REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Criminal Appeal 122 of 2007

EDWARD OKOTH WERE & OTHERS …….. APPELLANTS

-VERSUS-

REPUBLIC ……...……. RESPONDENT

JUDGMENT

Coram:

J. W. Mwera Judge

Ms. Oundo for state

Onsongo for 2nd, 3rd appellants

Onsongo for Abisai for 1st appellant

Ouma CC.

The three appeals about to be determined arose from the conviction and sentence from the lower court, at Nyando where the appellants were jointly charged with trafficking in narcotic drugs. In an unexplained manner appeals were filed as follows: CR. A. Nos. 122 and 125 both of 2007 by/on behalf of Edward Okoth Were – accused 1 in the lower court; Cr. A. Nos. 127 and 123 – Jared Obande Mositi – accused 3. There was only CR. A. No. 128/07 of George Omondi Regen – accused 2. The appeals were consolidated. Appellant 1 (Edward, accused1), Appellant 2 (Jared, accused 3), Appellant 3 (George, accused 2). While Mr. Abisai Advocate represented appellant 1, Mr. Onsongo Advocate appeared for appellants 2 and 3. Ms. Oundo, learned Senior State Counsel appeared for the State.

Mr. Abisai submitted that his client (Edward, appellant 1) was charged and convicted under section 4 (a) of the Narcotics and Psychotropic Substances Control Act no. 4/94, familiarly referred to as the "Narcotics" Act, the Act, and ordered to serve a 15 year term in prison.

Counsel argued the 3 points of appeal together in that the charge was defective because its particulars did not include the year in which the offence was allegedly committed. That the plea of guilty was not unequivocal since there was no proof laid before the learned trial magistrate, by a certificate from the government chemist that the substance before the court was a drug prohibited by the Act. Two cases

were cited:

ALI VINU -VS- R. MBA HCCRA. 45/2001 and

CHARLES OMUGA -VS- R. MBA HCCRA 145/98. The court heard that the amount of drugs was not set out in the charge sheet instead each accused/appellant owned up to different amounts. Thus charging them together was an anomaly. The charge was omnibus, wrong and prejudicial.

Mr. Onsongo filed a notice to add one more ground to his grounds of appeal. It was a ground under section 72 (3) of the Constitution which was argued besides the other two that the charge was bad for duplicity and no government chemist's certificate was placed before the court to say what substance the accused/appellants were charged with. This point as seen above was argued by Mr. Abisai whose submissions Mr. Onsongo fully associated himself with. Counsel however added that his clients were arrested on Thursday 2.8.2007 and first produced in court on Tuesday 7.8.2007. The State did not explain that period above the 24 – hour bar stated by the Constitution or that that was as soon as it was reasonably practicable to produce the appellants in court.

Further, counsel argued that the charge as laid did not set out the acts constituting trafficking of drugs as set out in section 2 of the Act. So in the light of CR. A. 193/05 Madline Barasa -VS- R. (C.A) appeals of appellant 2 and 3 should be allowed.

Ms. Oundo's position was that the appellants having pleaded guilty and sentenced, according to section 348 CPC they were not at liberty to appeal except on the legality of the sentence only. To this Mr. Onsongo responded that the plea of guilty was wanting in legal respects and also there was the issue of breach of fundamental rights.

The lower court record has it that the 3 appellants herein were charged at Nyando that:

" On the 2nd day of August – at Koru junction along Awasi – Fort Ternan Rd in Nyando District within Nyanza Province, were jointly found trafficking 224 stones, 1960 rolls, 52 stakes and 20 brooms of bhang to wit in a motor vehicle registration no. KAN 612J, TOYOTA COROLLA SE.90, of street value of Ksh 500,000/= in contravention of the said Act." (underlining supplied.).

The plea which appeared regular was followed with facts and the learned trial magistrate viewed the exhibit outside the court room. Due notes were made and there appellant 1 (Edward) admitted that the stones were his; appellant 3 (George accused 2) owned up to the rolls while appellant 2 (Jared) claimed the brooms. A formal conviction on admission of facts was entered. The appellants were treated as first offenders and their mitigation was recorded. The learned trial magistrate took in regard all that was before her and ordered that each appellant do serve fifteen (15) years in prison. The motor vehicle used in the commission was ordered forfeited.

This court would wish to address the points raised by both sides in the following order:

i) The charge: Was it defective?

ii) In a plea of guilty: Was it necessary to produce a government chemist's certificate?

iii) Under section 72 (3), Constitution: Were the appellants produced in court as soon as it was reasonably practicable?

iv) Section 348 CPC: Is it a final bar to appealing a plea of guilty?

Point (i): The charge sheet: Mr. Abisai submitted that it was lacking in the particular of the year in which the offence was committed. So it was fatally defective. On his part Mr. Onsongo added that the charge sheet did not specify which acts constituted trafficking of drugs. That section 2 did define these yet the charge did not set out exactly what the appellants were doing to commit the offence.

To begin with the omission of the year from the particulars of the offence, it is considered in order that a day, month and year of commission of an offence be set out. But if it is omitted as was the case was here, and that does not prejudice the accused person, then section 382 CPC should come into play to cure the omission. In the present case the appellants were not prejudiced. In fact in reproducing the facts the full date and time were stated and admitted:

" ---- on 2/8/2007 at 10.00 am ---- ."

Thus this point must fail.

Moving onto the part of the charge:

" ---- found jointly trafficking 224 stones ----."

Was it vague and thus prejudicial to the appellants? They were charged under section 4 of the Act whose pertinent parts read:

"4. Any person who traffics in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence and liable –

(a) ----- (b) ------."

And trafficking in section 2 of the Act is defined as:

" --- the importation, exportation, manufacture, buying, sale, giving supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance or any substance represented or held out by such a person to be a narcotic drug or psychotropic substance ----."

In the Madline Barasa case (supra) where the Court of Appeal appreciated the definition of the word "trafficking" in the charge that the appellant faced in that case, the learned judges remarked after setting out its meaning (as per section 2 of the Act, above):

"It is evident from the definition of the "trafficking" that the word is used as a term of art embracing various dealings with narcotic drugs or psychotropic substance.

In our view, for the charge sheet to disclose the offence of trafficking the particulars of the charge must specify clearly the conduct of an accused person which constitutes trafficking. In addition and more importantly the prosecution should at the trial prove by evidence the conduct of an accused person which constitutes trafficking. In this case neither the charge sheet nor evidence disclosed the dealing with the bhang which constituted trafficking.

In essence what the charge sheet or evidence should feature is an act of trafficking as set out in section 2 of the Act either: importation, exportation, manufacture, buying, sale, supplying, conveyance, delivery e.t.c as the case may be.

In the present case the charge sheet used the general word trafficking. It ought to have been added that the appellants were in fact doing any of the acts that constitute trafficking as set out above – importation, buying or conveying (transporting is not there) the drug (bhang) that the appellants were charged with. In sum, the charge was invalid for vagueness. But as the Court of Appeal did in the Madline Barasa case, this court would be minded, if these appeals are not allowed on any other ground, to invoke its powers under section 361 (4) CPC by substituting a conviction for possession of bhang for that of trafficking and pass a sentence for possession. But be it so for now.

Point (ii): A certificate from the government chemist: The case proceeded in the lower court on a plea of guilty. That means in the mind of the appellants they knew the charge was based on trafficking (but as

found in point (i), possessing) bhang. Section 207 CPC provides for the accused being called upon to plead, to answer whether he admits or denies the truth of the charge.

" 207 (1) ----

(2) If the accused person admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded."

In this court's view all the court needs to act on in a plea of guilty are the facts which are admitted unequivocally. The facts are not evidence which will include e.g. government chemist's certificate that this is bhang or not. This is in the particulars and an accused person is aware of it and that is why he/she has decided to admit that fact without proof. The accused person instance knows that the subject of the charge is bhang. This is what Archibold 2002 says on plea of guilty:

" If the defendant pleads guilty, and it appears to the satisfaction of the judge that he understands the effect of his plea, his confession is recorded, and sentence is forthwith passed, or he is remanded to be again brought up for judgment.

The responsibility of pleading guilty or not guilty it that of the defendant himself ----"

(See 4 – 104, pp 370 – underlining supplied.)

Accordingly the facts admitted by the accused person, to the satisfaction of the trial court that he understands the effect of the plea, should lead to a sentence right away, unless it is desirable to do that later. It is not required that the facts be proved by evidence. So requiring that a government chemist report ought to have been placed before the court when the appellants pleaded guilty to possessing what they admitted was bhang, cannot be sustained. Such evidence could have been required in the event the appellants denied the charge. See section 208 CPC:

" 208. (1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any)." (2) ------ (3) -----."

The complainant, his witnesses will testify and any evidence e.g. from experts including the government chemist will also be heard because the accused has denied the truth of the charge that he was having bhang. From the above this court is, with respect, disinclined to go along with the decisions of Ali Vinu and Charles Omuga cited here. The learned trial magistrate at Nyando properly dealt with the pleas of guilty when she forthwith sentenced the appellants. Evidence by the government chemist would only have come in had the appellants denied that what they had was bhang. They did not and they were legally and properly dealt with. After all there would be no value added to proving and certifying what has already been admitted.

Point (iii) Section 72 (3) of the Constitution: It was submitted and the lower court record has it that the appellants were arrested on 2/8/2007 and produced in court on 7/8/2007. Counsel checked the 2007 diary and informed the court that the arrest was on a Thursday while production in court was on the following Tuesday. Under the now very familiar section 73 (2) of the Constitution, and the abundance of case law now available, the accused persons charged with a non – capital offence as the case was here, ought to have been produced in court not later than 10 am on Friday 3/8/2007 after their arrest on Thursday 2/8/2007 at 10 a.m. If that was not done, then as soon as it was reasonably practicable to do so – but with an explanation. Here the police did not take the appellants to court on the following Monday. They did so on Tuesday 7.8.2007. Excluding the 2 days of the weekend, then the appellants were taken to court 2 days late. No explanation was given. In this court's opinion, and still mindful and anxious to protect fundamental rights of individuals under the Constitution as any other court would be minded to do, those

two days need not warrant granting the appellants an acquittal. They were in possession of a large haul of bhang – with street value of Ksh 500,000/=, destined for consumption and damage to the health of many. In the case of Paul Mwangi -VS- R. CR. A. 35/06 (C. A) the Court of Appeal delivered itself:

"So long as the explanation proffered is reasonable and acceptable, no problem would arise. Again the court may countenance a delay of say one day or two as not being inordinate and leave the matter at that. In this appeal, we are of the view that a delay of some ten days which remains totally unexplained was too long in the circumstances and we must follow the decision of the Court in Mutua's case."

(underlining supplied.).

The two days in this matter were not explained but the delay is not considered inordinate. This ground, too fails.

Point (iv) so 348 CPC:

"348. No appeal shall be allowed in the case of an accused who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."

Proper appreciation of this section does not lend itself to the interpretation that one should not appeal against conviction on a plea of guilty except when the appeal is limited to the extend or legality of the sentence. One can appeal from such proceedings e.g. by challenging the plea itself as not having been unequivocal. Or if it followed breach of other provisions of law e.g. here the Constitution e.t.c.

In the end these appeals are dismissed. The court however substituted the finding based on trafficking drugs with that of possession of drugs under section 3 (1) as read with section 3 (2) of the Act. The appellants did not satisfy the court that they had these large amounts of bhang (cannabia sativa) for their own consumption. So each will serve nine (9) years prison. Save for allowing the appeals on account of trafficking, setting aside the sentence there-under and substituting that with conviction and sentence of nine years under the charge of possession of bhang, these appeals are dismissed.

Judgment accordingly.

Delivered on 15.12.2008.

J. W. MWERA

JUDGE

JWM/hao