REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 218 of 2008

(From original conviction and sentence in Criminal Case No. 147 of 2006

of the Principal Magistrate's Court at Naivasha – N. N. Njagi {P.M.)

DAVID MBUGUA MACHARIA…… APPELLANT

VERSUS

REPUBLIC…… …RESPONDENT

JUDGMENT

The appellant David Mbugua Macharia was charged jointly with one Fredrick Okisa Carlos with the offence of trafficking in narcotic drugs contrary to section 2(c) as read with **section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act, No. 4 of 1994.** The particulars of offence as stated in the charge sheet were that on the 17th day of January, 2006 along Naivasha-Nairobi High way (road) in Nakuru District within the Rift Valley Province, the appellant and his co-accused were jointly found trafficking in 1801 stones of cannabis sativa *(bhang)* valued at Kshs 491,000/= , which they were transporting in a motor vehicle registration number KAU 512J make Toyota Corolla Saloon, in contravention to the said Act. The appellant's co-accused absconded in the course of the trial and has remained at large. After a full trial before the Hon. N. N. Njagi, Principal Magistrate Naivasha, where the the prosecution called a total of 8 witnesses, and the appellant alone testified in his defence, the appellant was convicted and sentenced to a fine of 1 million shillings *(or 12 months in default of the fine)* in addition to 25 years imprisonment. Being aggrieved by both the conviction and sentence he filed this petition of appeal through his advocate citing five grounds of appeal as follows:

1. That the Honourable Magistrate erred both in law and fact by not properly evaluating the evidence on record which does not support a conviction.

2. The Honorable Magistrate erred both in law and fact by not considering the fact that the steering wheel of the motor vehicle that is alleged to have carried Narcotic drugs, which are the substance of the charge against the accused person was never dusted for finger prints to prove that he (accused) was the one driving the same.

3. The Honourable Magistrate erred both in law and fact for he did not allow the defence counsel to do submission at the close of both the prosecution and defence case.

4. The Honorable Magistrate erred both in law and fact by not considering the numerous contradictions in the testimony of the prosecution witnesses to be in favour of the defence despite having admitted that indeed there were such contradictions.

5. The Honourable Magistrate erred both in law and fact by concluding that the fact that the accused person was actually present at the scene of the offence (heritage junction, Naivasha) confirmed that he committed the alleged offence.

6. The Honourable Magistrate erred both in law and fact by not taking into consideration that the key prosecution witnesses were police officers whose evidence was not corroborated by any independent witnesses.

7. The Honourable Magistrate erred both in law and fact by giving very little evaluation of the defence evidence and in fact did not give reasons why he believed the prosecution witnesses.

8. The Honourable Magistrate erred both in law and fact by giving a highly excessive sentence without even considering the accused's past history and records.

The appellant represented himself at the hearing of the appeal, which he argued on three main grounds, namely that the prosecution did not discharge its burden of proof, that the evidence tendered before the learned trial magistrate was contradictory and did not, therefore, support the conviction and that the appellant's defence of alibi was not at all considered. The appellant submitted that the Narcotic Drugs the trafficking of which he was charged were not recovered from him and that there was nothing to connect him with the vehicle in which the said drugs were recovered. He faulted the prosecution for neither exhibiting the said motor vehicle or even a picture of the same during the trial. He also stated that the prosecution witnesses contradicted themselves as to the exact quantities of cannabis sativa were recovered and/or tested by the government chemist.

Opposing the appeal, learned State Counsel **Mr. Mugambi** submitted that the conviction and sentence were based on two main grounds which are that:

the appellant and his accomplice who is still at large were arrested at the scene of crime having been ordered to stop by high way patrol police men but defying the order to do so. They were chased in a patrol vehicle, and were caught up with without the police losing sight of them. Realizing they were about to be cornered, the appellant and his accomplice alighted from the vehicle they were in, abandoned it and started running. The appellant was arrested just 20 metres from the abandoned vehicle and did not deny having been in the vehicle. Neither did he explain how he came to be around the vehicle at the material time. The State Counsel submitted that the defence of alibi was properly rejected since the evidence tendered by the prosecution witnesses was overwhelming. The substance found in the abandoned vehicle was taken to the Government Chemist and upon examination the same was confirmed to be cannabis sativa. Mr. Mugambi asked this court to uphold the conviction and sentence.

I have carefully analysed and re-evaluated the evidence tendered before the trial court. **PW1 Cpl. Wesley Kimetto** testified on the 17th January 2006 while based at the High Way Patrol Base, Naivasha, he received information from a **Cpl. Mutua** of Gilgil police station concerning a motor vehicle which had been flagged down along the Nairobi- Nakuru highway but had refused to stop. Although no registration number was given the vehicle was described as a white saloon. Being thus alerted PW1 and his colleagues, **PC Serem (PW6)** and **PC Nabwire (PW5)** spotted a white saloon car driving towards them at high speed. They flagged the vehicle down but the driver refused to stop. The vehicle bore the registration number KAU 512J. PW1 and his colleagues gave chase, having noted that the vehicle had two occupants, one in the driver's seat and the other a passenger. On reaching Naivasha junction PW1 and his colleagues caught up with the saloon vehicle and started firing at it. It came to a stop and the occupants jumped out and abandoned it. The driver ran towards Heritage hotel while the passenger ran towards Kayole. The driver was identified as the appellant and was arrested by PW5 and PW6. On searching the vehicle five bags of cannabis sativa were recovered. The vehicle and its contents was driven to Naivasha Police Station. The vehicle was later restored to its owner, the police having satisfied

themselves that the same belonged to a third party.

The evidence of PW1 as to the arrest of the appellant and the recovery of the drugs in connection with which he was charged was corroborated by his colleagues PW4, PW5 and PW6. They were all together on high way patrol when the information regarding the suspect saloon car was wired from Gilgil Police Station. Together spotted the suspect vehicle driving towards them at high speed and its driver refusing to stop when they flagged it down. PW1, PW5 and PW6 pursued the occupants of the vehicle as they fled on foot while PW4 was left guarding the motor vehicle. The testimony of PW1, PW4, PW5 and PW6 is corroborative of each other to the effect that the appellant emerged from the driver's seat and ran towards Heritage Hotel where he was arrested by PW5 and PW6. They all testified that they chased the suspect motor vehicle in a highway patrol vehicle driven by PC Serem. They all testified that he appellant came out of the driver's seat before he started running.

PW7 Simon Ndubi Atebe confirmed having tested the substance found in the motor vehicle and confirming that, indeed, the same was cannabis sativa. He produced the analyst's report compiled by him together with samples of the substance as exhibit 4. He said he tested the substance on 29th June 2006, having received the same from a **Cpl. Korir**. The examination was done in the presence of the appellant and the 2nd accused. **PW8 Cpl. Dickson Omimio** testified that he is the one who charged the appellant and his co-accused when they were brought to the D.C.I.O.'s office at Naivasha Police Station together with a white Toyota Corolla containing six bags of bhang, in which 1,801 stones of bhang were packed. He stated that the appellant and his co-accused had been brought to the station by the Nairobi –Nakuru Highway Patrol personnel.

The prosecution called two independent witnesses PW2 and PW3 who gave evidence regarding the ownership of the subject motor vehicle, registration number KAU 512J. **PW2 Thomas Kirangu Mwangi** testified that he worked in Nairobi VIP Limousines where he carried on the business of hiring out motor vehicles. He stated that on 4th January 2006 one Joseph Ngisa brought him two clients, one of them being the 2nd accused, who said that they wanted to hire a vehicle to go to Naivasha. The two told PW2 that they were students at Nairobi University and that they occupied room No. 207 at the University. They hired the vehicle for one week and paid a deposit of Kshs 17,000/=, undertaking to pay the balance later. PW2 took the particulars of the 2nd accused. The vehicle having not been returned after one week PW2 rang Joseph Ngisa, who promised to ensure that the vehicle was returned and the balance of the hire charges paid. Later on PW2 telephoned the 2nd accused who told him that the vehicle had been detained at Naivasha Police Station. PW2 came to learn that the vehicle had been used for trafficking bhang and the same had been detained. PW2 testified that he had hired the motor vehicle from one **Morris Ouma [PW3]** for a period of six months under an agreement which he produced in court as exhibit 3. His testimony was that he first saw the appellant in court and that the appellant was not supposed to drive the hired vehicle. **PW3 Cpl. Morris Ouma** testified only to confirm that was the owner of KAU 512J and that he had leased the same to VIP Limousines at Kshs 33,000/= per month. He testified also that he had been informed that the same had been intercepted by Police while ferrying narcotics.

In finding on the guilt of the appellant the learned trial magistrate considered the evidence tendered by PW1, PW4, PW5 and PW6 which he found conclusive that the appellant was in the subject motor vehicle, that he was the driver thereof and was arrested as he ran away from it. The learned trial magistrate held that the appellant's alibi defence which confirmed his arrest at the Heritage Club went to corroborate other than rebut the prosecution's evidence. I find it essential to mention at this stage that the learned trial magistrate had the advantage of observing the demeanor of the prosecution witnesses as well as that of the appellant herein.

Considering the evidence as recorded I am in no doubt that the same provided a direct link between the appellant and the vehicle in which the narcotics herein were recovered. The pursuit, arrest and recovery all occurred in one sequence in which the pursuers did not lose sight of the vehicle. The appellant and his accomplice were arrested after abandoning the vehicle in the road and while they fled from the scene. All this happened in broad day light and the prosecution's evidence was not shaken

during cross-examination.

The drugs found in the vehicle, whose existence and authenticity was confirmed by PW2 and PW3, were tested and confirmed to be narcotics. The samples tested together with an analyst's certificate were tendered in evidence in accordance with **section 74** of the Act. In furtherance of the argument that the offence herein was not proved owing to the discrepancies in the quantity of the drug allegedly trafficked, I am compelled to consider the provisions of **subsection 74(3)** and **subsection 74(5)** of the **Narcotic Drugs and Psychotropic Substances Control Act** which provide in mandatory terms, as follows:

*74(3) **"Upon receipt of the designated analyst's certificate and the samples analysed in accordance with the foregoing subsections the authorized officers shall, where the drug is found to be narcotic drug or psychotropic substance within the meaning of this Act, arrange with a magistrate for the immediate destruction by such means as shall be deemed to be appropriate of the whole amount seized (less the sample or samples taken for analysis and production as evidence at any subsequent trial) or any contemplated trial particularly where the accused person's identity is not yet known or the accused person is outside the jurisdiction of Kenya at the time of taking such samples."***

*74(5) **"The production in court by either one of the authorized officers at the trial of an accused person of the sample or samples together with the designated analysts certificates and the magistrate's certificate of destruction shall be conclusive proof as to the nature and quantity of the narcotic drug or psychotropic substance concerned and of the fact of its destruction in accordance with the provisions of this section."***

As rightly stated by the appellant, PW1 testified that he recovered 5 sacks of cannabis in the subject vehicle. PW8 stated that he *"counted the 6 bags of cannabis and a small one total stones were 1801"* and that he could not remember the street value. That PW7 testified that he was given 15 stones only is of no consequence since only a sample of the drug needed to be in his custody for purposes of testing.

Other than the nature of the drug, the quantity of the same is an equally important factor as the same is vital in assisting the court with sentencing which under the Act is based on the value ascribed to the particular quantity in question.

Although the record shows that 6 bags and a small one *(in total 1801 stones were produced)* it bears no evidence that the subject drugs were ever weighed and destroyed and/or a certificate signed by a magistrate as required under the Act. A document signed by a Cpl. Korir F/No. 12929 and Cpl. Reuben Ngetich F/No. 64843 on 26th May 2008 and witnessed by the lower court's clerk Donald Omayir(?) indicates that the 6 sacks *(said to have weighed 100 kgs)* and a small one *(of 50 kgs)* containing 1801 stones of bhang were on that day released to the said Cpl. Korir *"for safe custody"!* That being the case, I am led to find that there is no conclusive proof of the quantity of the narcotic drugs herein for the court to find that the charge and particulars thereof as stated in the charge sheet were proved to the required standard. In the circumstances, there is every likelihood that, the sentence imposed upon the appellant may well have been excessive. For these reasons the appeal succeeds and is hereby allowed. Accordingly the conviction is quashed and the sentence imposed set aside. The appellant is hereby set at liberty and shall be released from prison forthwith unless he is otherwise lawfully held.

In exercise of this court's unlimited inherent jurisdiction, and its supervisory jurisdiction over the subordinate court, I order and direct that this matter be mentioned on 23rd November 2009 and summons do issue upon Cpl. Korir F/N 12929 and Cpl. Reuben Ngetich F/N 64843 to explain what happened to the narcotics released to Cpl. Korir on 26th May 2008, in order that orders for their destruction may be confirmed and certified as in accordance with the law.

Dated signed and delivered at Nakuru this 13th day of November 2009

M. G. MUGO

JUDGE