



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**CRIMINAL APPEAL 279 OF 2006**  
**JAMES NJENGA WAMBUI.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**  
**(From original conviction and sentence in the Senior Resident**  
**Magistrate's Court Kilgoris Criminal Case No.185 of 2005 by**  
**W. N. Kaberia Esq., R.M.)**

**JUDGMENT**

The Appellant was tried and convicted by the learned Resident Magistrate, Kilgoris of the offence of trafficking in a Narcotic drug contrary to **section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No.4 of 1994**. The particulars were that on 11/3/05 along Awendo – Kilgoris road in Transmara District within Rift Valley Province, he was jointly with another (**Samwel Nganga Kuria** who was 1<sup>st</sup> Accused) found trafficking in 1050 stones of bhang and 3 sacks of plant material (bhang) of street value of Kshs.1.7 million in a motor vehicle registration number KAA 240H make Peugeot 505 in contravention of the said Act. He was sentenced to 6 years imprisonment. He has appealed against the conviction and sentence.

**Kuria** jumped bail but was subsequently arrested and his trial is pending.

This appeal is on the grounds that:

- (a) The trial magistrate erred in law and facts when he made the finding that the prosecution had proved its case beyond any reasonable doubt;
- (b) The trial magistrate grossly misdirected himself in not finding that the prosecution evidence was a fabrication;
- (c) The trial magistrate misdirected itself in not considering the Appellant's detailed defence.
- (d) The trial magistrate erred in law in not finding that there was no worthwhile investigation.

The appeal was prosecuted in person. **Mr. Kemo** represented the Republic. He opposed the appeal.

Briefly, the prosecution called **A.P. Corporal Paul Chiringinya (PW1), Police Constable Justus Mutua Ndanda (PW2), A. P. Corporal Samwel Langat (PW3) and Moses Mungai Kariuki (PW4)**. Their evidence was as follows. PW4 operates matatu business in Nakuru and was owner of motor vehicle registration number KAA 240H Peugeot 505 Saloon dark in colour. One Sunday in March 2005 **Kuria** came to him. He wanted to hire this vehicle to transport computer parts to Nakuru. PW4 had sold the vehicle but agreed to borrow it for him and to hire it out. It had mechanical problems. **Kuria** went away and returned with Appellant whom he said was a mechanic. PW4 knew **Kuria** but Appellant was a stranger. They took the vehicle to go and repair after PW4 agreed to hire it to **Kuria** who was to return it in 3 days. Two weeks passed and the vehicle had not been returned. What had happened was that on 11/3/05 police had spotted this vehicle along Awendo-Kilgoris road and chased it up to Kilgoris town where they had detained it and in it found the drug in the charge sheet. Police found two occupants therein. They were **Kuria** and Appellant who were arrested and charged at Kilgoris Police Station.

PW1 was based at Keiyan A.P Camp and was at Enoosaen Centre at 8 a.m. When he saw this vehicle passing from the direction of Awendo and headed towards Kilgoris. The car had tinted glasses. The front windows had been rolled down and the rear ones were up. He suspected the vehicle to be carrying something illegal. He rushed to District Officer's Office and shared his suspicion with PW3.

PW3 authorized him to drive their GK vehicle and the two followed the direction the car had taken. They caught up with it at Endonyonkopit and flagged it down. It did not stop. They overtook it and blocked it. The car passed on the side and continued on. It was pursued up to Kilgoris town bus stage and blocked. It had two occupants, **Kuria** and the Appellant. One of them tried to escape but was caught. PW1 said it was **Kuria** whereas PW3 said it was the Appellant. The evidence of the two officers did not agree as to who was the driver. PW1 said it was the Appellant. PW3 said it was **Kuria**. Both witnesses were at one that in the vehicle was found bhang. Three sacks were found at the rear seat and 1050 stones were found in the boot. Members of public and police from Kilgoris Police Station had helped restrain the suspects. They were taken to the Police Station where the bhang and vehicle were handed over. Samples of the bhang were taken to Government Analyst whose report was produced to confirm this was cannabis sativa.

Against that evidence, the Appellant made sworn defence denying they had any bhang. He testified he was a mechanic from Nakuru who had travelled with **Kuria** in the car to Awendo where he had come to repair a tractor. The car had been borrowed by **Kuria**. As to how they came to be arrested, he stated that on 10/3/05 between 10 p.m. and 11 p.m. they were driving to Kilgoris from Awendo. The vehicle developed problems with headlights. The car plunged into a stream. They spent the whole night looking for assistance without success. In the morning at 6 a.m. Administration Police Officers came but refused to assist. At 6 a.m. PW3 came. He was asked for assistance. He told them he knew a **Njoroge** who had a tractor. He went and returned with **Njoroge** with the tractor. The tractor pulled out the river. They cleared its plugs and distribution and took off. **Kuria** was driving. When they reached a petrol station near bus stage in Kilgoris town a GK land cruiser came and blocked them. Their vehicle fell into a ditch. An AP Corporal came and opened the door of their car and began beating **Kuria**. People had gathered. Appellant rushed to the G.K. vehicle. The Corporal shot in the air. About 10 to 15 minutes later officers from Kilgoris Police Station came, arrested them and took them to the Police Station. They were kept in custody till next morning when he was called to the crime office and told their car had stones of bhang. He wondered why PW3 had not arrested him earlier if he had bhang.

The Appellant did not say whether the AP Corporal who arrested him was the PW3. He told court **Kuria** had assisted him for free to come to Awendo. Appellant did not call witnesses.

The trial court considered the evidence above and found the prosecution had proved the guilty of the Appellant beyond doubt.

An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence (**Okeno v Republic [1972] EA 32**). In so doing, it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

It appears from the evidence before the trial Court that there was no dispute that the Appellant was found in this car when police detained it at Kilgoris bus stage. The car and its occupant were taken to Kilgoris Police Station. It is also not in dispute that the material (1050 stones and contents of the 3 bags) produced in court during trial were cannabis sativa. The prosecution case was that the bhang was found in the car with the Appellant therein and therefore that he was guilty of trafficking in it by conveying. The Appellant's defence was that the car had no bhang and he was not found with it. His version was that he had been framed. The judgment clearly shows the trial court was alive to the two versions and, having considered them as a whole, found the prosecution had established beyond doubt the bhang was found in the car in which Appellant was. Regarding the alleged frame up, the court went about it this way:

***“The accused does not deny that he was found in the motor vehicle. There is also evidence to show that PW1 and PW3 did not know the accused before the incident. There is therefore no conceivable reason why they would frame him. Moreover, the quantity involved is too big for anybody to imagine that a police officer would plant it on a stranger with whom he had no grudge.”***

I totally agree with the observations and find the allegation that the police officers planted the bhang on the Appellant was too far fetched. Indeed, PW1 denied the claim when put to him in cross examination by the Appellant. No reason was suggested as to why the officers would want to frame him.

It is true evidence of PW1 and PW3 was at variance as to who was the driver or who between the two occupants attempted to escape. I find this contradiction not material to the issues at hand. In any case, Appellant says Kuria was the driver and in that regard agrees with PW3. As to who sought to escape, the Appellant says he rushed to the G.K. vehicle before he was caught. PW3 said he is the one who attempted to run before he was caught.

The evidence before the trial court shows PW4 hired out the car to Appellant's colleague to go and transport computer parts from Busia to Nakuru. The two were found between Awendo and Kilgoris. On what mission? Appellant says he had been brought this way by his colleague to repair a tractor. The colleague had offered a free lift. Why a free lift if PW4 was going to charge him? There is the evidence of PW1 and PW3 that they had to chase this car for long to able to detain it and apprehend the occupants. All these facts show conduct of person who knew he was carrying illegal material.

I have evaluated the evidence as recorded and analyzed by the trial court. I am satisfied the conviction was properly reached and is safe.

Regarding sentence, it is quite clear the Appellant was found in possession of substantial amount of drug. The offence he was charged with carries a maximum penalty of life imprisonment. The court was informed the Appellant was a first offender and allowed him to mitigate. The mitigation was taken into consideration. I do not find that, in those circumstances, the sentence was manifestly excessive as to cause the court to interfere (**Wagude v Republic [1983] KLR 569**).

In conclusion, I order that the appeal against conviction and sentence to be dismissed.

Dated, Signed and Delivered at Kisii this 24<sup>th</sup> day of June, 2009

**A. O. MUCHELULE**

**JUDGE**

24.6.2009

Before A. O. Muchelule Judge.

Mongare c/c

Mr. Mutai for state

Appellant present

**Court:** Judgment delivered in open court.

**A. O. MUCHELULE**

**JUDGE**