REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 344 OF 2010

(From original conviction and sentence in Criminal Case Number 1759 of 2005 of the Chief Magistrate\'s Court at Nakuru)

GILBERT BARASA ONDABA……..……APPELLANT

VERSUS

REPUBLIC……..…….RESPONDENT

JUDGMENT

The Appellant and his two colleagues, accused 2 and 3 were charged with two counts of trafficking in a Narcotic drug contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Act (Control) Act 1994 *(No. 4 of 1994)*, and being in possession of a Narcotic Drug contrary to Section 3(1) and 3(2) of the Narcotic and Psychotropic Substances (Control) Act 1994. His colleagues, accused 2 and 3 jumped bail, and are still at large. The charges against them were withdrawn to facilitate the trial of the appellant alone.

The appellant was on the evidence found guilty and convicted on the principal charge of trafficking in narcotic drug and psychotropic substances, and was sentenced to a fine of Ksh 1.0 million and in addition thereto to life imprisonment. Aggrieved with both his conviction and sentence, the appellant appealed to this court on the grounds -

(1) that the trial magistrate erred in law and in fact in convicting the appellant on a case not proved beyond reasonable doubt.

(2) that the trial magistrate erred in law and fact in failing to find that the vital witness did not come to testify (in court).

(3) that the trial magistrate erred in law and fact in imposing upon the appellant an illegal sentence.

And for those reasons, the appellant prayed that the appeal be allowed, the conviction be quashed and sentence set aside.

When the appeal was urged before me on 7th March 2012, Mr. Wamaasa learned counsel for the Appellant, urged four points in support of the Appellant\'s grounds of appeal.

Firstly, counsel argued, there was no evidence to support the conviction of the appellant for the offence of trafficking. Counsel\'s ground for this argument is that there was no evidence that the appellant was the owner of motor vehicle KAB 602T in which the narcotic drug and psychotropic substances were being conveyed.

Secondly counsel argued, there was no evidence that the appellant was a passenger in the said motor vehicle, that the appellant was arrested between 1-2km away from where the motor vehicle had been abandoned by persons who were the appellant\'s companions, and with whom the appellant was arrested.

Thirdly, that there was no positive evidence among the two categories of officers, those who were pursuing the appellant and his colleagues, and those who intercepted and arrested the appellant and his colleagues as they approached the Nakuru-Eldoret road. Counsel submitted that neither group, and in particular PW4 described the clothing worn by the appellant, for instance, and that he could not say that he positively identified the appellant as one of those who was in the abandoned motor vehicle. In this regard counsel relied upon the decision of the Court of Appeal in **GATHARA VS. REPUBLIC [2005]2 KLR 58 -**

"a passenger in a vehicle may not be in possession unless it can be shown that he entered the vehicle with the full knowledge that it was being used as a means of conveying drugs."

Fourthly, Mr. Wamaasa argued, that the trial court erred in law by shifting the burden of proof against the appellant - who had pleaded an alibi, and although considering the alibi credible, went on to discredit it on the ground that the appellant had not summoned his friend to support his claim of an alibi. This amounted to a shift of the burden of proof whereas it is the duty of the prosecution to disprove the alibi. Counsel submitted that for this reason alone, the benefit should go to the Appellant. Once again the Appellant relied upon the decision of the Court of Appeal in the case of **KIARIE VS. REPUBLIC [1984] K.L.R. 739 -**

"..that an alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of the court a doubt that is not unreasonable …"

On those submissions counsel contended that the appellant ought to have been acquitted and urged the court to find that the conviction was improper and allow the appeal.

Miss Idagwa, learned State Counsel opposed the appeal. She submitted that there was no requirement of ownership or being a driver of a motor vehicle conveying a narcotic drug or psychotropic substance to prove the offence.

Counsel also submitted that the defence of alibi was completely displaced by the prosecution\'s evidence. Counsel also submitted that the sentence was legal under Section 4(a) of the Narcotic Drug and Psychotropic Substances (Control) Act, and urged that the appeal be dismissed.

OPINION & CONCLUSION

I have considered the rival arguments by counsel aforesaid. There are two issues raised by this appeal, whether the appellant was one of the passengers in the motor vehicle in which the narcotic drug and psychotropic substances were being conveyed, and whether he knew the vehicle was being used to convey the said drugs. The third issue is whether the appellant\'s defence of alibi is credible, and therefore raises a reasonable doubt in this court\'s mind, and whether that defence of alibi was completely displaced by the prosecution\'s evidence. I will consider each of those issues in turn, commencing with the question of an alibi.

ON THE DEFENCE ALIBI

It was the Appellant\'s unsworn statement *(and therefore little credence can be given to it)* that he is a resident of **Githima** area in Nakuru, and that he had gone to visit a friend at Kiamunyi and was returning home when he heard gunshots behind him and saw people running and he too started running towards Pipeline Area - along the Nakuru-Eldoret road, when he met two men who challenged him why he was running. He was stopped, and a little later, the two other men came running, and they too were stopped. The two gave the same story as his, of gunshots. The Appellant and his colleagues were put in a vehicle and were taken to Nakuru Central Police Station. The Appellant stated that he was supposed to be informed on the next day that he had bhang *(cannabis sativa)* and denied that he had any knowledge of the substance called **"bhang".**

English not being our mother tongue, we as courts sometimes suffer from what we used to call while in Form II, **"terminological inexactitude".** The learned trial magistrate *(now Judge of the High Court)* used the expression **"credible"** in relation to the appellant\'s defence of an **"alibi".** The other possible expression would be **"plausible"** as an explanation but highly improbable in light of the prosecution evidence, and in particular the evidence of PW2, PW4 and PW5.

The evidence of PW4 is the more telling. He and his colleagues were manning a road block near Kiamunyi area of Nakuru when motor vehicle Mitsubishi Lancer Registration No. KAB 602T refused to stop and drove away at high speed. With the help of a public spirited motorist, he and his colleagues gave chase and overtook the vehicle at **Gioto Dumping site**. The three occupants of the motor vehicle jumped out of their vehicle and took to their heels toward the Pipeline area along the Nakuru-Eldoret road, with PW4 and his colleagues in hot pursuit, while at the same time calling for help from the **Flying Squad** colleagues giving the location of the pursuit.

PW2 completes the picture, he received communication on their equipment that Menengai roadblock had stopped a motor vehicle which had refused to stop, and that the occupants had abandoned the vehicle and were moving towards the **Pipeline Pump Soilo** roadblock on the Nakuru-Eldoret road. On their moving towards that area, they saw three people being chased by the Police. He and his colleagues challenged the three people who raised their arms that they were not thieves, and that they (Police) should not shoot them as they were merely **"transporting bhang".**

In answer to the cross-examination by the appellant, PW2 told the court that the appellant told him, that he was from Busia *(not Kiamunyi)* and that they were *"carrying bhang and we should not kill them."*

The evidence of PW5 corroborated that of both PW2 and PW4.

"We saw three men running towards us. We cocked our rifles and one of them shouted that they were not thieves but they were bhang traffickers. They stopped and we arrested them. We searched them. One was called Gilbert Baraza. The others were Omondi alias Wandera. In the pocket of Amos we recovered a motor vehicle ignition key. Gilbert Barasa said Amos was the driver … It is the appellant who informed them that they were not robbers but drug traffickers."

PW4 was emphatic that they never lost sight of the three people who ran away from the abandoned vehicle.

The evidence clearly shows that the appellant\'s statement of "alibi" was merely a clever excuse, an afterthought to escape conviction. The defence of alibi was completely displaced by the prosecution evidence.

Having answered the defence of alibi, the next question is whether the appellant knew whether the motor vehicle was conveying cannabis sativa, a psychotropic substance as stated by PW1 a Government Analyst who testified that the substance recovered from the vehicle was **"cannabis"** which falls under First Schedule of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994.

Whereas it is possible as held in **Gathara vs. Republic (supra)** for a passenger not to be in

possession unless it is shown that he entered the vehicle with the full knowledge that it was being used as a means of conveying drugs, knowledge is, for purposes of Section 4(9) of the Act, irrelevant. **"Trafficking"** means the importation, exportation, manufacture, buying, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance … The expression **"knowing"** or **"knowledge"** does not appear either under that definition or Section 4(a) of the Act. Knowledge or lack of it is irrelevant under those provisions. In this particular case, the appellant and his colleague had a sack full of bhang, and "**stones"** weighing 103 kg. This material gives a peculiar smell. The appellant could not have failed to smell it, or as he claimed he never knew. This is a lie on the appellant\'s part. It was PW4\'s evidence that the appellant shouted to him and his colleagues that they *(the appellant and his colleagues)* were bhang traffickers and not thieves. The authority of **Gathora vs. Republic** *(supra)* is of no assistance to the Appellant.

Ownership of the motor vehicle is equally irrelevant. If ownership was a criterion for conviction on a charge of conveyance of "bhang" or other narcotic drug, trafficking through buses, matatus, trains and airlines would be prosperous business for traffickers. All offenders would have a perfect defence, they were not owners of the vessels through which the drugs were being conveyed. That would not only make the law ineffective, but would lead to absurdity. No one would be convicted if charged under such law.

Having answered all the above questions in the negative, the appellant\'s appeal on conviction fails. What of the sentence of a fine of Ksh 1.0 million and imprisonment for life?

Section 4(a) is a strict liability provision. The minimum punishment is a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, **whichever is the greater** and, in addition, to imprisonment for life.

Although the psychotropic substance was stated to have a market value of Ksh 103,000/=, the fine is a sum greater than the market value. The sentence of one million shillings fine and imprisonment for life were punishment prescribed under the Act, and the learned magistrate arrived at a correct decision. I find no reason for departing from it.

For all those reasons, I find no merit in the Applicant\'s appeal, and the same is dismissed. I confirm the conviction and sentence.

It is so ordered.

Dated, delivered and signed at Nakuru this 30th day of May, 2012

M. J. ANYARA EMUKULE
JUDGE