



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 192 & 193 of 2009

ALFRED MJOMBA MUCHILI 1ST APPELLANT

ANNA KATUNGWA 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The two Appellants **ALFRED MJOMBA MUCHILI** (hereinafter referred to as the 1st Appellant and **ANNA KATUNGWA** (hereinafter referred to as the 2nd Appellant) have jointly filed this appeal contesting their conviction and sentence by the learned Senior Principal Magistrate sitting at Mombasa Law Courts. The two Appellants together with a third person **AMOS MWALAGAI SALAI** (now deceased) were arraigned in the lower court on 30th December 2008 and jointly charged with the offence of **TRAFFICKING IN A SUBSTANCE OTHER THAN A NARCOTIC DRUG OR PSYCHOTROPIC SUBSTANCE CONTRARY TO SECTION 4(b) OF THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES (CONTROL) ACT, 1994**. The particulars of the charge were that

“On the 29th day of December 2008 at Tudor area in Mombasa District within the Coast Province, jointly, were found trafficking in a substance other than a narcotic drug or psychotropic substance to wit 1.5 kg of whitish substance which they presented to be a narcotic drug or psychotropic substance namely cocaine valued at Kshs.2.25 million in contravention of the said Act by storing the said substance”

Both Appellants denied the charge and their trial commenced on 24th June 2009. The prosecution led by **INSPECTOR NDUBI** called a total of four (4) witnesses in support of their case. The brief facts were that police from the Anti Narcotics Unit received information from an informer that some people were selling a substance said to be cocaine in the Tudor area. The police swung into action and laid a trap. They went to the scene with the said informer who posed as a potential buyer. They met three people allegedly offering for sale the powdery

substance and upon a pretext that they were going to seal the deal lured the three into their vehicle. They then drove with the Appellants to

Mama Ngina Drive where the exchange was to be made. Upon arrival there a second contingent of officers who were on standby at Mama Ngina Drive immediately stepped in and arrested the Appellants. A bag containing a powdery substance was confiscated by the police and was later taken to the Government Chemist for analysis. The substance was found not to be cocaine but was actually baking powder. The Appellants were then charged in court.

At the close of the prosecution case both Appellants were found to have a case to answer and were placed on their defence. Both opted to give sworn defences in which they denied the charges. On 28th October 2009 the learned trial magistrate delivered her judgement in which she convicted both Appellants. After listening to their mitigation the trial court proceeded to sentence both Appellants to a fine of Kshs.500,000/- in default one year imprisonment and in addition each was sentenced to serve five (5) years imprisonment. Being aggrieved with both their convictions and sentences the Appellants filed this present appeal.

MR. MAGOLO learned counsel argued the appeal on behalf of the Appellants whilst **MR. ONSERIO**, learned State Counsel, appeared for the Respondent State and opposed the appeal.

I have carefully considered the submissions of Mr. Magolo in support of this appeal, as I equally have carefully perused the written record from the lower court. As a court of first appeal I am mindful of the decision of the Court of Appeal in the case of **AJODE -VS- REPUBLIC [2004] KLR 81**, where it was held

“In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witness and make allowance for that”

The Appellants were charged with the offence of **“trafficking”** a substance represented to be a narcotic drug. The substance in question was recovered by police and was said by the witnesses to be a white powder. The said substance was taken for analysis and **PW3 JOHN NJENGA** the Government Analyst who did the analysis said he found the white powder to be **“sodium hydrogen”** i.e. baking powder. It was **not** a narcotic drug.

The Appellants were charged with the offence of trafficking which is defined by the Narcotic Drugs and Psychotropic Substances Act as

“the importation, exportation, manufacture, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such person to be a narcotic drug or psychotropic substance or making any offer in respect thereof ...”

It is pertinent to note that this definition does not include the mere *'possession of the substance'*.

Mr. Magolo raised issue with the charge sheet arguing that the addition of words *"by storing the said substance"* rendered the charge fatally defective. I have perused the charge sheet and it is quite clear that these words were added **after** the charge had been typed out. The additional words are handwritten as opposed to typed. S. 214 of the Criminal Procedure Code makes provision for the amendment of a charge. Such amendments may only be made with the consent of and by the order of the court. The said alteration is not signed or initialled. There is no indication from the record that any application was made to amend the particulars of the charge, much less that the trial court had granted leave for any such amendment to be made. In my view this was a material amendment, one for which leave to amend ought to have been sought. It is not proper nor procedural to simply alter a charge sheet without the consent of the court.

Be that as it may, the particulars indicate that the Appellants were found storing the white powder. The evidence from the witnesses is that acting on a tip-off they went to the Tudor area of Mombasa where they met the Appellants who were allegedly offering the substance for sale. The 2nd Appellant was said to have been holding a black paper-bag containing this substance. Just as the learned trial magistrate did, I turned to the Concise Oxford Dictionary 9th Edition for the meaning of the word *'to store'*. It does not describe storing as holding an item. It refers to an item *"kept available for use"* or items *"accumulated"* for later use. The general colloquial use of the term *'store'* is to keep an item or items in stock for later use. This is certainly what the Appellants were said to have been found doing. They did not remove the white powder from a stock which they had – the 2nd Appellant was found holding it in her hand. Thus the evidence adduced in court does not support the particulars of the charge.

The prosecution witnesses who were police officers stated that they relied on a tip-off from a police informer. This police informer actually rode with them to the scene and was with the police right upto the arrest of the 2 Appellants. Mr. Magolo has informed the court that the defence was supplied with the written statement of this informer. In that case I am left to wonder why he was not called as a prosecution witness to corroborate or verify what the police have said. I am mindful of the fact that as a general rule the identify of an informer is kept secret thus they are not called to testify in court but in a case like this where such an informer actually wrote a statement with the police and this statement was handed over to the defence, then his cover is already blown. His identity has already been revealed and there is no further reason for him not to be called to testify. This person was a crucial witness to the prosecution case and failure to call him to testify severely weakened the State's case. The prosecution are under a duty to call all such witnesses as are required to prove the case [see **BUKENYA –VS- REPUBLIC [1972] E.A.L.R. 549**].

PW1 Corporal Felix Kasambu told the court that on the material day he drove the police vehicle to Tudor. He says he saw the lady (2nd Appellant) holding the black paper bag. He did not however witness her hand over this bag to any person. Yet **PW2 SERGEANT PHYLLIS LANGAT** who was amongst the contingent of officers waiting to effect arrest at Mama Ngina Drive, told the court that upon arrival there the paper bag was in the hands of a police officer **CORPORAL GWANDAI**. At what point and under what circumstances did the bag exchange hands? This is not clear. Did 2nd Appellant voluntarily hand it over or did the said Corporal Gwandai just take it from her? We will never know the answer to this question because Corporal Gwandai was not called as a prosecution witness. He was a crucial witness whom yet again the prosecution failed/declined to call to testify. He was a police officer whose attendance it would not have been too difficult to secure. **PW4 CORPORAL FRANKLIN WANJALA**, was one of the officers who traveled in the police vehicle to Tudor and later to the Mama Ngina Drive. His evidence does not help shed much light on the issue. At page 15 line 28 he states referring to the black bag containing this white substance

"By then they had handed over the drugs"

At page 16 line 1 the same witness states

“The woman carried the substance ... The investigating officer took possession of the substance”

It is still not clear under what circumstances the substance was handed over. Did the investigating officer ask for it? Did the 2nd Appellant say anything whilst handing it over? These crucial questions remain unanswered. It transpires from the evidence of **PW4** that the investigating officer was this Corporal Gwandai. He played a crucial role in the whole saga. His evidence was essential to fill in the gaps in the prosecution case and to establish the thread of evidence. The failure to call him was in my view a blunder on the part of the prosecution. Our criminal law places an obligation on the prosecution to prove their case beyond a reasonable doubt. In a case such as the present one where several gaps remain in the evidence and where key and crucial witnesses have not been called to testify this standard cannot be said to have been met. By putting the Appellants on their defence the learned trial magistrate was effectively calling upon them to fill up the gaps in the prosecution case. I find that the conviction of both Appellants was unsafe in the circumstances. As a result I hereby quash both their convictions. The attendant sentences are also set aside. This appeal succeeds. Both Appellants are to be set at liberty forthwith unless they are otherwise lawfully held.

Dated and Delivered in

Mombasa this 13th day of September 2010.

M. ODERO

JUDGE

Read in open court in the presence of:-

Mr. Magolo for Appellant

Mr. Muteti for State

M. ODERO

JUDGE

13/09/2010