



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUSIA**  
**Criminal Appeal 53 of 2009**

**SAMSON OMOLLO OTIENO .....APPELLANTS**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(From the conviction and sentence of W.N. Nyarima, P.M. in Busia Cr. Case No.1966 of 2004).**

**J U D G E M E N T**

The appellant, Samson Omollo Otieno, was originally charged with the offence of Trafficking in Narcotic Drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, Act No 4 of 1994. He was tried and eventually convicted and sentence to 10 years imprisonment. He has appealed against the conviction and sentence.

The facts presented by the prosecution against the appellant are not complicated. The prosecution evidence came through PW2, PW3 and PW4. On 13.9.2004 at 7a.m. PW3 and PW4 who were police officers, were on patrol along Bukiri road. They saw a white car registration No KAQ 926Y Toyota Corrolla Saloon being driven in high speed towards Nangina. PW4, No.66902, PC Fredrick Otieno a police driver, motioned to the driver of the white car to stop. The latter went past in high speed and with no indication of going to stop. PW4 then made a “U” turn in is police vehicle, GK A913G. He began chasing the white car aforestated. He was in company of IP Walter Owino, PW Mbandi, and PC Alphas Biwott. At Nangina he said police officer caught up with the suspect car Reg. No.KAQ 926Y, but the driver refused to stop or give way, although the police vehicle more than once, tried to overtake it. Finally the suspect car smashed the side of the police motor vehicle and came into a stop.

There were three occupants in the car and they all jumped out and started to escape with the police chasing after them to arrest them. The police managed to a arrest the appellant alone while the two others escaped. On checking the inside of the suspects car aforesmentioned, the police found it was carrying sacks which were packed with bundles of bhang (Cannabis sativa). The vehicle was eventually taken to Busia police station with the bhang after leaving the appellant at Funyula Police Station. In all the police counted 2110 bundles of crude bhang and sixteen kilos of refined bhang.

The police thereafter sent samples of the stuff and having prepared a memo form took the same to Kisumu for examination to establish its contents. Later a report of the Government Chemist was received back – Exh 11. It was produced by the Investigations officer during the trial under section 77(1) of Evidence Act, as the maker the Government Analyst, could not be easily procured or made available.

In the meantime police investigations had shown that the motor vehicle Reg No.KAQ 926Y, belonged to Arnette Muthoni, PWI who had let it to John Gitau under a written Agreement dated 4.2.2004. The latter established that he had in turn hired the vehicle out to one Patrick Obote Mbiya, the 1<sup>st</sup> accused in the lower court, who in turn had further hired itout also to the appellant. Agreement (Exh 5).

In his unsworn defence the appellant said he was businessman who sold second hand clothes. He conceded hiring the motor vehicle Reg No.KAQ 926y FROM Patrick Mbote Mbiya to transport his clothes. He visited Port Victoria at the material day driving the motor car aforementioned. At Funyula police officers stopped and wanted a lift to a robbery scene but he refused to give them the lift and continued his journey to Port Victoria. On his way back, he met the same police whom he had refused a lift who stopped him, pulled him out of the hired car, handcuffed him and put him in their police car. They took him to Funyula police post and later to Busia police station where they charged him with this offence. The appellant also argued that since the motor vehicle, the bhang and himself, were not photographed on arrest, there is no credible evidence that he was arrested with said bhang and that he should therefore be acquitted.

The Honourable trial magistrate believe the prosecution evidence. He believed that the appellant was arrested at Funyula while carrying the bhang and after he tried to escape. He totally disbelieved the appellant's statement in defence. He in particular disbelieved the appellant on the evidence that the only reason the police arrested him was because the appellant had refused to give them a lift.

I have carefully perused the evidence which I have considered with keenness. I have independently come to the conclusion that the prosecution evidence was brief, cogent and credible. There is no reason why the police on patrol would arrest the appellant who was lawfully driving his car along the road. There is no reason why the police would heap such a big load of bhang on a person they did not arrest. The appellant did not even allege that the police collected the 2110 bundles from some place to heap them on him. He did not even deny that when the police took over the motor vehicle the bhang was not in it. All in all his defence was incredible under the circumstances he was arrested.

The conclusion I come to accordingly is that there was plenty of quality evidence against the appellant and the conviction was proper and is safe in so far as the evidence is concerned.

The appellant however raised other grounds of appeal which require separate consideration. The first ground is that the trial magistrate allowed the Government Chemist's report to be admitted under Section 77(1) of the Evidence Act. The provision authorises the production and use of Government Analyst, Medical Practitioner or any ballistic expert, Document examiner or Geologist's report, upon any person, matter or thing submitted to him for examination or analysis after presuming that the signature thereon is genuine and that the signature and office thereon indicated is authentic.

In my understanding of the above the provision thus gives way to any challenge being raised by the accused person on the said presumption. In the absence of any such challenge the presumption of authenticity stands. The trial court is however, suo motto or by request of the accused person, given discretion to call for the maker of such document to appear in court and be cross examined on the form and content of the report or document.

In this case the 2<sup>nd</sup> accused who is the appellant herein did not object to the production of the Government Analyst's Report. This was so despite such objection having been raised by the co-accused who wanted to ask some questions. In my view accordingly, the appellant should not be heard to be complaining when he went out of the way to inform the trial court that he had no objection to the production of the Government Chemist's report being produced by the Investigations office and confirming the evidence that the appellant was carrying to cannabis sativa.

Secondly, the appellant cross examined the witness PW7 on the report. He did not ask that the maker be called for further questioning. All in all, I am satisfied that failure to call the Government Analyst did not prejudice the appellant who in any case had no objection to the Report being produced in the manner it was.

The appellant questioned the possession of the relevant motor car at the time of his arrest. He purported to state that he was not arrested with the possession of the motor vehicle found carrying the bhang. He also questioned the evidence to the effect that he had hired the motor vehicle. There is however, ample evidence on the record that he had hired the motor car from PW2, Patrick Mbote Mbiya on a written agreement. Patrick Mbote Mbiya himself confirmed that in his testimony. In any case, the appellant himself in his unsworn defence statement admitted the said fact.

Before concluding this judgement the court noticed that in his written submission, the appellant raised and argued out the ground of his trial, conviction and sentence being unconstitutional on the ground that he was charged on the 16<sup>th</sup> day after being arrested. He thus was saying that he should have been arraigned in court within 24 hours of his arrest unless any delay was reasonable and was explained to court to show so.

Unfortunately, such a ground of appeal was not included in his Petition of Appeal from the beginning nor was leave of court sought to amend the petition to include it.

It will however be observed that the appellant raised the ground early in the prosecution of his appeal and indeed the State Counsel Mr. Okeyo specifically addressed the court over it. I have agonised as to whether I should admit and consider the ground. I have come to the conclusion that since the ground was fully addressed by the State Counsel as if it was validly in the petition, I will admit and consider it, more so because it touches on the basic rights of the individual under the constitution.

Mr. Okeyo admitted that the prosecution did not explain to the trial court the cause of delaying the charging the appellant before the lower court. He on that ground applied for and got adjournment to enable him to explain to this Court what might have happened before the lower court and why it should not interfere with the conviction and sentence of the appellant. Three weeks later he produced several legal authorities before this court without explaining them while leaving everything to court.

It will be observed that the quality and nature of the prosecution evidence in this case is excellent. The conviction accordingly, is proper and indeed safe. But the appellant argues that despite the good nature and quality of the evidence, the conviction where such evidence is based on an unconstitutionality, should not be countenanced by this court which should be a champion of enforcement of the constitution. Is he right?

As stated by the Court of Appeal in Albanus Mwasia Mutua v Republic Cr. App. No.120 of 2004 at page 3-

**“.....On the one hand is the duty of the courts to ensure that crime, where it is proved, is appropriately punished; this is for the protection of society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under our constitution.”**

As earlier indicated, the offence charged in this case is not a capital offence in the nature of robbery with violence or murder or treason. Section 72 (3) (b) of the former Constitution required that a person who has been arrested upon reasonable suspicion of having committed such offence be brought before the court of law as soon as possible, but in any case within 24 hours unless there is reasonable cause for delay. Where that is not done the burden of proving that that person has been brought before the court as soon as is reasonably practicable, rested with the person alleging that it did, in this case the prosecution.

In this case the appellant alleges, however belatedly, that he was not charged in a court of law within 24 hours of his arrest and that he was indeed not so brought as soon as was reasonably practicable. The prosecution neither denies that assertion nor accepts it but simply throws it to this court to decide it. It is the view and finding of this court that the prosecution did not arraign the appellant before the court within the prescribed time of 24 hours. It is its further finding that the prosecution did not bring the accused before court as soon as was reasonably practicable.

The above situation has serious consequences in that the appellant's constitutional rights were clearly violated, The violation of constitutional rights of an accused person leads to the invalidation of the whole process of trial, however

properly it was conducted. To that end the Court of Appeal in Albanus case aforecited, would say-

**“At the end of the day it is the duty of the courts  
to enforce the provisions of the Constitution,  
otherwise there would be no reason for having those  
provisions in the first place. The jurisprudence which  
emerges from the cases we have cited in the judgements  
appears to be that the unexplained violation of a  
constitutional right will normally result in acquittal  
irrespective of the nature and strength of evidence which  
may be adduced to support the charge. In this appeal,  
the police violated the constitutional right of the appellant  
by detaining him in their custody in a whole eight months  
and that, apart from violating his rights under section  
72 (3) (b) of the Constitution also amounted to violation of his  
rights under Section 77(1) of the Constitution which guarantee  
to him a fair hearing within a reasonable time.....”**

There is no doubt that a delay in Albanus case of 8 months cannot be compared with a delay of 15 days in this case before me, but in my view and finding, the principle is the same as the police definitely violated the herein appellants rights. The police also violated his right of guarantee to him of a fair hearing within a reasonable time. If the police had good reason not to bring the appellant before court within the prescribed 24 hours, then they were required to release him on bail or bond under Section 72(5) of the Constitution since the possible offence he was to be eventually charged with is bailable.

In conclusion then, and notwithstanding the strong and overwhelming evidence against the appellant in this case, the end result is that the appellant has to be acquitted. I accordingly quash the conviction against the appellant. I set aside the sentence ten years. The appellant is hereby set free forthwith unless otherwise lawfully held in prison.

Orders accordingly.

Dated and delivered at Busia this 13<sup>th</sup> day of October 2010.

**D.A. ONYANCHA**

**J U D G E**

