

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 198 & 196 of 2007

PETER OUMA ABUOM.....1ST APPELLANT

JOSEPH MBERO BOSE.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellants herein Peter Ouma Abuom and Joseph Mbero Bose (*1st and 2nd appellants respectively*) were charged with the offence 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 offence state that on the 30th day of September 2005 at about 2.00 am. at Siyapei Police Roadblock along Narok/Mai-Mahiu road in Narok District of the Rift Valley Province jointly trafficked in a narcotic drug namely cannabis sativa (*bhang*) to wit 185 stones valued at Kshs 92,500/= in a bus registration No. KAU 149D in contravention of the said Act.

After a full trial the 1st and 2nd appellants were fined Kshs 100,000/= and a sentence of 8 years. In the event that the fine was not paid each of the appellants was sentenced to 10 years imprisonment. Being dissatisfied with the conviction and sentence the appellants have appealed. They have challenged the conviction and sentence on the grounds that the evidence before the trial court by a single witness was not corroborated regarding their identity by an independent witness. The learned trial magistrate was also faulted for failing to take into due regard the provisions of **section 150 and 211 of the Criminal Procedure Code**. Finally the appellants contended that their defence which was plausible was disregarded by the trial court. The learned State counsel Mr. Njogu conceded to this appeal on the grounds that the procedure set out under **Section 74 of the Act** was not followed. Although **Josphat Murage [PW5]** produced the analyst report the circumstances under which the report was prepared is not clear. The circumstances under which the drugs were analysed are not clear from the evidence. The Act provides that once the drug is seized and is to be used in evidence it is supposed to be weighed and the samples taken for purposes of analysis.

This being a first appeal this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive at its own independent determination on whether or not to uphold the judgment by the trial court. In so doing this court is supposed to bear in mind that it never saw or heard the witnesses and give due allowance for that. See the case of **Njoroge vs. Republic [1987] KLR 19**.

I now wish to set out briefly the evidence that was before the trial court which led to the conviction and sentence of the appellant. On 29th September 2005 **Nathan Mwangi Mugambi [PW1]** testified that he was a conductor of a bus registration number KAU 149B which used to operate between Nairobi, Kisii and Kendu Bay. While at Kendu Bay they got 17 passengers. Along the way more passengers entered the bus and at Oyugis Peter Ouma Abuom the 1st appellant entered the bus and paid the fare of Kshs 350/= which was the full fare from Oyugis to Nairobi. He was issued with a receipt. At the time the accused person had no luggage but he indicated to PW1 that he would get his friend and his luggage at Kisii. When they reached Kisii PW1 testified that the 1st accused person was joined by the 2nd accused

person. They also loaded two sacks that had sweet potatoes. He charged them Kshs 300/= for the two luggages and issued the 2nd accused person with the receipt for fare from Kisii to Nairobi. When they reached Narok there was a roadblock.

The Police led by **Peter Ipati [PW3]** inspected the bus and the boot. They pierced the bag with sweet potatoes and smelt bhang. PW1 was asked to call the owners of the luggage and he identified the 1st and 2nd appellants. The bags were opened in the presence of the two accused persons. They counted 185 stones of *cannabis sativa*. The bus and the accused person were escorted to Narok Police Station. **PC Josephat Murage, [PW5]** he was alerted when the bus was intercepted. He instructed the bus driver to drive it to the Police Station. They carried the suspected bags to the DCIO's office where they found 185 bundles. They suspected it was bhang. He searched the 1st and 2nd accused persons and found that they had receipts for the fare from Oyugis to Nairobi and also the receipts for the two luggages. PW5 testified that he prepared the memo and took 14 bundles of the substance to the government chemist for analysis. He received back the report dated 10th November 2005 which showed that the plant material was examined and found to be *cannabis sativa* which is classified as drugs under the Narcotic Drugs and Psychotropic Substance Act. He produced the 14 bundles which had been examined as samples. The sacks with sweet potatoes were photographed and so was the motor vehicle that transported the drugs.

Put on their defence the 1st appellant gave a sworn statement of defence and denied any involvement with the drugs. He testified that he was a student at Nairobi Technical Training Institute. On the 29th September 2005 he boarded a bus in Oyugis travelling to Nairobi and was issued with a receipt. The bus stopped at various places and picked other passengers. While at Kisii the conductor was changed. The 1st appellant testified that he went on chatting with the person who sat next to him. While at Kisii he said that he never got out of the bus and even the person who sat next to him did not alight. The bus stopped in Narok. The conductor went to speak to the Police who were manning the road block. After conversing for about 20 minutes that is when the conductor called the 1st appellant. He was slapped by a male police officer and showed a luggage. He was ordered in Swahili to open the luggage which was in white sack. He refused to open it but PW3 opened the luggage. The conductor said the luggage was loaded in Kisii and alleged that the appellant boarded the bus in Kisii. Another woman was also conversing with the conductor. After a short while the 2nd appellant was also called outside. A police Land rover came with other police officers and the driver of the mini bus was ordered to drive to Narok Police Station. The appellants were then booked at the Police Station where PW5 counted the items that were in the sack. Thereafter the 1st appellant was searched and his bus ticket was taken. He was locked in the cells and charged with the offence which he said he knew nothing about.

The 2nd appellant Joseph Mbero Bose similarly gave a sworn statement of defence and denied the charge. He testified that on 29th September 2005 he was travelling to Nairobi. He boarded the bus in Kisii and paid Kshs 350/=. When the bus reached Narok at a road block the conductor asked him to alight. He was questioned by Police Officers regarding a luggage but he denied he had any luggage with him. He was taken to Narok Police Station where he was questioned. His finger prints were taken and charged with the present offence. The trial court considered the evidence especially the evidence by PW1 who identified the 1st and 2nd appellants as the owners of the luggage. The trial court was satisfied that the luggage which constituted 185 bundles of stones or stones of *cannabis sativa*. The trial magistrate also considered the defence by the two appellants which was dismissed as mere denial and did not dent the prosecution's evidence.

Having set out the summary of the evidence before the trial court I am not satisfied that the prosecution's case was proved beyond reasonable doubt. The prosecution's case purely depended on the evidence of PW1 who was the conductor of the motor vehicle which was transporting the Narcotic Substances. It is PW1 who pointed at the appellants as the owners of the luggage. Going by the evidence on record the conductor was also a suspect. It is trite that his evidence needed to be corroborated and to be taken with greatest care. On the other hand I also find the investigating officer did not comply with the provisions of **section 74(a) of the Act.**

In view of the above analysis this appeal has merit. The conviction and sentence imposed by the trial court is hereby quashed. Unless otherwise lawfully held the appellants are to be set at liberty.

Judgment read and signed on 8th day of April 2009

M. KOOME

JUDGE