



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

**AT KAKAMEGA**

**Criminal Appeal 86 of 2006**

**MOHAMED KWEYA OJUOK ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**J U D G E M E N T**

The appellant, MOHAMED KWEYA OJUOK, was convicted on two counts, being;

- (i) *Being in possession of narcotic drugs contrary to section 3 (1) of the Narcotic Drugs and Psychotropic Substances Control Act; and*
- (ii) *Being in possession of chang'aa contrary to section 3 (1) as read with section 4 (1) of the Changaa Prohibition Act.*

On count 1, the appellant was imprisoned for three years,

whilst on count 2 he was fined KShs.2,000/= or in default, one month's imprisonment.

In his appeal, the appellant has submitted that his constitutional rights were violated, as he was not brought before the court as soon as was reasonably practicable.

He was arrested on 27<sup>th</sup> August 2004, which was a Friday. By his calculations, if the police complied with the provisions of section 72 (3) (b) of the Constitution, they should have taken him before court on Monday 30<sup>th</sup> August 2004. However, they only took him to court for the first time on 31<sup>st</sup> August 2004.

Secondly, the appellant faults the prosecution for failing to have an expert testify in court, so as to prove that the items he was allegedly charged with were bhang and changaa respectively.

The failure to have an expert testify is said to have deprived the appellant an opportunity to cross-examine them. Therefore, the appellant submits that he was denied his rights.

The third point raised by the appellant was as regards the inconsistencies in the evidence produced by the prosecution. For instance, when PW1 said that the home of the appellant had a fence on only one side, the Investigating Officer, who was PW2, said that the home had a fence all around it.

The appellant also pointed out that whilst PW1 said that the store was opened by the appellant, both PW2 and PW3 testified that the store was broken into, as the appellant refused to open it.

The next issue raised by the appellant was that none of the prosecution witnesses produced the alleged bhang or changaa as exhibits before the trial court.

Another issue was that the appellant was tried by two magistrates. But, in his view, the second magistrate did not comply with the provisions of section 200 of the Criminal Procedure Code. That is said to have denied the appellant justice.

The appellant also drew this court's attention to his defence, in which he had stated, inter alia, that within his compound, there was only one house. According to him, that line of defence was not taken into account by the trial court.

His view is that if the trial court rejected the defence, the court should have given its reasons for so doing.

In answer to the appeal, the learned state counsel, Mr. Daniel Karuri, informed the court that the state was not opposing the appeal.

First, he conceded that the nature of the charges that the appellant faced required evidence of experts, who should have produced the reports of the Government Analyst, in court.

As the reports were produced in court by a police officer, the learned state counsel submits that that offended the provisions of section 77 of the Evidence Act.

That section reads as follows;

*“(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.*

*(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.*

*(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistic expert, document examiner, medical practitioner or geologist, as the case may be, and examine him as to the subject matter thereof.”*

In my understanding of the afore-cited provisions, they do not expressly require the Government analyst, or any of the specified experts, to produce their reports, in person.

In WANJIKU V. REPUBLIC [2002] 1 KLR 825, at page 833, the Hon. Onyancha J. said,

*“.....the section presupposes that the maker of the report cannot be called to prove that he made the report and that he signed it. The legislature wanted to surmount the problem of lack of authentication of the signature on the report by giving the trial court authority to presume that the signature on the report is the genuine signature of the maker. To do so, the trial court is given overriding discretion to admit or reject the report. It is supposed to reject it if it is satisfied that the circumstances surrounding the recovery of the subject matter for analysis, the method of sending it to the analyst, the sequence of events at the Government Chemist and the method or manner of bringing it back, who signed the report or why he is not available in court to give evidence of the report and all other related information, has not been established before the same is sought to be produced under section 77 of the Act.”*

In this case, the appellant said that he had no objection to the report of the government analyst being produced by PW2, PC. Moses Kinuthia.

Given that position, I hold the view that it is not right for the appellant to now complain that he was deprived the opportunity to cross-examine the analyst.

If the appellant wished to be afforded the opportunity to cross-examine the Government analyst, he could simply have objected to the production of the analyst's report through any other witness save for the analyst himself.

But, in the same vein, the fact that the appellant had no objection to the analyst's report being produced by PW2, did not exonerate the prosecution from the need to satisfy the trial court about the requirements that have to be met before the court could decide whether to admit or reject the report of the analyst, in the absence of the said analyst.

In the result, I find that the learned trial magistrate erred by admitting the report of the analyst into evidence without having exercised his mind judiciously on the issue of its admissibility.

The learned state counsel was thus right to have conceded the appeal on that ground.

I also find that the trial court erred in holding that the appellant was found in possession of 4.5 kilograms of bhang, whereas the quantity which was exhibited, and which the prosecution witnesses insisted was the bhang that the appellant had in his possession, weighed only 1.77 kilos.

As the bhang was weighed before the very eyes of the learned trial magistrate, and as the weight was 1.77 kilos, the trial court ought to have given its reasons for finding that the quantity which the appellant was found in possession of was 4.5 kilos.

That question is important because as the trial court noted, the quantity cited in the O.B. was 4.64 kilos; the charge sheet cited the quantity as 4.5 kilos; whilst the bhang produced in court weighed 1.77 kilos.

It is conceivable that, as PW2 said in his evidence, the bhang was originally raw, but it later dried up. If, as PW2 said, the bhang lost weight as it dried up, the proper person to have given to the court scientific information and explanation would have been the Government analyst. Perhaps, he could then have explained the difference between the original 4.64 kilos; and the 1.77 kilos when the bhang was weighed before the trial court.

In the absence of that explanation, the trial court was in error to have concluded that the bhang was 4.5 kilos. There was no legal basis for that conclusion.

As regards the exhibits, the appellant was mistaken when he said that the same were not produced in evidence. The record shows that PW2 did produce seven exhibits, just before he concluded his evidence in-chief.

The record shows that on 17<sup>th</sup> May 2005 PW1 testified before the Hon. Mshimba Acting Resident Magistrate.

By the time PW2 testified, on 28<sup>th</sup> December 2005, the trial magistrate was Hon. S. N. Abuya R.M.

Regrettably, the succeeding magistrate did not comply with the provisions of section 200 of Criminal Procedure Code. He did not draw the attention of the appellant to the fact that he had a right to have PW1 recalled, if the appellant so desired.

The failure to comply with section 200 of the Criminal Procedure Code rendered the trial a nullity.

As regards the defence put forward by the appellant the learned trial magistrate found that it was a lie, as it

*“was a mere allegation not proved in court.”*

That finding is a serious misdirection, as an accused person has no obligation to prove his innocence. The law presumes that he is innocent until and unless he is proved by the prosecution, to be guilty of the offence with which he has been charged.

To suggest that an accused person ought to prove his defence, is akin to shifting the burden of proof from the prosecution, to the accused person. That is improper.

Finally, the learned state counsel did not respond at all to the assertion that the appellant’s constitutional rights had been infringed.

In the absence of any explanation from the state, as to why the appellant was taken to court one day later than he ought to have been, I find that the state has failed to discharge the onus of proving that the appellant was brought before the court as soon as was reasonably practicable.

In the event, I find that the appellant’s constitutional rights, pursuant to section 72 (3) (b) of the Constitution, were violated.

For all those reasons, I find merit in the appeal. It is therefore allowed. The conviction is quashed and the sentence set aside. If the appellant paid the fine on account 2, the same ought to be refunded to him.

If the appellant is in custody he ought to be set at liberty forthwith, unless he is otherwise lawfully held. But if the appellant executed a bond, pursuant to the order dated 23<sup>rd</sup> January 2007, the same, and that of the surety are hereby discharged.

*Dated, Signed and Delivered at Kakamega, this 3rd day of July 2008*

**FRED A. OCHIENG**

**J U D G E**