

FESTUS SEMBWEJA WACHIRA APPELLANT

- Versus -

REPUBLIC RESPONDENT

J U D G M E N T

The Appellant, Festus Sembweja Wachira, was charged in the Senior Resident Magistrate's Court, Taveta, with 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 offence were that the appellant, on the 8th day of May, 2006, at about 7.00am at Mlima Wa Mahoo Bus stage in Taita Taveta District of the Coast Province trafficked in narcotic drugs by conveying 26 kilogrammes of cannabis sativa (bhang) with a street value of Kshs. 260,000/- in contravention of the said Act.

In addition to this, he also faced a second count of theft of farm produce contrary to Section 8(1) of the Stock Produce Theft Act, Cap. 355 of the Laws of Kenya. The particulars were that the appellant, on the night of 6th and 7th May, 2006 at an unknown time at Vikwatani Village in Taita Taveta District of the Coast Province, jointly with others not before the court, stole twelve (12) bunches of bananas valued at Kshs. 3,000/- the property of Priscila Kawiti.

The prosecution case was that the appellant stole some 12 bunches of bananas from the complainant's farm. Assisted by some others who were not before the court, he packed the bananas in four sacks and hired PW 4, one Jeremiah Mwakio George, a boda boda taxi operator, to take the bananas to the roadside. Upon receiving information from one Tatu that her bananas had been stolen, the complainant (PW 1) went round searching and found the 12 bunches parked by the roadside. She identified them by the light blue paint and initials "JKN" which she had inscribed on them. PW 4 told her that the appellant had hired him to carry the bananas. The bananas were then carried to Taveta Police Station where each sack was found to contain an inner sack which in turn contained some plant material which the Government Chemist later confirmed was cannabis sativa. The appellant was then charged with the above offences.

The prosecution called 7 witnesses after whose evidence the trial court found that the appellant had a case to answer and put him on his defence. He made an unsworn statement but did not call any witness. The court found him guilty and convicted him on both counts as charged. He was then sentenced to pay Kshs. 600,000/- or serve 5 years imprisonment on the 1st count. On the 2nd count, he was sentenced to pay Kshs. 5,000/- or serve 9 months imprisonment. He appealed to this court against conviction and sentence.

The grounds of appeal are neither specific nor are they clearly spelt out, but they generally touch upon lack of sufficient evidence to sustain a conviction against the appellant. As a first appellate court, it is the duty of this court to re-evaluate that evidence, always bearing in mind that this court does not share the advantage of the trial court to see and hear the witnesses. During the hearing of the appeal, the appellant appeared in person and relied on the written submissions which he had filed earlier with the leave of the court. Mr. Onserio, State Counsel, appeared for the Republic and opposed the appeal on the basis that the appellant did not raise any valid point on appeal, and that his submissions were mere denials.

After considering the appellant's submissions and those of the Respondent, I find that the issues to be determined were whether the evidence adduced in court was sufficient to sustain conviction on the charges of theft of produce and trafficking in narcotic drugs as charged. The charge of theft of farm produce alleged that the appellant stole twelve (12) bunches of bananas, the property of Priscila Kawiti (PW 1), who was the complainant. Her evidence was that she was informed by one Tatu, who was not called as a witness, that PW1's bananas had been stolen from her farm. She said that 12 bunches had

been stolen. It is not clear from the evidence whether it was Tatu who informed her that 12 bunches had been stolen, or whether she personally discovered for herself that the bananas stolen were 12 bunches. However, she said that she found the 12 bunches of bananas packed by the roadside. She checked them and found that they had the light blue paint and initials "JKN" which she had marked them with. The young man who had ferried the bananas to the road, Jeremiah Mwakio George (PW 4), told the complainant that Festus Sembweja Wachira, the appellant, had hired him to carry the bananas. They carried the bananas to Taveta Police Station where PW 1 recorded a statement. PW 4 was also asked to record a statement. In cross examination, the complainant said that she identified the bananas by her marks "JKN" and the light blue paint.

This account was corroborated by PW 2, Sabasi Onsongo who said that he found some 3 sacks of bananas and saw a young man carrying a fourth one. The four sacks were then packed by the roadside. The young man was PW 4, Mwakio, who said the he had been hired by the appellant to carry the bananas to the roadside. The bananas had the marks "JKN" and light blue paint, and PW 1 identified them as hers.

The evidence of PW 1 and PW 2 was further corroborated by that of PW 4, Jeremiah Mwakio, who said that on 8th May, 2006, the appellant told him that he wanted the witness to carry some bananas. They went to the homestead of PW 3 where the appellant got some luggage from one of the houses, which luggage PW 4 carried to the roadside where the bananas were packed. The complainant came and asked who the owner of the bananas was and the witness said, in the presence of PW 3, that they belonged to the appellant. The complainant identified the bananas as hers by the mark "JKN" and some light blue paint. The bananas were taken to the Police Station and PW 4 was later arrested and recorded a statement. He also gave the Police information which led to the arrest of the appellant whom he pointed out to the Police. He later learned that the sacks of bananas he had carried were concealing bhang.

The sixth prosecution witness was PC Optat Damian Sangawe who told the court that on 8th May, 2006 at around 8.00am, he was at the Police Station when PW 1 and some people took there some 4 sacks full of bananas. PW 1 reported that her 10 bunches of bananas had been stolen, and that she had found the bananas which she brought to the station after she recognized the initials "JKN" and light blue paint which were the marks of her bananas. When the scenes of crime personnel came to photograph the bananas, the sacks were opened in the presence of PW 7, Corporal Julius Ndegwa, and other police officers. It was then found that each sack contained an inner sack which in turn contained some bhang which is the subject of Count I. PW 1 then led the police to PW 4, the boda boda taxi operator, who led them to the appellant, who had hired PW 4 to transport the bananas with the bhang concealed therein.

The police officers then went to the house from where PW 4 had taken the bananas. They did not find anything except some other bananas marked "JKN" and with light blue paint. The appellant was then arrested. In cross examination by the appellant, the witness said that PW 1 said that 12 bunches of bananas had been stolen from her farm, but previously she had also lost some more bunches of bananas. The last prosecution witness, Corporal Julius Ndegwa (PW 7), was from the CID Narcotics, Taveta. He testified that inside the 4 sacks containing bananas were other 4 inner sacks containing some bhang. PW 1 led them to the house of PW 4 who had transported the bananas to the roadside. PW 4 informed them that it was the appellant who had hired him to do so. They were then led to the house of the appellant where they found some bananas bearing light blue paint and the mark "JKN" just like the bananas PW 1 had earlier positively identified to be her property. The witness added that the bhang weighed 126 kilogrammes. A sample was removed from each sack, and the witness prepared an exhibit memo form and he escorted the samples to Government Chemist for analysis. The Government Chemist confirmed that the samples contained cannabis sativa included in the class of narcotic drugs and psychotropic substances. The appellant was accordingly charged with trafficking in narcotic drugs as per Count I.

In his unsworn statement of defence, the appellant said that one Rashid told him that he had some work for the appellant. The appellant went and got a boda boda taxi so that they would carry Rashid's luggage. They carried the bananas to the roadside and later he found the bananas were not by the roadside where he wanted them kept. He then went to Taveta Town from where he was arrested.

From the above accounts, it is quite clear that the appellant contracted Jeremiah Mwakio to carry the

sacks of bananas to the roadside. This was not only the evidence of PW 4 himself but it was also corroborated by PW 3 who lived in a house within the homestead from where the sacks were removed. It was the evidence of all the witnesses, except PW 5, that the bananas had a mark "JKN" and light blue paint which the complainant said were her marks. That evidence points irresistably to the appellant as the person who had stolen the bananas. However, PW 6, the Police Officer manning the report office, said that PW 1 reported that her 10 bunches of bananas had been stolen and he booked the report. In cross examination by the appellant, he said that the complainant said that her 12 bunches of bananas had been stolen, and that was also the testimony of all the other witnesses. If the complainant reported that only 10 bunches were stolen, that disparity casts a cloud in a relatively clear sky. Secondly, both PW 6 and PW 7 said that when they visited the appellants house, they found some more bananas bearing the same "JKN" mark as the one by which the complainant had identified her bananas. This makes one wonder whether those were her bananas as well, especially when we are told that she reported the loss of 10 bunches. For these reasons, the conflicting evidence does not clearly prove Count II and the appellant is entitled to the benefit of doubt on that charge.

As for Count one, it is clear from the evidence that the sacks of the bananas originated from the appellant who contracted PW 4 to transport them to the roadside. These were the same sacks which the complainant claimed she identified by the mark "JKN" and some light blue paint and which she helped to transport to the Police Station. Inside the bags were some other bags containing the cannabis sativa, which PW 7 testified was certified as such by the Government Chemist, and produced the Government Analyst's report to that effect as Exhibit 7. For these reasons I find that the appellant was properly convicted of trafficking in narcotic drugs.

With regard to sentence, Mr. Onserio for the Republic conceded that on account of his mitigation, the sentence was harsh. Secondly, the trial court did not indicate whether the sentences of imprisonment in default of the fine would run consecutively or concurrently. Having found that the conviction on Count II was founded on shaky ground, I allow the appeal in respect thereof, quash the conviction and set aside the sentence in respect of theft of farm produce. As for the sentence in Count I, I share Mr. Onserio's concerns that the sentence was manifestly excessive and reduce the term of imprisonment to the period which the appellant has served to date. The appeal succeeds to that extent.

The appellant is accordingly set free forthwith unless he is otherwise lawfully held.

Dated and delivered at Mombasa this 26th day of March, 2009.

L. NJAGI

JUDGE