellant trafficked narcotic drugs which were mentioned as cannabis. That **section 2** of the **Act** as alluded to by the appellant is a definition section defining the various terms used in the **Act** and that the said section being a definition section it is not incumbent upon the prosecution to state any of the acts in the charge sheet. He further submitted that the charge sheet merely put the appellant on notice that he was charged with trafficking. Counsel submitted that the evidence brings out all of these elements beyond reasonable doubt.

15. Thirdly, counsel contended that the trial court addressed itself to the issue of whether the trafficking aspect of the charge had been proved and that the appellant was aware of the charge he was facing.

16. Fourthly, on the issue of the valuation report, he submitted that the main purpose for valuation even in the absence of proof of the market value of the narcotic drug trafficking was proved and a sentence on such finding would ensue.

17. Lastly counsel submitted that the authority provided by counsel for the appellant was merely persuasive, that the quantity of the substance when brought out in evidence determines whether the drug was for trafficking or was for personal use and that the evidence in this case of the appellant conveying 6 bags could not have been for personal use.

18. Mr. Kisera in reply to Mr. Mutai's submission reiterated that the

decision in **Madeline Baraza case** was a Court of Appeal decision which

affirmed that for a charge of trafficking to stand, it must prove/disclose one of the ingredients of trafficking as set out in the Act. In addition that the respondent did not address the issue that the motor vehicle alleged to have been used for ferrying the narcotics had no number plates and that a certificate of value was the only basis for the court to know the magnitude of the offence in terms of monetary value of fine and length of prison term.

19. After hearing the above submissions and on reconsidering and evaluating afresh the evidence adduced in the lower court the following are the issues for determination:

- 1) *Was the charge sheet defective in that it did not disclose the form of trafficking the appellant was involved in?*
- 2) *Was the decision to impose a fine on the appellant by the trial magistrate valid without proof of market value of the narcotics?*
- 3) *Was the motor vehicle used to ferry the drugs positively identified?*
- 4) *Was there a variance between allegations in the charge sheet and evidence given in court regarding the narcotics?*
- 5) *Was the appellant positively identified and linked to the crime as stated in the charge sheet?*

20. Firstly on the issue of the defective particulars in the charge sheet, the particulars of the charge sheet were as follows:-

“Peter Magio on the 4th day of March 2010 along Masongo -

Menyinkwa road in Kisii Central District within Nyanza Province,

jointly with another not before court was found trafficking Narcotic Drugs namely cannabis in six sacks to wit 210 kgs valued at Kshs.350,000, in a motor vehicle Reg. No.KBP 994 B a Toyota Corolla.”

According to **section 2** of the **Act** trafficking means:-

“The importation, exportation, manufacture, buying, sale, supplying,

storing, administering, contingency, 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---?

21. In Madline Akoth Barasa & Another –vs-Republic [2007] e KLR – Criminal Appeal No.193 of 2005, the Court of Appeal sitting in Kisumu held:-

“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.”

22. Similar sentiments were expressed in David Andoh –vs- Republic [2009] e KLR where Ojwang J. (as he then was) cited Wanjiku –vs- Republic [2002] 1 KLR 825 where Mr. Justice Onyancha held:-

“It is therefore logical and indeed sensible that a charge of trafficking

should clearly specify the exact kind of trafficking to enable not only prosecution to know what evidence to lead to prove the charge but even more important, to enable the accused to know the actual elements of the charge the prosecution is out to prove by the evidence it will be adducing.”

23. The Learned Judge in the Wanjiku case(above) went on to state that:-

“The purpose of this is both obvious and fundamental. It is that the accused has a right to know the charge he is facing to enable him to fully prepare the defence. Failure to specify which one or more of the specific trafficking is charged is likely to embarrass or even confuse the accused in the preparation of his defence to the charge. It is also possible that failure to specify the actual act as aforesaid may as well possibly lead or mislead the trial court to convict the accused on the more serious charge of trafficking as defined under section 4 of the Act instead of rightly convicting on a lesser or cognate offence under section 5 or 6 of the Act, with the dire consequences in terms of the type of sentence that is done under section 4 of the Act. It is my view therefore that the charge as drawn in the lower court was erroneous in so far as it failed to specify the activity or act (as defined under relevant Act) that the prosecution embarked upon proving and the accused purported to

defend. It cannot be easily argued that the trial did not therefore embarrass and or prejudice the appellant.”

24. In the present appeal the charge sheet used the general word trafficking. It ought to have been added that the appellant was infact doing any of the acts that constitute trafficking. But as the Court of Appeal stated in the **Madline Barasa Case**, this court would be minded, if this appeal is not allowed on any other ground, to invoke its powers under **section 361 (4)** of the **Criminal Procedure Code**, by substituting a conviction for possession of narcotics for that of trafficking and pass sentence for possession. But be it so for now. Secondly, on the issue of the fine imposed in the sentence without a valuation certification **section 86 (1)** of the **Act** provides:-

“Where in any prosecution under this act any fine is to be determined

by the market value of a narcotic drug, psychotropic substance or prohibited plant, a certificate under the hand of the proper offer of the market value of such narcotic drug or psychotropic substance shall be accepted by the court as prima facie evidence to the value thereof.”

25. In **Hamagon Khan –vs- Republic – Criminal Appeal NO.159 of 2000**, it was held:-

“There was no evidence adduced at the trial as to the value of the

heroin and upon which the sentence of Kshs.39 million or in default one year imprisonment could be based. The value of the heroin given in the charge sheet is by itself no evidence as to the value of the heroin. The sentence imposed in this respect is invalid. Unfortunately the learned judge of the superior court did not even notice this illegality.”

26. This court’s view in reference to the above authority is that the fine imposed by the trial magistrate amounting to Kshs.1,000,000/= was illegal, without the relevant certificate.

27. Thirdly on the issue of the motor vehicle used to ferry the narcotics and the fact that it did not have number plates this court takes cognizance of the fact that the said motor vehicle did not have number plates when it was viewed at the CID offices, though the plates were produced separately. The other motor vehicles in the CID yard did not also have number plates. The explanation given for this was to discourage the abuse of such motor vehicles. The explanation is plausible and I am convinced like the trial court was, that despite not having its plates the vehicle was positively identified by PW1 and PW2 beyond any reasonable doubt.

28. Regarding the alleged variance between the quantity of narcotics stated in the charge sheet and those produced in court, this court notes that pending the commencement of the trial *de novo* the exhibits had to be stored for a longer period than expected and as a result, the prosecution gave the explanation that some of the narcotics had been eaten by rodents. Even though the prosecution had an obligation to preserve the exhibits in terms and quantity throughout the trial, I appreciate the words by the trial magistrate that the appellant could still be convicted and the issue of whether he trafficked 6 or 5 bags be left to affect the sentence as it is only in the sentence that the value of the drug is relevant.

29. Lastly on the issue as to whether the appellant was positively identified and linked to the crime as stated in the charge sheet, reliance was placed on the account given by PW1 and PW2 both CID officers of how they spotted a motor vehicle registration No. KBP 994 B, how they decided to give chase whereupon the vehicle lost control and fell into a ditch. They alighted from their own vehicle and managed to arrest the appellant as he tried to flee from motor vehicle KBP 994B. The appellant in his defence conceded that a motor vehicle appearing to be speeding lost control and fell into a ditch, that another vehicle having police officers arrived at the scene and that he was arrested near the vehicle that had fallen into a ditch. However the evidence of PW1 and PW2 is that he was arrested as he tried to get out of the vehicle. This court notes that the incident occurred at 11 a.m. in broad daylight and I am satisfied, like the trial court was, that the police could not therefore have been mistaken. In any case since it was the appellant’s evidence that about 12 people had come to the scene when the motor vehicle fell into the ditch the question that must be answered is: why is

it that the police officers arrested only him and not the rest of the people? The answer to this question is that the appellant was arrested as he got out of motor vehicle KBP 994B in an attempt to flee.

30. The upshot of what I have stated above is that this court substitutes the finding based on trafficking drugs with that of possession of drugs contrary to **section 3 (1)** as read with **section 3 (2)** of the **Act**. The appellant did not satisfy the court that he had these large amounts of bhang (cannabis sativa) for his own consumption. He will therefore serve 9 years in prison. Save for allowing the appeal as above stated, the appeal is hereby dismissed.

Dated and delivered at Kisii this 14th day of March, 2013

RUTH NEKOYE SITATI
JUDGE.

In the presence of:

Mr. C.A. Okenye for Omonde Kisera for Appellant

Mr. Shabola for Respondent
Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE.

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