REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL 64 OF 2010

MOHAMED FAMAU BAKARI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein was charged in the Lower Court with the offence of Trafficking in Narcotic Drugs contrary to section 4(a) of the Narcotics Drugs and Psychotropic substances (Control) Act No. 4 of 1994. The particulars of the charge were as follows:

"That on 27th day of July, 2009 at about 2100hours at Serena Area in Malindi Location within Malindi District of the Coast Province, was found trafficking in Narcotic Drugs to wit 7 big rolls of cannabis and 50 tablets of royhpnol all valued at Kshs. 3,900/- in contravention of the said Act."

2. Following a full trial before the learned Chief Magistrate sitting in Malindi, the appellant was convicted and sentenced to life imprisonment. He was also ordered to pay a fine of shs. 1,000,000/-.

Through his counsel, Mr. Mouko, the appellant has raised five grounds of appeal challenging both the conviction and sentence.

3. The grounds are as follows:

1. The Honorable Chief Magistrate erred in law and in fact by basing the conviction on insufficient evidence.

2. The honorable Chief Magistrate erred in law and in fact by basing the conviction on insufficient evidence.

3. The honorable Chief Magistrate erred in law and in fact by admitting inadmissible evidence contrary to the law thus prejudicing the appellant.

4. The honorable Chief Magistrate erred in law and in fact in convicting the appellant on a defective charge sheet.

5. The honorable Chief Magistrate erred in law and in fact by convicting and sentencing a person who was never charged and by failing to appreciate that the person referred to and charge dint he charge sheet was never produced in court.

6. The person sentenced before court in this case Hamad Famau Bakari was never charged and that the accused charged in the charge sheet presented before the court in this case Mohamed Famau Bakari was never produced and that is the two were different and distinct persons.

7. That by prosecuting, convicting and sentencing the appellant who was never charged the appellant\'s rights have been grossly infringed and continues to be infringed.

8. That the honorable Chief Magistrate failed and misdirected herself by not considering the appellant\'s defence which was reasonable, cogent and believable.

9. The honorable Chief Magistrate erred in law and in fact by meting out a life sentence against the appellant which sentence was excessive in the circumstances.

The appellant therefore takes issue with the quality and adequacy of the evidence as well as the extent of the sentence. As obligated to do, I have reappraised the evidence in the Lower Court in order to draw my own conclusions (see **Okeno vs R 1973 EA 322).**

4. The prosecution called three witnesses. In summary, the prosecution case was that on 27-7-09 Pc Ouma (PW1) and his colleagues Pc Mugambi (PW2) and Pc Ali were patrolling the beach in a police vehicle. The time was 9.00pm. Acting on information received, they laid an ambush at Serena Stage along the Mombasa/Malindi Road. They intercepted a Nissan Matatu in which the appellant was traveling. The appellant tried to get out and run off but the police officers who recognized him caught him. Upon being searched the appellant was found to be carrying seven rolls of bhangi concealed among baby clothes packed in a bag. From his person, they found 50 Rohypnol tablets tucked inside his trouser pocket. The suspected drugs were handed over to Cpl. Titus Munialo (PW3) who prepared samples for analysis. The government analyst (PW4) confirmed that the plant material was cannabis sativa while the tablets were a substance called rohypnol, both which are psychotropic substances.

5. The appellant gave a sworn defence statement. He said that a police officer traveling in the same *matatu* tipped his colleagues to arrest him without a reason. He denied that he was arrested in possession of drugs. He said the police officers who arrested him were known to him.

6. Mr. Mouko submitted that the charge sheet was defective for failing to indicate the manner in which the appellant trafficked the drugs. He cited the case of **Edward Okoth vs R Cr. App. 122 of 2007** for this proposition. He also highlighted what he termed as contradictions in the evidence of PW1 and 2 on two main issues:

1. Whether appellant tried to escape or not

2. The wrapping and packaging of the drugs.

7. The chain of handing over of the drugs was also the subject of complaint by the defence. The defence submit that the evidence did not clearly demonstrate the chain. Hence there was a lacunae. In this regard the defence cited **Cr. Appl. 66 of 2000 Bernard Omondi Odulo vs R** and Mr. Mouko also faulted the court\'s analysis of the prosecution case (especially on the issue of trafficking) and defence evidence. He argued that vital witnesses were not called **(Alfred Mjomba Mchili and Ano vs R (2010)e KLR).**

This omission he said was fatal to the prosecution case.

8. Mr. Kemo for the State opposed the appeal. He supported the conviction and sentence while arguing that the charge sheet was not defective and that the case of **Edward Okoth** is therefore irrelevant. He contended that from the charge sheet and evidence it was very evident as to the nature of offence preferred. That in **Okoth\'s Case** facts given during the plea supported a charge of possession rather than trafficking, which is not the case here. He denied that there was a lacuna in the handling chain and urged the court to find that reference in notes to Cpl. Ouma by PW1 was to Cpl. Munialo (PW3) who testified

that he prepared the exhibit memo Exh.4. He distinguished **Bernard Odulo\'s Case** from the instant one, based on the facts.

9. I have considered all the submissions, the record of the Lower Court and the authorities cited. The alleged contradiction as to whether the appellant was alighting or tried to escape from the *matatu* is a matter of perception by PW1 and PW2. It does not detract from the substance of their evidence. Equally, whether the drugs (plant material) was in a white cloth (per PW3) or in baby\'s cloth (per PW1 and PW2) is a minor issue. PW3 was not at scene of arrest. Those who were, that is PW1 and PW2 gave consistent evidence on the wrapping. The baby cloth itself was produced in court as exhibit 3 even though the outer plastic bag referred to by PW2 was not.

10. Regarding the charge sheet, I am not persuaded that it is defective for the reason stated by Mr. Mouko. The facts in the case of **Edward Okoth** were very different. It is true that more clarity would be added to the charge by the inclusion of the manner in which an accused trafficks going by the definition in Section 2 of the Psychotropic Substances (Control) Act No. 4 of 1994. However, Section 134 of the Criminal Procedure Code must always be borne in mind as to what amounts to reasonable information on a charge.

Section 134 of the Criminal Procedure Code states:

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged." (emphasis mine)

11. The purpose of the particulars is to provide "reasonable information" as to the nature of the offence. The appellant participated fully in the trial in the Lower Court and appeared to understand the nature of charges laid against him. - see for example his cross-examination of PW1. There is no suggestion that the appellant was prejudiced by the alleged omission of the precise method of trafficking.

12. I think the most serious challenge leveled by the appellant in this appeal relates to the chain of handling of the drug from arrest to examination. Because clearly, PW2 was recorded as testifying that the drugs were after recovery handed over to Cpl. Ouma. Yet Cpl. Munialo (PW3) said he prepared the exhibit memo form. It is true that PW3 did not explicitly state that he received the drugs from PW1 and 2 but his evidence when read as a whole clears any doubts on the matter. Firstly, the arrest occurred after 9.00pm following the tip off to PW1 and PW2. PW3 came into the scene at 9.40pm. Already the appellant was in custody. He contacted the arresting officers whom he said "kept the exhibits" after the arrest.

13. PW3 prepared P. Exhibit 4. the exhibit memo form. This form was prepared on the same night of arrest. It is dated 27th July, 2009. The narration in the form as to the "exhibits and identification markings," the precis of offence and other details clearly indicate that PW3 must have been in possession of the exhibits at the time of preparing P.Exh.4. Secondly, and more importantly in the space provided for "taken possession by …." the name of PW3 is inserted before the date and signature. The details of the recovery of the drug at 21 hours tally with the evidence of PW1. His name and force No. are inserted in the space provided for "time, date, place, exhibit (s) found and by whom." Hence to suggest that the chain was somehow broken is to ignore the time factor involved in the matter and the details in P.exh.4. In these circumstances I am inclined to agree with the State that PW2 must have erroneously referred to Cpl. Ouma as the one who took possession after recovery or indeed the court recorded an erroneous name.

14. It would of course have been different if the other name referred to was the deputy OCS who summoned PW3 to come in and deal with the case: (He evidently cannot be a police corporal). Because this commanding officer was not called as a witness. I cannot therefore accept the defence proposition that certain \'key\' witnesses were not called. At any rate, the question whether Cpl. Munialo or Cpl. Ouma took possession of the exhibits from PW1 and PW2 was not made an issue at all during the trial. In

Bernard Odullo\'s Case the delay was almost two months between recovery and analysis. The appeal court was concerned that there was no evidence as to who took the drug to the government chemist, or who had custody thereof during the intervening period. In the case before us, the chain from recovery on arrest to escort to the government chemist is covered by the oral and documentary evidence adduced through PW1-3, the error of names notwithstanding.

15. There was no delay as the exhibit memo was prepared the same day and drugs forwarded by PW3 to the Government Analyst within a fortnight. In **Odullo\'s Case**, the court stated that due to the break in the chain, "there is doubt as to whether what was recovered from the appellant was the heroin which was referred to in the Government Analyst\'s Report." Considering the chain of events in the case before us, there is no room for such doubt. And from the circumstances of the offence, it is clear that the appellant was conveying the offending substances hence the conviction for trafficking therein was justified. The sentence meted out is also legal. The Lower Court justified it on the basis of **Chukwu vs R [2010]e KLR.** At the same time the appellant admitted a previous conviction on a drug related offence in 2002.

Accordingly, I find no merit in any of the grounds raised in this appeal and will dismiss it in its entirety.

Delivered and signed at Malindi on this **21st** day of **September, 2012** in the presence of the appellant, Mr. Obaga holding brief for Mr. Mouko for accused, Ms. Mathangani for State.

Court clerk – Leah.

C. W. Meoli
JUDGE