



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Criminal Appeal 75 of 2005

ISLAM NASSIR MOHAMEDAPPELLANT

V E R S U S

REPUBLICRESPONDENT

(Appeal from the conviction and sentence by the Resident Magistrate Mr. K. Bidali in Criminal Case No.339 of 2005, Lamu, delivered on 16th November, 2005)

J U D G M E N T

The appellant was sentenced to five years imprisonment after he was tried for the offence of trafficking in narcotic drug contrary to Section 4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, No.4 of 1994 as read with Sub-section 2 (a) of the said Act.

The appellant being aggrieved by both the conviction and sentence preferred this appeal. Through the firm of Okanga & Co. Advocates, the appellant has listed five grounds which were argued together and can be summarized that there was no evidence upon which the appellant's conviction could be based. In support of his submissions learned counsel for the appellant cited several authorities to which I shall make reference in the course of this judgment. It is necessary that I evaluate the evidence recorded by the trial court in order to arrive at my independent finding, always appreciating the position of advantage of the trial court where evidence was received and witnesses seen.

It is the prosecution case that the appellant while boarding Falcon Bus No.KAM 757M to Lamu at Bondeni Mombasa was seen by the bus loader, Hussein Shali Mohammed (PW1) carrying a bag and suit case, the subject of the trial.

When the bus was stopped by the police at Witu and the bag was opened it was found to contain 219 rolls of green plant substance wrapped in a yellow polythene bag and a gunny bag. In the small bag, clothes and some dry plant material were found.

The contents of nylon bag were taken to the Government Chemist who on analysis confirmed the 15 rolls

of green plant substances to be cannabis sativa.

The appellant was then charged. In his defence the appellant denied that the nylon bag in which the drugs were found belonged to him. That he had only the small suit case which was recovered and in which the contents were not tested.

In arguing the appeal learned counsel for the appellant urged the court to allow the appeal on the grounds listed in the petition. He particularly submitted that there was contradiction in the prosecution case as to where the nylon bag was recovered. He also argued that the trial magistrate imported into the judgment matters not adduced in evidence. Learned counsel for the respondent supported both the conviction and sentence. He submitted that there are no contradictions as to the discovery of the nylon bag. That if there are contradictions they are minor and cannot affect the prosecution case.

I have carefully considered these submissions. There is no dispute that the appellant was in the bus from which the nylon bag in which the drug was retrieved. The only issue is whether there was anything to link the appellant with the bag in question and therefore its contents.

It is an offence under Section 4 of the Narcotic Drugs and Psychotropic Substance (Control) Act, 1994 to traffic in any narcotic drug or psychotropic substance.

Trafficking, on the other hand is defined under Section 2 of the aforesaid Act to mean several activities, namely, importation, exportation, manufacturing, buying, sale, giving, supplying, storing, administering, conveyance, delivery or distribution by any person of a narcotic drug or psychotropic substance.

It is therefore vital that the charge sheet should reflect one or more of the activities constituting trafficking in any given case.

The charge sheet in this case does not specify how the appellant was trafficking. It is of paramount importance that a person charged with an offence must know fully the charge he is facing to be able to fully prepare and defend himself. The appellant was prejudiced in not knowing whether he was importing, buying, selling, giving, supplying, conveyancing, delivering or distributing.

The second and the more fundamental issue is the handling of the substance retrieved from the nylon bag. The appellant was charged with trafficking in 219 rolls of cannabis sativa. The two arresting officers confirmed that the nylon bag contained 219 rolls of cannabis sativa.

PW3 P.C Nicholas Lewa simply produced the exhibit memo form forwarding the alleged drugs to the Government Analyst without stating who forwarded the same. The Government Analyst report indicates that the substance for analysis was forwarded to him on 26th September, 2005 by No.74704 P.C Samuel Charo. It also states that 15 rolls of dry plant material were the subject of the examination.

Three critical issues stand out. The bag that was retrieved from the appellant is said to have contained 219 rolls of dry plant material. The exhibit memo form forwarding the exhibits to the Government Analyst also reflects that 219 rolls were forwarded. What the Government Analyst examined were only 15 rolls.

The second issue is that the 219 rolls of the dry plant material were recovered by P.C Ali Komora (PW1) and P.C Nicholas Lewa (PW3). But it is another officer, P.C Samuel Charo who was not in the team that recovered the dry plant material who forwarded the substance for examination. He was not called as a witness.

The third issue is, what happened between the day the plant material was recovered on 4th September until 26th September 2005 when the same was finally submitted for analysis?

In cases involving items the subject of scientific analysis great care ought to be taken to ensure that the items are submitted to the Government Analyst without delay and the continuous link in handling the

same is not broken. Where this requirement is not complied with strictly there is a likelihood of mixing up exhibits.

In the instant case the court cannot, with certainty, state that the 15 rolls of dry plant is what or part of what was recovered from the nylon bag. It may have related to another matter altogether, which was being investigated by P.C Charo.

So, although the bag may have belonged to the appellant as was correctly found by the trial court, there was no evidence that its contents – the green dry plants were cannabis sativa.

I come to the conclusion on the above basis that the prosecution case was not made out against the appellant beyond any reasonable doubt.

The appeal is allowed, conviction quashed and sentence set aside. The appellant shall be set free forthwith unless for any other lawful reason he is detained .

Dated and delivered at Malindi this 4th day of July 2006

W. OUKO

J U D G E