



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII**

Criminal Appeal 173 of 2007

ZACHARI NJENGA KAMAU APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant and one John Omondi Likoyo were charged with trafficking in Narcotic drugs (bhang), 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 on the 13th day of October, 2006 at 7.00 a.m. along Imbo/Olare road in Homa Bay District within Nyanza Province, the appellant, jointly with others not before court, were found trafficking in 1,360 stones and 600 long tape rolls of Narcotic drugs, (Bhang), in motor vehicle registration number KAU 198W Toyota Corolla. The street value of the said drug was given as Kshs.1.2 million.

After a full trial, the appellant and his co-accused were found guilty of the offence as charged with, convicted and each sentenced to a fine of Kshs.1,000,000/= in addition to imprisonment for life.

The appellant was aggrieved by the said conviction and sentence. He preferred an appeal to this court. He raised 5 grounds of appeal as follows:

“1. The learned trial magistrate misdirected himself

on several matters of law and fact.

2. The learned trial magistrate erred in law of

evidence and practice in failing to note that

the ingredients of the offence of trafficking as

defined by Section 2(1) of the Narcotic Drugs

and Psychotropic Substances (control) Act had

not been proved as against the appellant and

therefore the offence under Section 4(a) of the

above Act was not proved as against the appellant.

3. The learned trial magistrate erred in law in

imputing the element of common intention from unrelated facts, which did not even amount to circumstantial evidence.

4. The learned trial magistrate erred in law of evidence and practice in deciding the case against the weight of evidence and in distorting the evidence given by the defence in order to import common intention.

5. The learned trial magistrate erred in law in passing a sentence, which was excessive in the circumstances of the case and was not wholly capable of enforcement and hence tantamount to an abuse of the powers of the court.”

The brief facts of the case as per the evidence that was adduced before the trial court are that on 13th October, 2006 at about 7.00 a.m, John Omondi Likoyo, who was driving a motor vehicle registration number KAU 198W, along Imbo-Olare road, lost control of the motor vehicle and hit a young girl. The vehicle veered off the road. It was then discovered that the vehicle contained a large consignment of bhang as stated in the charge sheet. The matter was reported to the police and the driver was arrested. The drug was tested at the Government chemist and confirmed to be bhang.

The said motor vehicle had been hired by the appellant in Mombasa. The learned trial magistrate held that the appellant and his co-accused, who was at Mombasa on the material date, had a common illegal intention of trafficking in Narcotics.

This being the first appellate court, it is mandated to submit the evidence that was tendered before the trial court to a fresh examination and evaluation and reach its own independent conclusion, see **OKENO VS REPUBLIC, [1972] E.A 32.**

The evidence that related to the appellant was that **Nicholas Munyari Mwangi, PW3**, has a car hire company in Mombasa by the name, “**Magnick Tours & Car Hire**”.

He had employed a secretary by the name **Janet Wamboi Muli, DW3**. She was the one who was running the business on a day-to-day basis, as PW3 was an employee of the Kenya Navy at Mtongwe, Mombasa. Motor vehicle registration number KAU 198W was owned by PW3. The appellant was known to PW3 as at 11/10/2006 when DW3 hired out the said motor vehicle to the appellant. The vehicle was supposed to be returned on 14/10/2006 at around 11.00 a.m. On the evening of that day, which was a Saturday, PW3 said that he called the appellant severally. The appellant promised to return the car but he did not do so. On the following Monday, DW3 called the appellant and again he promised that he would return the car. PW3 met the appellant on 18/10/2006 and asked him about the car. The appellant promised to return the same plus the hire charges in the evening of that day but again he did not honour his word. On 19/10/2006, the appellant informed PW3 that he had rent the vehicle to another person who could not be reached on his mobile telephone.

Meanwhile, the appellant proceeded to report the incident to the police. He told the police that he had sub-hired the said car to a person who had failed to return it as agreed. PW3 was aware that the appellant and one of his friends operated a car hire business. PW3 also made a report to the police at urban police station, Mombasa, and the appellant was summoned by the police. The appellant told the police that the vehicle had been detained at Homa Bay. Urban Police Station contacted their counter parts at Homa Bay and confirmed that the car was indeed at their station. PW3 was aware that the appellant had previously hired vehicles from his company. PW3 added that he was also aware that if a car hire company had hired out all its vehicles, it could sub hire a car from another car hire company for the benefit of its customer.

In his sworn defence, the appellant testified that his friend by the name Phares Kinjanjui Kiarie had registered a business name – “**IVORY CAR HIRE & SAFARIS**”. The appellant was operating a car hire

business in the aforesaid name. A copy of the certificate of registration was produced as an exhibit. The said company operates near the offices of Magnick Tours & Car Hire. The appellant stated that on 11/10/2006 a customer by the name Wilson Okoth went to his office for purposes of hiring a car. The appellant took copies of the customer's identity card and driving licence. The same were produced in court as exhibits.

He also produced a copy of the car hire contract. The vehicle was supposed to be returned on 14/10/2006 but it was not returned. On 19/10/2006 he made a report to the police and was given a police abstract to that effect. Thereafter he proceeded to Homa Bay with two police officers and PW3. After some interrogation he was arrested and charged together with John Omondi Likoyo.

The appellant called DW3, who confirmed that she hired out the said motor vehicle to the appellant.

Mr. Okoth for the appellant submitted that there was no evidence to connect the appellant with the commission of the offence of drug trafficking, which John Omondi Likoyo was convicted for. There was no common intention as defined under **section 21** of the **Penal Code**. In his view, all the evidence exonerated the appellant. The trial court should not have based its conviction of the appellant on the uncorroborated evidence of PW3. He faulted the trial magistrate for relying on such circumstantial evidence. Counsel cited the case of **OKITO VS REPUBLIC** [1981] 477. In that decision, it was held that one cannot be convicted merely upon circumstantial evidence when the court had neither considered nor decided that such evidence was compatible only with guilt of the accused and unexplainable upon any other innocent hypothesis.

Mr. Kemo, Senior Principal State Counsel, opposed the appeal. He submitted that the evidence of PW3 showed that the appellant was acting in cahoots with his co-accused. It was not necessary to show that the appellant was directly involved in trafficking the said bhang. The definition of "**trafficking**" under the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 was wide enough to include any person who participated in conveyance, delivery or distribution of a narcotic drug, Mr. Kemo submitted.

In his view, the appellant had knowledge that John Omondi Likoyo was hiring the motor vehicle for purposes of carrying drugs in it.

I have carefully considered all the evidence that was tendered before the trial court. The learned trial magistrate was not satisfied by the appellant's defence. He was convinced that the purpose for which the appellant hired out the motor vehicle to his co-accused was to enable him ferry the bhang. There was however no evidence to suggest that the appellant knew his co-accused or that he hired out the motor vehicle to him. According to the appellant, he hired out the motor vehicle to one Wilson Okoth Ochieng whose identity Card number was given as No.5793760/68. The hirer also gave out a copy of his driving licence. Copies of the car hire contract, the driving licence as well as the identity card were produced as exhibits by the appellant. That evidence was not discredited at all by the prosecution because the appellant was not cross-examined. The appellant had earlier recorded his statement with the police and supplied them with copies of the said exhibits. It was for the police to investigate and arrest the said Wilson Okoth Ochieng, interrogate him and establish whether indeed he had hired the car from the appellant.

The appellant's co-accused may as well have obtained the vehicle from the said Wilson Okoth Ochieng. It is trite law that for circumstantial evidence to sustain a conviction, it must point irresistably to the accused, and in order to justify the inference of guilt on such evidence, the inculpatory facts must be incompatible with innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. See **KARIUKI KARANJA VS REPUBLIC** [1986] KLR 190.

The burden of proving facts that would justify the drawing of the inference of guilt is always on the prosecution.

The evidence of both PW3 and DW3 revealed that the appellant used to hire cars from PW3's

Company, rent them out and have them returned. The appellant could not know every person whom he dealt with in his business. That is why he had to retain copies of their driving licences and identity card.

Considering the totality of the evidence on record, I agree with the appellant's counsel that there was insufficient evidence to justify the appellant's conviction. I therefore allow the appeal, quash the conviction and set aside the sentence that was pronounced by the trial court. The appellant is set at liberty unless otherwise lawfully held.

DATED, SIGNED and DELIVERED at **KISII** this 26th day of May, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Mr. Okoth for the appellant

N/A for the State.

D. MUSINGA

JUDGE