REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL 47 OF 2011

(From Original Conviction and Sentence in Criminal Case No. 2454 of 2010 of the Chief Magistrate's Court at Mombasa: ***T. Ole Tanchu – S.R.M****.)*

BAKARI SAID JAO ……..……..……..……..…… APPELLANT

=VERSUS=

REPUBLIC ……..……..……..……..……... RESPONDENT

JUDGEMENT

The Appellant herein **BAKARI SAID JAO** has filed this appeal challenging his conviction and sentence by the Senior Resident Magistrate sitting at Mombasa Law Courts. The Appellant was charged on two counts of **TRAFFICKING IN NARCOTIC DRUGS CONTRARY TO SECTION 4(a) OF THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES CONTROL ACT 1994.** The particulars of Count No. 1 read as follows:

"On the 15th day of August 2010 at Shika Adabu area in Shika Adabu Location of the likoni district within Coast Province, was found trafficking in Narcotic Drugs by selling 24 satchets of heroin with a street value of Kshs.2,400/- in contravention of the said Act"

The particulars of Count No. 2 were that:

"On the 15th day of August 2010 at Shika Adabu area in Shika Adabu Location of the Likoni district within Coast Province, was found trafficking in narcotic drugs by selling 71 rolls of cannabis with a street value of Kshs.1,420/- in contravention of the said Act"

The Appellant entered a plea of ***'Not Guilty'*** to both counts. His trial commenced on 27th January 2011 at which trial the prosecution led by **INSPECTOR SUMBA** called a total of three (3) witnesses in support of their case. **PW1 SENIOR SERGEANT JOSEPH BUHAJI** and **PW2 A.P.C. GIDEON MUTUNGA** both told the court that on 15th August 2010 at about 5.30 p.m. they were on patrol in the Shika-Adabu area. They received a tip off about a house where narcotic drugs were being sold. Police raided the house and found the Appellant therein resting on a bed. In a porch next to the Appellant's right leg they recovered 71 rolls of plant material suspected to be bhang. The Appellant who had rasta braids was told to

remove his cap. Hidden inside his braids police recovered 24 satchets of a white powdery substance suspected to be heroin. The Appellant was arrested and taken to the police station where he was charged.

At the close of the prosecution case the Appellant was ruled to have a case to answer and was placed onto his defence. The Appellant made an unsworn defence in which he denied having been found with the drugs in question. On 14th February 2011 the learned trial magistrate delivered his judgement in which he convicted the Appellant on both counts and thereafter sentenced him to serve 15 years imprisonment on each count. The sentences were ordered to be served concurrently. Being dissatisfied with both his convictions and sentence the Appellant filed this present appeal. **MR. TANUI** who appeared for the Respondent State conceded the appeal.

I have perused the grounds of appeal raised by the Appellant in his written submissions filed in court. The first ground is that of defective charge sheet. I have carefully considered the charge sheet and I find that it was properly drafted in all respects. I therefore dismiss this ground of the appeal.

The second ground relates to insufficiency of evidence. Both **PW1** and **PW2** testify that they arrested the Appellant from his house. This fact of arrest is conceded to by the Appellant himself. The police state that upon searching the Appellant they recovered 71 rolls of bhang hidden in a porch and 24 satchets of heroin hidden in the braids of the Appellant's hair. The testimony of **PW1** and **PW2** in this regard is consistent and is mutually corroborative. They both remain unshaken under cross-examination by the Appellant. The recovered items were duly produced in court as exhibits and were positively identified by both witnesses **Pexb1** to **Pexb4**. In his defence the Appellant denied having been found in possession of any drugs. However there is no explanation as to why the two officers would seek to frame him. There is no evidence of a pre-existing grudge against the Appellant. The Appellant's defence was given due consideration by the trial magistrate but was dismissed as a mere denial. I am inclined to agree with this dismissal. I am therefore satisfied that the Appellant was indeed found with the items in question inside his house.

Proof that the recovered substances were infact narcotic drugs is provided by the evidence of **PW3 PC. COSMAS KIPRUTO** who told the court that he prepared an exhibit memo and forwarded the 71 rolls of plant material as well as the 24 satchets to government chemist for analysis. **PW3** later collected the reports from the Government analyst which he produced as exhibits in court **Pexb5** and **Pexb6**. In conceding this appeal Mr. Tanui for the State submitted that the two reports ought not to have been admitted by the trial court because their maker i.e. the Government Chemist was not called to testify. Whilst it is true that this witness was not called to testify I do not feel that such an omission as of necessity rendered the two reports inadmissible. S. 77 of the Evidence Act sets out rules governing the admissibility of expert reports. S. 77 provides:

"77(1) In criminal proceedings any document purporting to be [a] report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence *[my emphasis]*

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it"

Therefore notwithstanding the failure to call the Government analyst the two reports are admissible and are deemed to have been prepared and signed by the Government analyst. Section 77(3) goes on to provide that a court **may** if it thinks fit summon the analyst to testify. The use of the word may implies that the decision on whether or not to summon the analyst lies solely at the court's discretion which discretion the trial magistrate here did not deem necessary to exercise. On his part the Appellant raised no objection to the production of the two reports by **PW3** and likewise he made no request to the court to summon the Government analyst to testify in person. As such I find that the two reports were properly produced as exhibits. The first report **Pexb6** indicates that the 17 rolls were examined and found to be ***'Cannabis'***. The second report **Pexb5** indicates that the whitish powder was examined and was found to be ***'Heroin'***. Both are prohibited Narcotic drugs.

The charge which the Appellant faced on both counts was that of ***"trafficking by selling".*** Thus the particulars imply that the Appellant was engaged in the transport and/or selling of the drugs in question. This is not supported by the facts. The Appellant was not found in the act of transporting the drugs nor was he found selling the same to any person. Both witnesses testify that they found the Appellant lying on his bed. He was alone in the house. No third party was present. The trial magistrate's conclusion that the Kshs.568/- found on Appellant were proceeds of sale is misconceived. It is quite in order for a person to have on his person that sum of money and no adverse conclusion can be drawn from such possession. The evidence in my view did not prove this charge of Trafficking.

Having said that, and being mindful of my obligation as a first court of Appeal to re-examine and re-evaluate the evidence and to draw my own conclusions on the same, I am satisfied that the evidence adduced did prove the offence of Possession. Section 3(1) of the Narcotics Act provides as follows:

"subject to subsection (3) any person who has in his possession any narcotic drug or psychotropic substance shall be guilty of an offence"

There is no doubt at all that the Appellant was found alone inside his house having in his possession 71 rolls of Cannabis as well as 24 satchets of Heroin. Thus based on the foregoing I hereby quash the appellant's convictions on the charge of Trafficking and substitute instead convictions for the lesser offence of Possession of Narcotic Drugs contrary to Section 3(1).

Similarly I do hereby set aside the fifteen (15) year term of imprisonment imposed on the Appellant and instead substitute a sentence of ten (10) years imprisonment on each count to run from the date of conviction in the lower court. Sentences will run concurrently.

It is so ordered.

Dated and Delivered in Mombasa this 26th day of June 2012.

M. ODERO
JUDGE

In the presence of:

Appellant in person

Mr. Gioche for State