



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 1054 of 2003

From Original Conviction and Sentence in Criminal Case No. 3210 of 2003 of The Chief

Magistrate's Court at Kibera

FATAYI ADEBIYI ALUWATOSIN APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGEMENT

The appellant was convicted for the offence of trafficking in narcotic drugs contrary to section 4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994. He was then sentenced to four years imprisonment. However, he was dissatisfied with both the conviction and sentence, and therefore lodged an appeal to this court.

In his Memorandum of Appeal, the appellant set out twenty-four grounds. However, when the hearing of the appeal commenced, he summarised the said grounds into three, as follows;

- "(i) The charge sheet was defective. Having in mind the circumstances of the case and the recovery of the goods, the offence of trafficking was not proved.**
- (ii) Findings by the court, on some issues, were not supported by evidence.**
- (iii) There were material contradictions in the prosecution case.**

Before delving into the substance of the appeal, I wish to make a few observations. First, the hearing of this appeal commenced before me, on 17th May 2005. On that occasion, Mr. Wandugi Advocate represented the appellant, whilst the Republic was represented by Mr. Ogetii, learned state counsel.

After recording some eight hand-written pages of the appellant's submissions, the appeal was adjourned to 27th June 2005. However, by that date, I had been moved from the Criminal Appeals Division, to the Commercial Court Division of the High Court. Therefore, when the hearing of the appeal was set to resume, the judge before whom it was listed referred it to me.

On 14th July 2005 the case was listed before me, but it could not proceed. The reason why the appeal was unable to proceed, on that date, was that the learned state counsel, Mr. Ogetii, who had had the conduct of

the matter, had been transferred from Nairobi to Mombasa. In the circumstances, Ms Nyamosi, learned state counsel sought an adjournment, so that she could peruse the record, with a view to familiarising herself with what had already transpired. As the appellant's counsel did not oppose the adjournment, the appeal was then adjourned to 9th August 2005.

As fate would have it, the appellant and his advocate failed to attend court on 9th August 2005. In their absence, Ms. Nyamosi asked the court to adjourn the matter, and the court did so.

Thereafter, the appeal was set down for hearing on 21st March 2006. The record shows that the Hon. Attorney General was served with a Hearing Notice on 13th March 2006. Therefore, although the state was not represented in court on 21st March 2006, I allowed the appellant to proceed with the appeal. I found no justifiable reason to further delay the hearing of the appeal, simply because the Attorney General had failed to attend court.

On the other hand, I believe that it is perhaps best that when a judge has only just commenced hearing an appeal if the said judge is then transferred either to another division of the High Court or to another station, it is perhaps more convenient and practical to have the appeal start de novo before another judge who is in the appellate division. If my experience with this matter is anything to go by, it is extremely tricky for a judge in a division other than that of the criminal appeals, to create time to fit in the hearing of criminal appeals. Secondly, logistics of moving the appellants to courts which were not designed to handle criminal cases is extremely sensitive.

As the determination of appeals are not dependent, in any manner whatsoever, on the demeanour of witnesses or of the appellant, it ought to be easy and convenient to re-start the hearing thereof de novo. Alternatively, appropriate rules should be enacted to enable a succeeding judge to continue with the hearing of the appeal. These are matters about which I hope and trust that the attention of the relevant authorities will be drawn to.

Reverting now to the substance of the appeal, the appellant asked me to allow the appeal, firstly, because it was not opposed. Whilst it is the true that the appeal was not opposed, as the state failed to attend court on 21st March 2006, I do not think that that alone is reason to warrant an order allowing the appeal. Notwithstanding the absence of the learned state counsel from court, during the hearing of the appeal, the court is obliged by law to give due consideration to the substance of the appeal. In the process of doing so the court, in its capacity as the first appellate court, will discharge its obligation of re-evaluating all the evidence on record, and weighing it alongside the judgement and the submissions which were made at the hearing of the appeal.

PW1, Chief Inspector Nehemiah Bitok testified that when they searched the appellant and his co-accused, they found nothing on their persons. However, a search in the ceiling to the bathroom in the guest wing, which was occupied by the appellant, revealed 3 pellets. The three pellets were wrapped in a blue cellotape. Eight other pellets were found in the store. Out of the eight pellets, one was under some palm leaves whilst the other seven were inside a carton. But all the eight pellets were said to have been wrapped in the same manner as the first three.

Also recovered from the house were an electronic weighing machine, cellotape and two plastic spoons.

According to PW1, the pellets were weighed and then submitted to the Government Chemist, who found it to be cocaine.

During cross-examination, PW1 said that the house in question had been rented by a lady, Wanjiku Macharia. Although that lady had introduced the appellant, to the landlord, as her husband, PW1 established that the appellant and the lady were not married.

When PW1 was asked if he knew how long the pellets had been in the house, the answer was in the negative. He also confirmed that the store where the eight pellets were found, did not have a lock.

Therefore, as far as PW1 was concerned, the complainant and his family had access to the said store. The complainant's family consisted of PW4, Wahinda Khan, her husband Mohammed Sahir; a daughter who was about 30 years old; and two sons who were not very young.

Apart from the complainant's family, PW1 said that the gardener too had access to the store.

PW2, PC Francis Kipchumba, also gave a similar story as PW1. But he also said that the gardener lived in one room outside the guest wing. And in his explanation as to why the police officers laid an ambush at the appellant's residence, PW2 said;

"The accused were suspected to be trafficking drugs within Lavington Area. Trafficking means selling."

PW2 testified that he had no idea about the person who occupied the guest wing before the appellant, or how long the carton containing the seven pellets had been in the store. He also had no idea about the number of times other people may have entered the guest wing.

On his part, PW3 PC Raphael Wanjohi, testified that he is the person who recovered the three pellets from the ceiling to the bathroom.

According to that witness, the information which the police got was to the effect that the accused were peddling drugs inside the car. However, no drugs were recovered from the vehicle. Indeed, the witness readily admitted that he did not find the appellant peddling, even though he insisted that the appellant and his co-accused were using the vehicle to convey drugs.

The said testimony is somewhat interesting when it is borne in mind that PW3 also said;

"I cannot tell how long the pellets had been inside the ceiling. I do not know for how long accused No. 1 stayed in that house. I do not know who had occupied the house before the accused persons. I believe that it is accused No. 1 who put the pellets in the ceiling. I cannot tell when. I saw the body language of the accused person and his behaviours made us conclude that he had committed the offence."

Upto that stage of the testimony, it is not clear what exact offence the appellant was suspected to have committed. That is because PW2 had talked about the accused persons being suspected to be selling drugs within the Lavington area, whilst PW3 talked of the drugs being conveyed using the appellants vehicle.

If, as PW2 said, trafficking in this case meant selling, then the prosecution did not produce any evidence to support the contention that the appellant was selling drugs. If anything, PW3 readily conceded that he did not find the appellant peddling.

PW4, Wahinda Khan, was the landlady. She testified that Ann Wanjiru went to view the guest wing on 1st December 2002. Ann was said to have been in the company of her husband, Adhullahi. Thereafter, Ann signed the tenancy agreement, and she began staying at the house from 23rd December 2002.

According to PW4, the house had been previously rented to another person, prior to Ann and the appellant. She also confirmed that the store was accessible to other employees in the house.

PW5, James Kamau Karaya, testified that he was a Sales Manager at Rimcon Motors, Langata Road. In 2002, the appellant asked him to sell-off his Suzuki Vitara, and to get him a replacement, which was a smaller vehicle. PW5 sold off the Vitara and purchased a Toyota Starlet for the appellant. He also handed over to the appellant the sum of Kshs.200,000/=, in cash, being the proceeds of sale from the Vitara, after the Toyota Starlet was paid for.

When PW6, Chief Inspector Peter Njeru, testified, he too conceded that he did not know how long the

pellets had been in the store or the ceiling.

PW7, Paul Waweru Kang'ethe was an employee of the Government Chemist. He testified that he received twelve polythene bags containing powder. The bags were given to him by Acting Police Inspector Nguyo.

When PW7 analyzed the powder, he found it to contain cocaine, which is a narcotic drug. However, the witness had no idea where the samples were obtained from, as nothing was taken to him in pellet form

PW8, Dennis Owino, testified that he did purchase for the appellant, a DVD player. The make was a JVC, and the player was purchased from Dubai in or after January 2003.

PW8, Emily Nyangega Kamau, testified that she had met the appellant and the co-accused in 2001. She said that the appellant's co-accused persuaded her to carry some drugs to America. She agreed to do so, but was arrested and jailed in America, for a period of 18 months.

PW10, Inspector Adan Ding, was the investigating officer. He testified that all the items which were recovered from the appellant's residence, were handed over to him. He said that the items so recovered included eleven pellets. He took samples of the powder in the pellets, which he took to the government analyst.

PW10 also placed the value of the recovered drugs at Kshs.572,000/=

In his understanding, trafficking

"entails transporting, selling and possession of drugs."

But in this particular instance, PW10 said;

"I do not know where accused intended to take the drugs. None of the accused persons were found with the drugs in the (sic!) possession."

During cross-examination, PW10 said that he did not know when the drugs were taken to the house where the appellant was residing. However, the witness insisted that the drugs were taken to the house by the two accused persons.

Later still, when PW10 was facing further cross-examination, he said;

"I do not have any evidence to show that Ann is not the one who put the pellets in the carton or at the ceiling."

Having given due consideration to the evidence tendered, the learned trial magistrate, Ms. Mwai SRM, found that Ann Wanjiru rented PW4's guest wing. She moved into the house with the appellant, on 23rd January 2003. Wanjiru thereafter left the house to the appellant.

According to the trial court,

"The accused did not dispute the fact that the officers who testified here, PW1, 2, 3, 6 all found them in a house in Lavington, where they proceeded to do a search. They also did not dispute the fact that several items as produced herein were recovered from the premises. They included several pellets which were found to contain narcotic drug cocaine. A government analyst testified herein that the samples he was given by the police officer investigating this case."

Whereas, the appellant did not take up the issue on appeal, it is clear to me that when the trial court made a finding, to the effect that the government analyst had received samples from

"the police officer investigating this case"; that was not an accurate observation.

It is true that PW10, who was the investigating officer said that he handed over 12 polythene bags containing samples, to the government analyst. However, PW7 who testified that he carried out an analysis on the samples, testified that he got the said samples from Acting Police Inspector Nguyo.

In the circumstances, the inevitable question is whether the 12 samples were the same ones as those which PW10 had taken from the pellets which were recovered.

Secondly, PW10 is the only person who testified about the value of the drugs. He said that it was worth Kshs.572,000/-. However, the witness did not state whether or not he is the person who carried out a valuation of the drugs. If so, he should have demonstrated to the trial court that he was a person duly authorized by the minister, and that he is so gazetted, as stipulated in Section 86 (1) of the Narcotic Drugs and Psychotropic Substances Control Act. Having failed to demonstrate that he was a person duly authorized, or that the valuation was carried out by someone else but who was authorized, the evidence as to the value of the drug must be deemed to have been irregularly admitted by the trial court.

In HAMAYUN KHAN –VS- REPUBLIC, CRIMINAL APPEAL NO. 159 OF 2000, the court of Appeal expressed itself thus;

“Furthermore, there is no evidence adduced at the trial as to the value of the heroin and upon which the sentence of Kshs.39 million, or in default 1 year imprisonment, could be based. The value of the heroin as given in the charge sheet, is by itself, no evidence as to the value of the heroin. The sentence imposed in that respect is invalid.”

In this case, the value of the cocaine was not only stated in the charge sheet but was also stated by the investigating officer. However, the said witness did not demonstrate to the trial court that he had the necessary relevant know-how to value narcotic drugs. A bare statement as to value cannot be presumed to be sufficient as evidence. Secondly, the witness did not demonstrate that he had been clothed with the requisite authority, as stipulated by law. Therefore, had the trial court imposed a fine on the appellant, based on the value of the drugs as testified to by PW10, the said sentence would have been invalid. But, as it is, the trial court herein did not impose a fine on the appellant, as by law required. In effect if this court were to dismiss this appeal, it should be expected to impose a fine on the appellant. However, the difficulty would lie in the fact that there would be no sound basis upon which the quantum of such a fine would rest.

On the issues for determination the learned trial magistrate spelt it out thus:

“.....the question now before the court, is whether the prosecution has proved its case against the accused person as required by law. That is to say as to whether it had been established and proved beyond doubt that the accused persons were found trafficking in drugs.”

Although the appellant did, at that stage, and again in his appeal submit that the charge sheet was defective, for failing to specify how the accused were trafficking in drugs, the learned trial magistrate held that the alleged defect could not warrant the dismissal of the charge sheet. As far as she was concerned, the generalized wording of the charge sheet did not occasion any injustice to the accused persons. This is the way she stated her findings;

“The term trafficking has many meanings as set out in Act No. 4. I do not believe that any injustice is occasioned to the accused persons therefore.

To note though is that the officer who arrested the accused persons did state that they did search the accused persons but no drugs were found in the accused persons nor were they found holding any of the alleged drugs.

The accused were thus arrested because the said drugs were found in a premises they were said to

be occupying and hence, the prosecution case is that the accused were trafficking in the said drugs as they were found having stored them.”

In my considered opinion that very holding illustrates the exact point which the appellant was seeking to make. There are many meanings of the term trafficking. Therefore, if a person is charged with the said offence, which of the said many meanings would the prosecution be seeking to prove? That is the question. Is it fair on an accused person to face a trial without being sure about what exactly the prosecution was seeking to prove? The appellant says it was not. But the learned trial magistrate thinks that there was no injustice even when the charge sheet is in generalized terms, as opposed to specific meanings of the term trafficking.

Before reverting to that issue, I find it appropriate to mention here that it is not clear to me how the learned trial magistrate came to the conclusion that the prosecution case was that the accused persons were arrested for trafficking as they were found to have stored the said drugs.

First, if that was the case, I believe that nothing would have been easier than for the prosecution to have given the said specific details in the charge sheet.

Secondly, PW2 testified that the accused persons were suspected of trafficking drugs. To his mind, PW2 said that by trafficking was meant “selling”. On the other hand, PW3 said that the police had information that the accused persons were peddling drugs inside their car.

Those two pieces of evidence were not consistent with the findings by the trial court, as to the reason for the arrest of the appellant and the co-accused. According to PW2, the accused persons were selling the drugs within Lavington area. And when PW3 talked about the accused persons peddling the drugs inside their car, both versions would appear to be inconsistent with the finding by the trial court that the accused persons were arrested only because they had stored the drugs.

To my mind, the prosecution was still trying hard to show that the appellant and his co-accused sold drugs. I say so because the police officers who were involved in the recovery of the drugs all laid emphasis on the fact that they also recovered a weighing machine and scooping spoons. By necessary implication, the prosecution was saying that the appellant was deemed to be weighing the drugs and then peddling or selling the same within the Lavington Area.

I believe that it is for that reason that PW1, PW6 and PW10 all said that the police believed that the appellant had purchased his vehicle registration Number KAP 855B, a Toyota Starlet, out of proceeds from the trade in drugs.

In other words, both prior to, and subsequent to the arrest of the appellants, the police believed that the accused persons not only did business in narcotic drugs, but also purchased the motor vehicle KAP 855B, out of the proceeds from the said illegal business. In effect, the case against the appellant appears to have been wider than that which was seen by the learned trial magistrate. It was not just about storage of drugs, but also the peddling or sale thereof. So, the question is whether the appellant was prejudiced by the failure to have the particulars of the offence spelt out in the charge sheet.

In WANJIKU –VS- REPUBLIC [2002] 1 KLR 825, Onyancha J. dealt with an appeal in which the appellant had complained about the charge being amorphous and thus fatally defective. At page 829, the learned judge held as follows;

“The main element of the charge as drawn above is the phrase “jointly trafficking.” The Act under which the charge was drawn defines ‘trafficking’ as follows, to wit;

‘importation, exportation manufacturing, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person, of a narcotic drug or making any offer in respect thereof.

It will be noticed that the word has a much wider meaning than its ordinary dictionary meaning which in Collins English Dictionary is “to carry on trade or business especially of illicit kind”, with a few exceptions which we are not concerned with here. It is therefore 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. The purpose of this is both obvious and fundamental. It is that the accused has a full right to know the charge he is facing to enable him to fully prepare his defence. Failure to specify which one or more of the specific “trafficking” is charged is likely to embarrass or even confuse the accused in the preparation of his defence to the charge.”

I am in full agreement with those words of my learned brother. Indeed, it is for that reason that I have endeavoured to illustrate that various prosecution witnesses testified as if the ingredients or elements which were being proved against the accused persons were varied, from selling, to peddling, to storing the narcotic drugs. In the final analysis, I hold the view that the appellant was embarrassed or prejudiced in his endeavour to prepare his defence to the charge which was not specific. That being the case, there is no doubt in my mind that the charge sheet was wanting. However, I do not think that the said defect was fatal.

In her judgement, the learned trial magistrate also made the following observations;

“There is no doubt therefore that accused No. 1 was in occupation of the said guest wing as at the time of arrest. The questions that were however (asked) by the defence were;

- 1. When were the drugs placed in the ceiling? Was it before or after the accused took over the house?**
- 2. Since accused were not seen placing the drugs there, who placed the drugs in the ceiling?**

The prosecution witnesses did not have straight answers to these questions. They relied on the circumstantial evidence that they were able to gather.”

Clearly, the conviction of the appellant was based on circumstantial evidence. In **KIMEU –VS- REPUBLIC [2002] 1 KLR 756 at 763**, the Court of Appeal held as follows;

“We agree with the learned trial judge that if the dying declaration is excluded all that remains is circumstantial evidence. The learned judge after citing Tumuheire –vs- Uganda [1967] EA 328, among other authorities held that to act on circumstantial evidence to support the conviction of an accused person, the evidence must point irresistibly at the accused’s guilt to the exclusion of everybody else. But there is a second principle which he omitted, which is clearly enunciated in the case of Simon Musoke –vs- Republic (No. 10 of 1997) that before drawing the inference of the accused’s guilt from circumstantial evidence the court must be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

Now in this case, the trial court held as follows;

“The defence argument was that any other person could have placed the drugs in the store. The store was said to be unlocked at all times. There were other people staying in the compound, the gardener, the house girl, the landlady and her family all could have accessed the said store. That is indeed true; for the court was told that the store was actually not inside the guest room and door was always unlocked.”

When it is noted that the prosecution witnesses readily conceded that they had no knowledge when the drugs were put in the ceiling, or whether they were placed there before or after the appellant took over the house; And because there were many other people who had access to the store, it could not be said that there were no other co-existing circumstances which could weaken or destroy the inference as to the

appellant's guilt.

PW10 admitted, during his cross-examination, that he did not have evidence to show that Ann was not the person who had placed the drugs in the ceiling or the store. If that be the case, it implies that there was a possibility that the drugs were placed in the ceiling or store by the said Ann. And, if that were the position, the appellant could not be held responsible for the actions of Ann.

The appellant was not proved to have had exclusive control of the guest wing and store, so as to be deemed to be in possession of that which may have been found therein. But even if he had been in exclusive control of the guest wing at the time of his arrest, as the prosecution had no idea how long the cocaine may have been in the ceiling or store, the appellant could not be held solely responsible for something which may well have been placed in the ceiling prior to his moving into the guest wing.

And whereas the carton or box in which the drugs were found, inside the store, may have been placed there only after the appellant had purchased the DVD player, that would not necessarily imply that it was the appellant who stored the drug inside that box. I find nothing that would make it impossible for any of the people who has access to the store, to have placed the drug inside the box. There is nothing which points exclusively at the appellant, to the exclusion of all other persons, as the one who stored the drugs either in the said box or in the ceiling.

For all the foregoing reasons, I find the appellant's conviction to be unsafe. That is not to say that the appellant is definitely innocent. But, there is doubt about his guilt. If the prosecution wished his conviction to be watertight, they would have been obliged to do more. They should have tested the weighing machines and the scooping spoons to ascertain that they were used for handling drugs. They should also have finger-printed the said items, so as to connect them to the appellant. But for now, although there may have been good reasons to suspect the appellant of trafficking in drugs, the evidence adduced was insufficient to sustain a conviction. Therefore, the conviction herein is set aside.

However, as regards the sentence of imprisonment for four years, I hold the considered view that the same cannot, by any stretch of imagination, be deemed to be excessive. The maximum sentence prescribed by law is life imprisonment. Therefore, had I found the conviction to have been sound, I would have dismissed the appeal against sentence.

In conclusion, the appeal is now allowed, and the conviction quashed. The appellant should thus be set at liberty forthwith, unless he is otherwise lawfully held in custody.

Dated and Delivered at Nairobi, this 22nd day of May 2006

FRED A. OCHIENG

JUDGE