



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 253 & 254 of 2010

JOSHUA ATULA ATULA.....1ST APPELLANT

BENARD ONYANGO ODHIAMBO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Joshua Atula Atula and **Benard Onyango Odhiambo** were jointly charged with the offence of trafficking in Narcotic Drugs contrary to **Section 4(a)** as read with **Section 3** of the **Narcotic Drugs and Psychotropic Substances Control Act No. 4. of 1994**. The particulars of the charge are that on 31/3/2010 along Naivasha Mai Mahiu Road, in Naivasha District, Rift Valley Province, jointly, were found conveying in a motor vehicle Registration No. KBJ 502M Toyota Caldina, 2,200 stones of cannabis sativa with a street value of Kshs.440,000 which was not in medicinal preparation form. The Appellants denied the offence and the case proceeded to full trial with the prosecution calling a total of 7 witnesses while the appellants made unsworn statements in their defence and called no witnesses. T. W. C. Wamae, Senior Principal Magistrate found the Appellants guilty and sentenced them to a fine of Kshs.1,320,000 in default 12 months imprisonment and in addition each was sentenced to serve 15 years imprisonment. They are aggrieved by both conviction and sentence and preferred appeal Nos 253 of 2010 and 254 of 2010, which were consolidated to proceed as Criminal Appeal No. 253 of 2010. The Appellants are as per the record in the Lower Court, Joshua Atula, 1st Appellant, while Benard Onyango Odhiambo is the 2nd Appellant. The grounds of appeal are contained in the petitions of appeal and can be summarized as follows;

- (1) **That the evidence adduced by the prosecution witnesses was insufficient and contradictory;**
- (2) **That the charge against the Appellants was not proved to the required standard;**
- (3) **That the trial court failed to consider the defences of the Appellants;**
- (4) **That the trial court shifted the burden of proof to the Appellants;**
- (5) **That the Appellants were not given adequate time to prepare for their case contrary to Article 50 (2)(c) of the Constitution;**

(6) That the sentence meted on the Appellants is excessive and harsh.

The Appellants filed written submissions and made further submissions orally and urged the court to quash the convictions and set them free. Ms Idagwa, learned counsel for the State opposed the appeals.

As the first appellate court, it is my duty to analyze and evaluate the evidence afresh and arrive at my own findings, of course bearing in mind that this court did not have the benefit of seeing the witnesses in order to weigh their demeanor.

This is a summary of the prosecution evidence; PW1, PC Josiah Matu and PW4 PC Mohamed Bushuti, both of Naivasha Police Station, with others, were at a road junction along Naivasha-Mai Mahiu Road, at about 10.45 a.m. PW1 stood on the side of vehicles traveling to Mai Mahiu while PW4 stood on the side of vehicles traveling to Naivasha. A motor vehicle KBJ 502M Toyota Caldina tried to overtake motor vehicle KAN 335 N (Ambulance), which belonged to Kijabe Mission Hospital and collided with it slightly. KAN 335 M stopped immediately upon impact but KBJ 502M stopped about 100 metres away. The 1st Appellant got out of motor vehicle KBJ and ran back where motor vehicle KAN 335N was. He claimed to be the owner of KBJ. PW1 decided to walk to motor vehicle KBJ to see the damage that it had sustained but the person who had remained therein drove off. PW1, PW4, 1st Appellant and PW3, Moses Njoroge who was a passenger in KAN 335 M gave chase to KBJ.

At Longonot Trading Centre, they found the vehicle parked on the side of the road, they stopped and on opening the doors of KBJ, stones of bhang fell out. It is then the 1st Appellant also took to his heels. Police followed the direction that the driver of the vehicle had taken. PW1 called for reinforcement from Longonot Police Station. They arrested the 1st Appellant about 400 metres away while the 2nd Appellant was arrested about 500 metres from the vehicle. PW1 recovered 2,200 stones of bhang from the vehicle, worth Kshs.440,000 and with the motor vehicle, they produced in court as P.Exh.No.1. PW3 said that when they arrived where motor vehicle KBJ was abandoned, him and the driver of KAN 335N were sent to bring reinforcement from Longonot Police Station which they did. The police from Longonot were armed and they shot in the air before the 1st Appellant surrendered.

PW5, Samson Omalla and PW6 PC Henry Simiyu both of Longonot Police Station were called as reinforcement to assist in the arrest of the fleeing suspects. They found PW4 at the abandoned vehicle who showed them the direction where the suspects had ran towards the hill and they gave chase. PW6 also told the court that it is in company of PW1 PC Matu that they arrested the 1st Appellant and the 2nd. PW7 PC Saidi Baya was the investigating officer and forwarded the material recovered in KBJ to the Government analyst and also prepared the exhibit memo form. Anthony Otieno Opiyo, PW8 examined the plant materials sent to him for analysis. He sampled 44 bundles weighing 6 kg which he examined. The bundles had been in 11 sacks of 2,200 bundles weighing 268 kg. The report, sampling form were produced in evidence (PEx.3(a)(b) and (c).

PW2, Steve Mbogo Ndungu testified that the motor vehicle KBJ 502 M is his and he had hired it out to one Mr. Tom Nyimbo Aima on 17/3/2010 for 2 days. The said person has never been traced. He did not know the Appellants before. The said vehicle had been the subject of Misc. Case No. 22 of 2010, where identification documents were produced.

In his unsworn defence, the 1st Appellant stated that on 31/3/2010, he received a call from one of his clients who was on his way from Nakuru to Naivasha and they agreed to meet at the junction of Karagita (Maili Mbili). He found several motor vehicles parked along the road and there were traffic officers. He was asked by PW1 if he owned any of the vehicles and he sat on a stone nearby. Corporal Toke who was present said he saw the 1st Appellant alighting from one of the vehicles and Cpl. Toke was asked to watch over him. His friend came. They agreed and then left. He then saw the vehicle KAN 335N and PW1 said he wanted the 1st Appellant investigated. He was arrested. He denied knowing the 2nd Appellant. According to him, PW1 framed him.

The 2nd Appellant told the court that he was walking to *Soko Mjinga* market because there were no vehicles. About 11.00 a.m., he heard the sound of vehicle, moved off the road for it to pass. Two to thirty metres ahead, it stopped, three men came out, including PW5. He asked to be given a lift to the market, he got into the vehicle but it turned back to the main road, where they found PW3 who joined them in the vehicle. It was then driven to Naivasha Police Station. He said he knew PW5 before because he owed PW5 money that PW5 had lent him money to boost his business but he did not have it then. He denied knowing the 1st Appellant.

I have considered all the evidence on record and the defences of the Appellants. The incident resulting in the arrest of the Appellants occurred in broad daylight about 10.00 am to 11.00 am In respect of the 1st Appellant, PW1, 3 and 4 were at the scene where the motor vehicles KBJ and KAN collided. They all saw the 1st Appellant alight from motor vehicle KBJ 502M which stopped a few metres away and came to enquire what damages had been caused to KAN 335M.

After the driver of KBJ drove off, PW1, 3 and 4 got into KAN 335M with the 1st Appellant and gave chase to the get away car. I am satisfied that the three witnesses had ample time to see the 1st Appellant well, they conversed with him and stayed with him in the vehicle before he tried to escape after KAN 335 stopped. Even when he ran off, they knew whom they were chasing. PW6 and 7 said it is PW1 who identified the persons they were chasing. There was no possibility of mistaken identity as regards the 1st Appellant.

As regards the 2nd Appellant, when the vehicle KBJ first stopped near the scene of accident, the officers at the junction did not see who the driver was. However, when he drove off as PW1 approached the vehicle KBJ, PW1, 3 and 4 gave chase. All of the witnesses PW1, 3 and 4 said they saw somebody come out of the driver's seat of KBJ and ran. According to PW1, the 1st Appellant ran towards the same direction as the person who had alighted from KBJ and that he lost sight of both of them. PW3 went to get reinforcement, PW4 was left where the vehicle KBJ was abandoned. The reinforcement which came included 5 and 6. They were directed towards the hill where the suspects had ran and PW1 and another pointed out the accused persons to them. Besides, all the witnesses said that there was no human traffic in the area with whom they could confuse the suspects with.

I am satisfied beyond any doubt that the 2nd Appellant was seen by PW1, 3 and 4 as he ran off from the vehicle KBJ, he was chased and arrested about 500 m away. He was properly identified and there would have been no need for an identification parade to be conducted in respect of both the Appellants because they did not get away. They were chased and arrested.

The Appellants contend that the prosecution failed to produce the spent cartridges and ignition key as evidence. As regards the keys, the Appellants did not lay any claim of the vehicle KBJ. PW2 came up, adduced evidence to prove ownership of the vehicle and the vehicle was released to him on condition none else laid claim to it. He explained the circumstances under which he parted with his vehicle and the court was satisfied. The ignition key was no longer material once the vehicle was produced as an Exhibit. The owner needed to drive the vehicle. As for spent cartridge, PW6 said that he fired 18 rounds as they chased the appellants and they did so for over 500 metres. It would be an impossible exercise for the witnesses to go back to look for the cartridges. In any event, the police did not shoot anybody and failure to produce the spent cartridge did not result in any injustice against the Appellants nor was it material to the case.

It was the 1st Appellant's case that he was framed by PW1 did not adduce any reason why PW1 could have done so. There is no evidence that PW1 and the 1st appellant knew each other before. The 1st Appellant never put any such accusation to PW1 when he testified. In his defence, the 1st Appellant also introduced Cpl Otoke or Toke as having witnessed it. Cpl Otoke is an afterthought. No such allegation was ever put to PW1 when he testified. I reject and dismiss the 1st Appellant's defence as an afterthought and totally untrue. There is no reason why PW1 could have framed a total stranger with such serious offence.

The 1st Appellant challenged the prosecution as to why he was not charged with offence of escape or resisting arrest. When the 2nd Appellant drove off, the 1st Appellant was with PW1, 3 and 4. The witnesses did not know what was in the vehicle KBJ or why the driver in KBJ had driven away. They had not arrested or suspected the 1st Appellant for commission of any offence till they reached the vehicle KBJ and found bhang. He was not a suspect nor was he arrested. Besides, I believe the police would have a discretion as to which offence the suspect would be charged with based on their investigation and evidence.

The 2nd Appellant claims to have been framed by PW5 because the 2nd Appellant owed PW5 some money. That allegation came as an afterthought. At no time during cross examination of PW5 did the 2nd Appellant make such allegation for PW5 to respond. The court was not even told how much the 2nd Appellant owed and when he was supposed to have paid it back. Further to the above, we have the evidence of PW1, PW3 and 4 all total strangers to the 2nd Appellant and why would they have framed him? It is PW1 and 4 who first met the Appellants. PW5 was not present. I reject the 2nd Appellant's defence as an afterthought and untrue as did the trial court. The Appellants were found in possession of the cannabis sativa. Both appellants did not give any a plausible explanation as to how they came by it.

Although the appellants alleged that they were not given a fair trial by not being accorded time to prepare, they never demonstrated how the court denied them that right under **Article 50 Rule 2(c)** of the **Constitution**. They cross examined witnesses and gave their defences. The record in the lower court does not disclose any breach of the appellants' rights.

I have read the judgment of the trial court. Although that court did not analyze the evidence and draw conclusions as required, I find nowhere in the judgment that the court shifted the burden of proof onto the Appellants.

In the end, I find that the appeal against conviction lacks merit and is hereby dismissed.

Is the sentence harsh and excessive?

No evidence was led in the lower court on the value reliance of the drugs that were recovered in the possession of the Appellants. It follows that the value indicated in the charge sheet is only an estimate. The value of the narcotic drugs is important because **Section 4(a)** of the **Act**, bases the sentence on the value. Although the value was not ascertainable, I am convinced beyond any doubt that 2,200 stones of cannabis sativa found with the Appellants is not of little value. The magistrate imposed a fine of Kshs.1,320,000/- three times the value of the drugs. Since the value was not ascertained, I am inclined to impose the fine of Kshs.1 million in default 12 months imprisonment in accordance with the **Act**. In addition the appellants were handed a prison sentence of 15 years each. I find no good reason to interfere with it. The appeal is hereby dismissed.

DATED and DELIVERED this 4th day of May, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:

Both Appellants – in person.

Mr. Nyakundi for the State

Kennedy – Court Clerk.