



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 190 of 2006

GEORGE NJOROGE NDUNGU APPLICANT

VERSUS

REPUBLIC RESPONDENT

(From Original Conviction and sentence in Criminal Case No.514 of 2005 in the Principal Magistrate's court at Kericho before Hon. J.K. Ngeno – Senior Principal Magistrate)

JUDGMENT

The appellant George Njoroge Ndungu was charged with the offence of trafficking a narcotic drugs Contrary to Section 4(a) of the Narcotic Drugs and Psychotropic substance control Act No.4 of 1994. The appellant was charged with another person **Caleb Okeyo Agalo** but the second accused jumped bail in course of the trial and the case proceeded against the appellant.

The particulars of the charge stated that on the 6th day of March, 2005 along Kipchimchim Brooke Market Murram Road in Kericho District in the Rift Valley Province, were jointly found while trafficking in Narcotic drugs namely cannabis to wit seven hundred and thirty six (736) stones with approximate street value of Kshs.184,000/= while using a motor vehicle registration Number KAE 832Y Toyota Saloon in contravention of the said Act.

The appellant also faced an alternative charge of being in possession of Narcotic drugs contrary to Section 3(1) as read with sub section 2(a) of the Narcotic drugs and psychotropic substance control Act No.4/94.

The particulars of the charged stated that on the 6th day of March, 2005 along Kipchimchim Brooke Market Murram Road in Kericho District within the Rift Valley Province, were jointly found while in possession of a Narcotic drug namely cannabis to wit seven hundred and thirty six stones with approximate street value of kshs.184,00/= in contravention of the said Act while traveling in a motor vehicle registration Number KAE 836Y Toyota Corolla Saloon.

The appellant pleaded not guilty to all the charges and at a full trial he was found guilty of the main count for which he was convicted and sentenced to pay a fine of Kshs. 1 million and in default to serve a sentence of 3 years.

Being aggrieved by the conviction and sentence, the appellant has appealed and in the petition of appeal he has raised several grounds of appeal . The appellant challenged the conviction which he contended

was based on a defective charge that failed to specify the actual charge . The appellant also faulted the evidence by the Police officer who produced the Government Analyst Report of the said Narcotics. The appellant was also dissatisfied with the conviction which was based on evidence and findings that failed to comply with the laid down principles in Criminal Law that is the accused person is presumed guilty until proved otherwise. The appellant is also dissatisfied with the sentence which he termed harsh and excessive in the circumstances and faulted the trial magistrate judgment which tended to shift the burden of proof to the appellant to show his innocence.

On the part of the State, the learned State Counsel Mr. Mugambi opposed the appeal and supported the conviction which he submitted was based on cogent evidence by 3 police officers who intercepted , arrested and counted the rolls of Narcotics which the appellant was transporting.

This being a first appeal, this court is mandated by law to consider and evaluate the entire evidence and the judgment of the trial court in order to arrive at its own independent determination on whether to uphold the conviction of the appellant. In arriving at this determination, this court should bear in mind that it never saw or heard the witnesses and give due regard to that aspect (*see the case of Njoroge V Republic 1987 KLR page 90*). I therefore briefly set out the summary of the evidence before the trial court that raised the conviction and sentence of the appellant. On the 6th day of March, 2005 ,**Sgt. Stephen Ole Tanki (PW1)** who is in charge of Anti Corruption Unit in Kericho received a report that motor vehicle KAE 832Y was trafficking drugs along Kipchimchim Brooke Murram Road. The OCS Kericho had already dispatched officers to pursue the said motor vehicle . **[PW1]** proceeded towards the direction where he **Sgt Arende[PW2]** and **PC Wilson Kiriungi [PW3]** intercepted the motor vehicle which was driven by the appellant who was in the company of the second accused. In the motor vehicle they found 736 stones of substance were packed in a bag and covered with a blanket. The second accused person tried to escape but the witnesses managed to arrest him. The Motor vehicle was towed to the police station and the police together with the appellant counted the number of stones which totaled to 736 out of which 28 were submitted by PW1 to the government chemist in Kisumu on the 11th March 2005. The Government Analyst report was produced as an exhibit and it confirmed that the substance was cannabis which classified as a narcotic drug under the Act.

The trial court found that the prosecution had established a prima facie case in respect of the main count. Put on his defence the accused person gave un-sworn statement. He denied having had any knowledge that he was transporting narcotics. He claimed that his services as a taxi vehicle and driver were hired by the 2nd accused who jumped bail in course of the trial. He claimed that it was not possible for him to know what was contained in the bags that belonged to the 2nd accused who told the appellant that he was carrying **omena fish**.

The trial court after considering the evidence found that the charge of trafficking was proved against the appellant The trial court also considered the defence evidence and remarked as follows:

“The accused 1 has no good defence at all. The accused 1 ought to have known or to have been suspicious of the consignment said to be fish yet under different smell as stated by Pw2 and PW3. He (accused 1) ought to have been suspicious when accused 2 allegedly made him make a detour of Kericho Town . I find the prosecution’s case on trafficking proven beyond reasonable doubt and convict accused 1 accordingly.”

This conclusion by the trial court was faulted by counsel for the appellant who submitted that the trial court shifted the burden of proof to the appellant. Secondly, the trial court assumed the appellant had a sense of smell that could distinguish fish from narcotics or that the appellant knew the geography of Kericho to have known that he was made to take a detour of Kericho Town.

I find merit in the above submission. The trial court tended to infer guilty knowledge on the part of the appellant for failing to detect the smell of the substance when there was no evidence adduced before the court to show that the appellant had a sense of smell that could distinguish substance from fish. There was no evidence also regarding the issue of the appellant having deliberately taken a detour from Kericho Town to avoid arrest.

As regards the grounds of appeal that challenges the charge, the charge sheet clearly indicates that the appellant was charged with trafficking. Trafficking is described as engaging in conveyance, production, manufacture possession, sale, purchase, transportation, warehousing, consumption, use or consumption, importation, exportation of narcotic drugs (see **Section 1 (2) 1 (c)** of the narcotic drugs and psychotropic substance Act.) In the case of **Wanjiku V R 20021 KLR page 825**, the High Court while dealing with interpretation of the same Act held that “The definition of “trafficking” in the Act embraced several kinds of acts including importation, exportation, manufacture, buying, sale, supplying, storing, administering, conveying or distributing. It is logical and indeed sensible that a charge of “trafficking” should clearly specify the exact kind of trafficking to enable not only the prosecution to know what evidence to lead to prove the charge but even more important, to enable the accused to know the actual elements of the charge the prosecution is out to prove by the evidence it will be adducing.”

I respectfully agree with the above principle that an accused person need to be notified the exact kind of trafficking he is facing to enable him prepare for his defence. The circumstances of this case including the arrest clearly shows that the appellant was trafficking by way of transportation of the narcotics. The circumstances in the case of **Wanjiku** were perhaps different although I will not have allowed the appeal on this ground alone, it is important to emphasize that the prosecution should always endeavor to clarify and specify the kind of trafficking they are charging an accused person with. On the ground that the exhibit was submitted for examination and took a long time for the results to come out, it is important to underscore the important of handling exhibits and samples that have been submitted for examination with due care. The record shows that the samples were submitted to the Government Chemist for examination on 11th March, 2005 as per exhibit No.1 and the result of the Government Analyst is dated 23rd March, 2005. I would not agree with the submission by the counsel for the appellant that the trial court erred by admitting the exhibits which were produced by the police officer instead of the maker of the **report**. In the case of **Soki V R [2004]2 KLR** the court held that Section 77(1) allows any document purporting to be a report under the hand of a government analyst, medical practitioner or any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis to be used in evidence. The same could be produced by a police officer.

It is clear from facts of this case that the appellant was represented by counsel all throughout the proceedings and even when the exhibits were produced. The only anomaly which is noted from the record is the fact that the exhibits do not tally with the number of stones that the appellant is alleged to have been found in his possession.

In conclusion this appeal should be allowed as I find merit on the ground that the court tended to shift and infer the presence of guilty knowledge on the appellant. For the other grounds of appeal, I find no miscarriage of justice was occasioned by the discrepancies in the presentation of the exhibits and the charge sheet. I allow the appeal, quash the sentence imposed by the trial court. The appellant is set at liberty unless otherwise lawfully held.

It is so ordered.

Judgment dated 10th May, 2007.

M. KOOME

JUDGE