REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Criminal Appeal 96 of 2011

MAHIR SAID AHMED ALIAS NANGA .....APPELLANT

-VERSUS-

REPUBLIC .....RESPONDENT

(From the original conviction and sentence in Criminal Case no. 3808 of 2009 of the Chief l Magistrate's Court Mombasa – L. Mutende – SPM)

JUDGEMENT

MAHIR SAID AHMED alias **NANGA** hereinafter referred to as **"the Appellant**"was charged jointly with others with the offence of;

"Being at a place to which person resort for the purpose of smoking, sniffing and inhaling narcotic drugs contrary to section 5(1) of the Narcotic Drugs and Psychotropic Substances control Act No. 4 of 1994" hereinafter referred to as the Act.

The particulars of the charge sheet are that:

"On the 23rd day of November 2009 at Bondeni area in Mombasa District within the Coast province, jointly without lawful and reasonable excuse were found at a place to which persons resort for the purposes of smoking, sniffing and inhaling narcotic drugs in contravention of the said act."

He was charged in the 2nd Count, alone 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 thereof are that:

"**On the 23rd day of November 2009 at Bondeni area in Mombasa District within the Coast Province, trafficked in Narcotic drugs by conveying 16 rolls of cannabis with a market value of Kshs. 1,600 in contravention of the said Act".**

The Appellant was tried, convicted on both counts and sentenced as follows:-

1st Count
To serve nine (9) months imprisonment

2nd Count

To pay a fine of Kshs. 5,400 or 6 months imprisonment in addition to serve three (3) years imprisonment.

Being aggrieved, he has appealed against both the conviction and sentence.

The brief facts of the case are that on the 23rd November 2009, police officers from the Anti – Narcotics Unit, acting on information, went to Bondeni area. The information received was to the effect that there were people in that area peddling narcotic drugs. The officers found four people, who included the Appellant and arrested them. That, they searched the Appellant herein and recovered a black paper bag he was carrying on his right hand shoulder. Upon searching that bag, they recovered 16 rolls of dry plant materials rolled in a khaki paper. A search in the khaki paper, yielded recovery of documents bearing a picture and a visa in the name of the Appellant. Similarly, seeds and papers, allegedly used to roll **"items**" were recovered on the ground where the Appellant and the others were arrested. They were all charged after investigation.

At the close of the prosecution case, the appellant was put on his defence. He told the court that, on 23rd November 2009 he was leaning on a wall in the company of collegues, some 20 Kms from his house. That, the police officers arrived at the place in a motor vehicle and inquired as to who they were. That, they were searched but nothing was recovered. They were then handcuffed and taken away. However, shortly one returned with a bag and alleged it was found where they were arrested. They were taken to the Police Station and placed in the cells. After 10 minutes, the Appellant was called out and informed that they had recovered his visa and 16 rolls inside his bag. He was charged the following day. He denies the offence todate.

After hearing the entire case, the Learned Trial Magistrate wrote the judgment and observed:-

"**The accused herein was found by police – the bag was carried on his shoulder. The said bag contained cannabis rolled. There is hence proof that he was conveying the same."**

He was thus convicted and sentenced as stated above.

The Appellant filed the following grounds of appeal.

1. That the Learned Magistrate erred in law and facts in considering the evidence of PW1 which was not consistent with the other witness evidence.

2. That the Learned Magistrate erred in law in convicting the Appellant with the offence in Count II yet the charge sheet failed to show exactly what he was doing with the drug but just showed he was conveying.

3. That the Learned Magistrate failed to consider that the charge sheet did not reveal the correct particulars of the charge yet the law is clear, details should be shown on the charge sheet.

4. That the Learned Magistrate failed to consider the Appellant's defence but only relied on the prosecutions case which was not proven beyond doubt.

5. That the Learned Magistrate erred in law and facts in concluding that the Appellant was guilty yet the evidence produced by the prosecution had serious doubts as to identification since there was a group of people.

6. That the Learned Magistrate erred in law in considering that the exhibits were found in the Appellants possession yet that evidence is not corroborated.

7. That the Learned Magistrate erred in law in considering the prosecution case yet there was no single independent witness to tell the court how the police had known a group of people were gathered to inhale or sniff drugs.

8. That the Learned Magistrate erred in law in convicting and sentencing yet the time of arrest was dusk and therefore circumstances would not be reliable in evidence.

9. That the Learned Magistrate failed to consider the mitigation and that the Appellant was a first offender and gave him a harsh sentence in circumstances which should not have necessarily been custodial.

At the hearing of the appeal, the Appellant was represented by the Learned defence Counsel, Mr. Magolo, while the State was represented by the Learned State Counsel, Mr. Jami.

In a nutshell Mr. Magolo submitted that;

1. That the charge sheet was **defective** in two aspects namely:

- it did not identify the particular place by name to which people resort for the purpose of smoking, sniffing, and inhaling the narcotic drugs.

- it did not specify, by what means that place is known for that purpose.

2. That, the prosecution did not call evidence to support the fact that the Appellant was "**Conveying"** the alleged narcotic drug. That, the evidence adduced was at variance with the particulars of the charge, and therefore that renders the charge defective. He relied on the case of **Chumba Abdalla -Vs- R. Cr.App. No. 279 of 10**

3. That there was inconsistencies and contradictions in the evidence of the arresting officers as to where they found the suspects. (inclusive of the Appellant) as at the time of arrest and what they were doing and that although all these issues were canvassed at the trial, the Learned Magistrate did not consider them in the judgment.

4. That, even if the conviction were to be confirmed then the sentence served should be taken into account while assessing the appropriate sentence, if any.

In opposing the appeal, the Learned State Counsel submitted that:

1. The State was conceding to the appeal in respect to the 1st ground. This is because there was no evidence adduced to prove that the place where the Appellant and the others were found was a place known for smoking, sniffing etc and, that name of the place was not included in the particulars of the charge.

However, the State opposed the appeal on the 2nd ground. The Learned State Counsel submitted:

1. That, the evidence adduced proved that cannabis sativa was found in a bag that belonged to the Appellant.

2. That, since the appellant was found with the drugs at a place not of his place of abode, then he must have transported it there.

3. That, the issues, the Appellant has raised at the appeal, regarding the prosecution's failure to prove the Appellant was **"conveying**" the alleged drugs, are issues that were raised at the trial court and were considered.

4. That the charge sheet as drafted was sufficient to inform the Appellant of the Charges and indeed, he understood the same and took part in the proceeding.

5. That, the Government Analyst confirmed the recovered drug was a narcotic drug.

6. That, the Appellant's defence was a mere denial. He did not make any effort to disassociate himself from the recovered drug and the recovered documents.

In a nutshell that was the submissions by the parties.

I shall now deal with the grounds of appeal raised. I do appreciate the fact that, the duty of the 1st Appellant Court is to re-evaluate the evidence adduced at the trial and draw its own conclusions **(Shantilal M. Ruwala VS. R (1975) EA 57).** Where it was held:

"It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions, it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

Thus in this judgment I caution myself that I did not have the benefit of seeing the witnesses, that is, the benefit of their demenour. But I have considered the proceedings of the trial Court, the judgment of the Learned Magistrate, the grounds of appeal, the submission in support of, and or, in opposition to the grounds of appeal, and the authority cited.

I find that, as regards the issue of charge sheet the particulars of the 1st Count reads in part as follows:

". . . jointly without lawful and reasonable excuse were found at a place to which people resort for the purposes of smoking, sniffing and inhaling narcotic drugs . . ."

As rightfully observed by the Learned defence and State Counsel(s), the place alleged is not **"identifiable**". Analysis of the entire evidence reveals that the name of the place was not disclosed or described during the proceedings and why it is held to be a place for such a purpose was not revealed too in evidence.

In that regard, I find the offence and the particulars in the 1st count were not proved beyond reasonable doubt. I therefore give the Appellant the benefit of doubt. I quash the conviction on the 1st count and set aside the sentence imposed upon the Appellant on that count. Unfortunately due to the effluxion of time, Appellant has already served that sentence. That, reminds me of the saying **"Justice delayed is justice denied".**Had the appeal been prosecuted on time, may be, justice would have been served. All the same it teaches all sundry that, **"time is of essence in criminal justice system".** Infact an appeal such as this, where the end results have no real meaning to the Appellant, emotionally, physically and socially (due to the delay) is an injustice in itself.

I now turn to the 2nd count. In that count, the Appellant is 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.

Section 2 of the Act defines trafficking 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 . . ."

In the particulars to the charge, it's alleged the Appellant trafficked in the drug by **"conveying**". The Learned Trial Magistrate analysed very well and in details the meaning of the word **"conveying**". I take note of the same. The defence, however submitted that, the evidence herein did not support the element of conveying. The Counsel submitted that, the act of conveying, involves moving from point A to B. He relied on the case of **Chuba Abdalla Mbwana –Vs- R Cr. Appl. No. 27 of 2010**. I have read it and noted it.

The question is this: **Did the Appellant convey and in so doing trafficked in the said drug? Where were they arrested? What were they doing?**

Analysis of the prosecution evidence reveals that, the Appellant was found in a group of others, leaning on the wall while the others were standing next to him facing him according to PW1. According to (PW2) the people were standing leaning on a wall of a house - they stood in a line and PW3 stated he found the young men leaning against the wall. They were standing all four were standing.

According to the Appellant, the evidence of PW1 and PW2 is contradictory but I don't see the contradictions. All the testimonies of PW1, PW2 and PW3 simply indicate that the Appellant was found at the place of arrest, with others standing and/or leaning on a wall. I also don't really think it is an issue, whether they were standing or sitting or walking. They were at that place. What they were doing is what I would consider material. I hold they were found together at the place of arrest.

I now, move to consider whether the Appellant was trafficking in the narcotic drugs. I find from the evidence of PW1, PW2 and PW3 that upon the arrest of the Appellant, he was found to be carrying a black paper bag on his right shoulder. That bag was searched and 16 rolls of plant material were recovered. The plant material was examined by (PW4) John Njenga the Government Analyst and found to be cannabis sativa, a narcotic drug.

In additional, the Appellants personal documents identified as a "**visa"** in his names was found inside the bag containing the cannabis sativa. Equally seeds believed to be for "**bhang"** were collected at the scene of arrest, although they were not examined by the Government Analyst to prove beyond reasonable doubt, that, they were indeed bhang seeds. Again as regards the papers found allegedly used for rolling bhang, there was no proof, those papers are used for that purpose per se. However, l find that, when the Appellant gave his evidence, he did not rebut the prosecution's evidence of the recovery of the bhang from him nor the presence of his personal documents. I therefore concur with the Trial Court's finding that that the cannabis sativa herein was recovered from the bag the Appellant had. I now pose the question; ***Was he conveying it?*** In the case of **Chuba Abdalla Mbwana –Vs- R** the court observed.

"to prove trafficking by conveying it must be alleged (and proved) that the Appellant was found in the act of conveying the narcotics from point A to point B".

I understand the court to be arguing that, there must be a form of transfer or a "movement" of the drug. In that case, the police, ***"came across"*** the Appellant, conducted a quick search and in the left pocket of his pair of trousers, recovered five sachets wrapped in white papers of what they suspected to be heroin . . .' In the judgment, the Court observed

"the facts infact disclose the offence of possession of narcotics contrary to section 3(i) of the Narcotics Act"

I find the facts in that case of **Chubia Abdalla Mbwana –Vs- R** very similar to those in this matter.

In the instant case, the Learned Trial Magistrate analysed the meaning of the word **"conveyance"** in details and very well so. The definition has one key term "**carriage"** and/or **"take, carry, transport".** These words have to be proved by evidence. With due respect, in this case none of the prosecution witness testified that the Appellant was **"carrying the bhang in the strict meaning of moving from one point to another".** He was found leaning or standing. Therefore, I find that trafficking by conveyancing was not proved.

Be it as it were, the Appellant laments that his defence was not considered but the defence was considered by the Learned Magistrate and in details so

She observed:

"In their explanation on the accuseds said they were not very far from their residential houses at the time of their arrest. No explanation whatsoever was given why they were at this place where accused had carried drugs. Their co-accused, Yusuf Ali knew was known for smoking drugs and was littered with papers popularly known for wrapping narcotic drugs.In my opinion no reasonable explanation has been given as required by the law in the circumstances. I, therefore find the prosecution having proved the case against the accuseds beyond doubt. They are guilty and convicted for the offence accordingly."

I, therefore, find the Appellants submission that his defence tendered was not considered, as having no basis.

He also laments that, several issues raised in his submissions at the trial were not considered, again, that cry is in vain. The trial Magistrate wrote a very detailed and analysed judgment and considered the issue raised. I find no merit in that complaint.

In conclusion I find upon re-evaluation and analysis of the evidence herein, a charge of possession of narcotic drugs contrary to section 3(i) of the Narcotics and Psychotropic Substances (Control) Act, is proved by the evidence. The offence of trafficking in narcotic drugs contrary to section 4 of that Act was not proved. In that regard, I quash the conviction of the Appellant on the 2nd count, over the offence of trafficking in narcotic drugs and substitute it with a finding of a conviction on the offence of being in possession of narcotic drugs accordingly. I do so by invoking the provisions of section 354 of the Criminal Procedure Code, which empowers the High Court to alter the findings and sentence of the Trial Court, including the nature of the sentence meted out.

I now turn to the issue of sentence. The Appellant was sentenced as aforesaid to serve nine 9 months imprisonment on the 1st Count, I have quashed the conviction on that court. It therefore follows that, the sentence thereto is hereby and I so order, set aside accordingly.

I then turn to the sentence on the 2nd count. The Trial Magistrate imposed a sentence as follows:-

"A fine of Ksh. 5400 in default six (6) months imprisonment and in addition he will serve three years imprisonment."

I have considered the sentence imposed and the sentence provided for the offence by the law. First and foremost, the Appellant was convicted for trafficking narcotic drugs. Under Section 4 of the Act, the sentence provided for trafficking is inter alia:

A fine of one million shilling or three times the market value of the narcotic drug or Psychotropic substance whichever is the greater, AND in addition to imprisonment for life".

Thus, even if I was to uphold the conviction on trafficking in narcotics drugs, the sentence imposed herein would have to be reversed, because, it is irregular.

The issue of sentencing on a charge of trafficking was considered in the case of **Kingsley Chukwu Vs R Criminal Appellant No. 257 of 2007.** The court held that:

"The Act does not permit either of those (referring to the sentence imposed by the trial and superior Court(s) that is, a default jail term; and a jail of 3 ½ years. Accordingly we must interfere with sentence under Section 361 (b) of the Criminal Procedure Code and correct the same."

That was a decision of the Court of appeal, delivered at Nairobi on **16th April 2010** by the Judges of Appeal Justice(s) J.W.Onyango Otieno, Justice D.K.S. Aganyanya(as he then was) and Justice Alnashsir Vishram. That decision is binding on this Court and all other subordinate Courts under the doctrine of stare decisis and judicial precedent. Be it as it were, I have held the Appellant herein is convicted in a charge of possession therefore the decision in Kingsley case does not apply. All in all I set aside the sentence imposed upon the Appellant on charge of trafficking.

I shall now consider the sentence provided for the offences of possession of narcotic drugs. The same is found under Section 3(2) (a) of the Act which states as follows:-

"3(2) (a) "A person found guilty of an offence under subsection (i) shall be liable:-

in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years; and. ."

It's the duty of the person in possession of the cannabis sativa to satisfy the Court that he had the same, purely for his own consumption. The Appellant herein has denied possession of the drug. May be the quantity of the drug recovered may be guideful but that does not necessarily lead to a conclusion that it was necessary for own use purpose. It would not be safe to conclude for example that, little quantities are for own use. That may be or may not be the case. It can also be a dangerous conclusion, in that the little quantity have equally been a sample from a bulk. The quantity herein is 16 rolls. That may be or may not be, for own use. As already stated, the Appellant has denied possession of the drug. I cannot therefore safely assume that it was for his own use. The 2nd limb of the sentence, under section 3 of the Act then became applicable. That limb provides for imprisonment for 20 years.

Is this twenty years, a mandatory sentence or maximum or minimum. I have considered the decision of the Court of Appeal in the case of ***Edward Okoth Were and* 2 others –Vs- R (201)eKLR** where the Court confirmed a sentence of nine (9) years, after the same had been imposed on the Appellants by the superior court for an offence of possession. That confirms the sentence of 20 years is not a mandatory sentence for an offence of possession of a narcotic drug. That case had originally been handled in the subordinate court. The Appellants as herein were convicted of trafficking in Narcotic Drugs Contrary to Section 4 (a) of the relevant Act. They appealed. Upon consideration of their appeal, the superior court found that the facts stated disclosed the offence of possession of the drug under Sect 3 of the Act, and the Court proceeded to set aside the conviction under Section 4 (a) of the Act, and substituted it with a conviction under Section 3(1) of the Act. Under Section 3(2) of the Act, Court sentenced each Appellant to nine (9) years imprisonment. That sentence was confirmed by the Court of Appeal. By confirming nine years (9), the Court of Appeal was giving direction, that twenty years is not the maximum sentence. If that is so, then the court has discretion under Section 3(2) in sentencing.

In this case I have considered:

- the amount of bhang involved is 16 rolls.
- The Appellant was on trial from **25th November 2009 to 21st February 2011.** That is a period of 1 year and 3 months. He was sentenced to serve 3 years imprisonment with remission he will serve two years. So far, he has served one year and about 2 months. He has about 10 months to go.
- · He was treated as a first offender.
- I do of course appreciate the prevalence and menace of drug issue but in this case, justice must be balanced on the scale by considering the facts of the case.

I therefore order as follows:-

1. I quash the conviction of the Appellant on the 1st Count.

2. I set aside the sentence imposed on the Appellant on the 1st Count.

3. I quash the conviction of the Appellant on the 2nd Count under Section 4(a) of the Act and substitute it with a conviction under Section 3(i) of the Act.

4. I also set aside the imprisonment term of three years on the 2nd Count and substitute it with two years to run from the date judgment and sentence by the Trial Court.

Those, then are the orders herein.

Dated, signed and delivered at Mombasa on this 18th day of May 2012.

G.L. NZIOKA

JUDGE
18.5.2012

In the presence of:

Magolo for the Appellant

Jami for the State

Phillip – Court clerk