



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 311 OF 2010**

*(From Original Conviction and Sentence in Criminal Case No. 615 of 2010 of the Chief Magistrate's Court at Mombasa: L. Mutende – S.P.M.)*

**JOSHUA OKETCH KIKOA ..... APPELLANT**  
**-VERSUS-**  
**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The Appellant **JOSHUA OKETCH KIKOA**, has filed this appeal seeking to challenge his conviction and sentence by the learned Senior Principal Magistrate sitting at Mombasa Law Courts. The Appellant was arraigned in court on 22<sup>nd</sup> February 2010 on a charge 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 of the charge were that:

***“On the 19<sup>th</sup> day of February 2010 at Mariakani along Mombasa Nairobi Highway in Kilifi District of the Coast Province, trafficked in narcotic drugs by transporting 32 kilograms of cannabis with a market value of Kshs.64,000/- in a motor vehicle registration KAW 386V Akamba bus in contravention to the said Act”***

The Appellant entered a plea of ‘**not guilty**’ to the charge and his trial commenced on the same day. The prosecution led by **CHIEF INSPECTOR NDUBI** called a total of five (5) witnesses in support of their case. The brief facts were that on 19<sup>th</sup> February 2010 a bus belonging to the Akamba Bus Services was making a journey from Nairobi to Mombasa. The bus Registration No. KAW 386V which was produced before the court as an exhibit **Pexb1** left Nairobi at 8.00 A.M. with only seven (7) passengers on board. At about 10.00 A.M. the bus made a stop at Machakos where a further 35 passengers boarded the bus then proceeded on its journey to Mombasa. At 4.00 p.m. the bus arrived at Mariakani weighbridge where it was stopped by police officers who were on normal traffic duties. The police opened the luggage compartment and demanded to see the owner of two suitcases, one blue and the other red and black. Both suitcases were tagged with No. 9 representing ticket No. 9. **PW2 NICHOLAS MUSILA KYALO**, a conductor on the bus, boarded the bus and pointed out the Appellant who was occupying seat number 9. The Appellant alighted and upon being questioned by police conceded that the 2 suitcases were his. The police opened the suitcases and recovered therein several stones of dry plant material suspected to be bhang. The bus was driven to the police station where the exhibits were weighed and found to be 32 kg. (each suitcase weighed 16 kg.). The Appellant was placed into cells. The plant material was taken to the government chemist for analysis and was certified to be cannabis sativa which is a prohibited

drug. The Appellant was then charged with this present offence.

At the close of the prosecution case the Appellant was found to have a case to answer and was placed on his defence. He gave an unsworn defence in which he denied all knowledge of the two suit cases and their contents. On 28<sup>th</sup> June 2010 the learned trial magistrate delivered her judgement in which she convicted the Appellant of the charge of trafficking and thereafter fined him Kshs.192,000/- in default one (1) year imprisonment and **in addition** to a term of life imprisonment. It is against that conviction and sentence that the Appellant now appeals.

**Mr. Magolo** Advocate represented the Appellant at the hearing of his appeal whilst **Mr. Ondari** appeared for the Respondent State and urged the court to uphold both the conviction and sentence of the lower court.

Mr. Magolo in his oral submissions to the court contended that the proceedings before the trial court were a nullity as they were conducted in a language with which the Appellant was unfamiliar. He contended that the Appellant was fluent in the Luo vernacular yet there is no indication that a Luo interpreter was availed to translate the plea and proceedings. The plea was taken on 22<sup>nd</sup> February 2010. It is indicated that upon the charge being read out the Appellant replied in Luo. The trial magistrate recorded his reply thus:

***“It is not true”***

The only way the trial magistrate would have known what the Appellant had said was if his reply was properly translated from Luo. At no time did the Appellant seek translation into any other tongue. The record clearly indicates that on the material date (and indeed at all times when the matter was proceeding) there was a court clerk present in court. I have perused the record of the trial and note that the Appellant participated fully in the trial. The mere fact that he did not cross-examine **PW2** does not mean that he had any problem comprehending the language. **PW1** gave evidence on 29<sup>th</sup> March 2010 the same day that **PW2** testified. Both witnesses gave their evidence in Kiswahili. The same clerk named in the record as **‘Obart’** was seated in court. How is it that the Appellant was well able to cross-examine **PW1** yet suddenly when it comes to **PW2** counsel alleges that he could not understand the language. In their decision in the case of **STANLEY KARIMI KAGO & ANOTHER –VS- REPUBLIC Crim App 228 and 234 of 2008**, the Court of Appeal sitting in Nyeri held at page 5, that although the language used in respect of the witnesses is not indicated in the record –

***“the record shows that the coram including the court clerk (CC) was the same throughout the trial. It is the court clerk’s function among other things, to interpret the language where necessary ..... The record also shows that the Appellant’s cross-examined every witness and at no time complained about their inability to understand the language”***

The same situation prevails in this case. The same court clerk was present throughout the trial. On page 9 the record does indicate that this clerk Obart is able to translate in Luo. Failure of the Appellant to cross-examine **PW2** does not mean that he did not comprehend the evidence. It could merely have been that the Appellant had no questions to put to this particular witness. The Appellant participated fully in the trial, he cross-examined the other witnesses at length. At no time did the Appellant complain that he was unable to follow the proceedings. I am satisfied that the court clerk present was well able to translate and in fact did so translate the proceedings into Dholuo for the benefit of the Appellant. I find no merit in this ground of the appeal and the same is dismissed.

The second ground of appeal raised by Mr. Magolo is that failure to supply the Appellant with witness statements at the commencement of the trial in the lower court amounted to a violation of the Appellant’s right to a fair trial and thus nullified the trial. The record indicates that no application for witness statements was made until 29<sup>th</sup> April 2010 after three prosecution witnesses had testified. It was not at the time a legal requirement that witness statements be provided to an accused person. It is imperative to note that this trial was conducted in the year 2009 well before the promulgation of the new

Constitution in August 2010 which Constitution by Article 50(1) clearly provides for statements to be supplied to an accused. If the Appellant required witness statements he was at liberty to make such a request in court. He did not do so until 29<sup>th</sup> April 2010 after three of the prosecution witnesses had testified. Later the same day the Appellant did confirm to the trial magistrate that the statements had been supplied to him and the case was adjourned to enable him peruse the same. On 19<sup>th</sup> May 2010 when the matter proceeded for hearing the Appellant did not apply to re-call any of the three witnesses who had testified for further cross-examination. No doubt after reading the witness statements the Appellant was satisfied that he was in a position to proceed with the trial. In my view the Appellant did not suffer any prejudice by the failure to access witness statements at the commencement of his trial. The three witnesses testified in open court, the Appellant was allowed an opportunity to (and indeed did) cross-examine these witnesses. After receiving the statements Appellant made no application to re-call any witness. In my view the Appellant was in no way deprived of a fair trial and I therefore dismiss this ground of the appeal.

Another ground of appeal raised by counsel for the Appellant is that one of the key witnesses being the investigating officer who testified as **PW4** was not identified by name. Counsel argues that in those circumstances her evidence ought to be disregarded and without her crucial testimony the prosecution case falls flat. I have perused both the typed and hand written proceedings and find that indeed this witness did not give her name. In my view this could have merely been an oversight. In any event the witness did identify herself by her Force number **77338** and states that she is an officer attached to the **“Anti Narcotics Unit Mombasa office”**. I do agree with **MR. ONDARI** who appeared for the State that use of a police force number provides adequate and sufficient identification of a police officer. The officer stated exactly where she works and what role she played in the investigation of her case. No prejudice was suffered by the Appellant’s not knowing her name. This is not a ground to expunge the evidence of **PW4** from the record. I am satisfied that this witness was properly identified by way of her Force Number. I find no merit in this ground of the appeal and I do hereby dismiss the same.

Mr. Magolo also submits that the charge is fatally defective. The Appellant was charged with **‘Trafficking of Narcotic Drugs’**. The evidence is that he was arrested being a passenger in a bus traveling from Nairobi to Mombasa. The Appellant’s luggage was searched and the said narcotic drugs recovered therein. The term **‘trafficking’** is defined in S. 2 of the Narcotics Act to mean:

**“the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance ... [my emphasis].”**

The act of moving an item from point A to point B or as in this case from city to city i.e. Machakos to Mombasa amounts to **‘conveying’** that item. By having inside his luggage narcotic drugs and transporting the same by bus from Machakos to Mombasa, the Appellant was clearly **‘conveying’** and therefore **‘trafficking’** those drugs. This act of conveying is what is made an offence by S. 4(a) of the Act. The charge therefore does reveal an offence known to law and is a valid charge. As such I do dismiss this ground of the appeal.

Lastly with respect to the charge counsel argued that the evidence adduced was not sufficient to prove the charge. With respect I cannot agree. Indeed this is one of those cases where I am happy to note that great care was taken by the carrier to label each passenger’s luggage for ease of identification. The identity sticker placed on the two bags bore the seat number, name, nationality and destination of the traveler. The Appellant who was Joshua Oketch occupied seat No. 9 a fact which he does not deny. There can therefore be no doubt that the two suitcases from which the drugs were recovered belonged to the Appellant. **PW4** prepared an exhibit memo form and after witnessing the weighing of the drugs took a sample to the Government Chemist for analysis. **PW5 JOHN NJENGA** the government chemist testified that he did analyze the plant material and found it to be **‘cannabis sativa’** commonly known as **‘bhang’**. He produced his report as an exhibit **Pexb 7**. This is what can be called an **‘open and shut case’**. The evidence pointed squarely at the Appellant and nobody else. The evidence adduced was clear, cogent and reliable. The learned trial magistrate did consider the Appellant’s defence but dismissed the

same at page 21 of her judgement with the words –

***“Therefore the defence put up by the accused in an endeavour to explain how he came to be arrested does not challenge the fact that indeed the accused had knowledge of what he was carrying namely cannabis sativa”***

I am in total agreement with the above finding by the trial court. On the whole I find that the evidence adduced overwhelmingly proved the charge of Trafficking against the Appellant. His conviction was both sound and merited and I do confirm the same.

After his conviction the Appellant was allowed an opportunity to mitigate. He was thereafter sentenced to a fine of Kshs.192,000/- in default one (1) year imprisonment and in addition the Appellant was sentenced to serve life imprisonment. The Appellant has appealed against his sentence terming it harsh and excessive in view of the fact that he was a first offender. S. 4(a) of the Narcotics Act provides for the following sentence upon conviction on a charge of trafficking:

***“(a) in respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life”***

In this case the value of the drug being trafficked by the Appellant was Kshs.64,000/-. Three times its value is 64,000 x 3 which amounts to Kshs.192,000/-. Therefore this fine imposed was lawful and I have no inclination to interfere with the same. The trial court proceeded to impose **in addition** to this fine a term of life imprisonment. As Mr. Magolo has rightly pointed out this is the maximum sentence for this offence. Ordinarily the maximum penalty is reserved for the worst possible manifestation of a particular offence. Granted that drug menace is one of national concern, but I do not believe that trafficking of 32 kilos of Cannabis Sativa though a grave offence can properly be termed as the worst possible manifestation of this particular offence. The court prosecutor did confirm to the trial court that the Appellant was a 1<sup>st</sup> offender as he had no previous records. The Appellant made a plea for leniency. In my view the maximum penalty was not merited and was in the circumstances both harsh and excessive. I therefore do allow the appeal against the second part of the sentence. I set aside the term of life imprisonment imposed by the trial court and instead substitute a term of ten (10) years imprisonment. To this extent **only** does this appeal succeed. In conclusion for clarity and to re-cap my findings – I do confirm the conviction of the Appellant and I do uphold his fine of Kshs.192,000/- in default one (1) year imprisonment. However I set aside the term of life imprisonment imposed by the trial court and instead substitute a term of ten (10) years imprisonment.

**Dated and Delivered at Mombasa this 23<sup>rd</sup> day of March 2011.**

**M. ODERO**  
**JUDGE**

In the presence of:  
Mr. Magolo for Appellant  
Mr. Onserio for State