



(From original conviction and sentence in criminal case No.1433 of 2009 and sentence of the Chief Magistrate court at Malindi Before Hon. L. W. Gitari - CM)

B.S.MAPPELLANT

-VRS-

REPUBLICRESPONDENT

JUDGMENT

1. B.S, the appellant herein was charged before the Lower Court with the offence of Trafficking in Narcotic Drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act. Following a full trial, he was found guilty, convicted and sentenced to life imprisonment and in addition, ordered to pay a fine of shs. 1,000,000/-.

2. He has appealed to this court against conviction and sentence. In summary, he challenges the quality and adequacy of the evidence forming the basis of his conviction, asserts that his defence was not considered and terms the sentence handed down as harsh and excessive. This is the substance of the seven amended grounds of appeal filed on 18th august 2011. These were the grounds relied on at the hearing, as expounded in written submissions.

3. The State through Mr. Kemo has opposed the appeal and reiterated the prosecution evidence. He stated that the court considered and dismissed the accused's defence.

4. As required on a first appeal, I have looked at the entire record of the trial in order to make fresh appraisal (see **OKENO VS R 1972 EA 322**). The prosecution case in the Lower Court was that on 17th October 2009 Cpl. Opondo (PW1), Cpl Munialo (PW2) and two other police officers were on routine drug detection duties in the area called Mbuyu wa Kusema, a village notorious for illicit drug trade in Malindi.

5. The officers were tipped off that a man riding a motor cycle and wore "rasta" hairstyle (dreadlocks) was about to deliver drugs to one of the peddlers based at the village. Police laid an ambush. Presently the accused who rode a motor bike and fitted the description appeared and when he stopped, they confronted him.

6. Upon being searched he was found with 78 satchests(wrapped in batches of 13) in the left trouser pocket. The satchets contained a substance later examined by the Government Chemist(Pw 5) and confirmed to be heroin.

7. In his defence the accused gave an unsworn statement and called one witness, his teenage son by the name A.B.S. The accused's defence was that on the material day he was going about his normal duties as a motor cycle taxi operator and father. At about 12.45Pm a neighbour approached him requesting to be taken to town to drop some luggage. The luggage consisting of a paper bag was tied on the motor bike. The lady directed him to drive to Mbuyu wa Kusema but as soon as he stopped police appeared and

spoke in Luo language with the woman. She gave them money and left. The luggage on his motor bike was inspected. He was arrested, police ignoring his explanation that the luggage belonged to the lady. He denied that the luggage, which turned out to be drugs belonged to him.

8. There is no dispute that at the time of arrest the appellant had in his possession – on the bike or person – the offensive drugs, which turned out to be heroin. The appellant did not question Pw 1 but to Pw 2 he suggested that the luggage was on the motor bike and that Pw 2 forced the appellant to place it inside his pocket before arresting him. Pw 2 denied this. In fact he and Pw 1 said the drug was found in the trouser pocket of the appellant and not on the motor bike. They denied that a passenger, LUCY KIBAGENDI had the drugs but paid her way out.

9. It would appear from this evidence that the 78 sachets could fit in a pocket, and considering that the lady supposedly had a bag, it is rather strange that she would have it strapped on the motor bike as suggested by the appellant. As for Pw 2, he was obviously not present during the arrest of his father.

10. On the appellants submissions regarding grounds 2 and 3, there is no requirement that any given number of witnesses be called to prove a fact, unless expressly provided (see section 143 Evidence Act). Secondly, there is no evidence of the existence of a grudge between police and the appellant. This latter issue was not raised at the trial. Besides, the appellant has not indicated what “important” witnesses the trial court ought to have summoned under section 150 Civil Procedure Code.

11. Having read the evidence of Pw 1 and Pw 2, I would agree that the same was consistent and mutually corroborative as the trial court concluded. The judgement shows that the trial court considered and dismissed the appellant’s defence and I cannot see any valid reason to fault her conclusions.

12. The circumstances of the arrest, the manner of packaging of the drug in batches of 13 as well as the amount strongly support the charge of trafficking. I agree with the learned trial magistrate’s finding that the appellant had the drug and not a passenger. It is unthinkable that the police would stage a dramatic ambush attracting onlookers and proceed to receive a bribe openly from the real suspect letting her go. This allegation to my mind was as absurd as the other to the effect that Pw 2 having found the drug package on the motor bike first ordered the appellant to place it in his pocket, before purporting to arrest him over the same. On the strength of the prosecution evidence, I am satisfied that the trial court was entitled to return a verdict of guilty against the appellant.

13. Regarding the sentence, the same is legal as provided under section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act (**See CHUKWU VS R(2010)e KLR**). In conclusion, I find no merit in the appellant’s appeal and will dismiss it in its entirety. The conviction in the Lower court is hereby upheld and sentence confirmed.

Delivered and signed at Malindi this **11th May, 2012** in the presence of, Mr. Kemo for the State, No appearance for the appellant. [cc Evans].

C. W. MEOLI
JUDGE