



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 78 OF 2002

(From original conviction and sentence of the Chief Magistrate's
Court at Nakuru in Criminal Case No. 1726 of 1999 – G. A.
Ndeda)

MOHAMMED ABWALO DUNYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Mohammed Obwolo Dunya, was charged with two offences. He was charged with trafficking in narcotic drugs contrary to **Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act (Act No. 4 of 1994)**. The particulars of the charge were that on the 3rd of October 1999 jointly with others not before court, at Soilo road block along Eldoret-Nakuru road, the appellant was found trafficking 3,027 stones of cannabis sativa (bhanga) with a street value of Kshs 3,027,000/= in motor vehicle registration No. GK Z244 Isuzu Trooper in contravention of the said Act. He was also charged with the offence of unlawful use of a motor vehicle contrary to **Section 294 of the Penal Code**. The particulars of the charge were that on the 3rd of October 1999 at Soilo road block along Eldoret-Nakuru road, Nakuru District the appellant unlawfully and without any colour of right, but not so as to be guilty of stealing, converted to his own use a motor vehicle, namely Isuzu Trooper registration No. GK Z244 belonging to the Ministry of Health, Nairobi. The appellant pleaded not guilty to the two charges. After a full trial he was convicted as charged and sentenced to pay a fine of Kshs 1,000,000/= or to serve ten years imprisonment on the first count. On the second count he was sentenced to serve twelve months imprisonment. The appellant was aggrieved by his conviction and sentence and has filed this appeal against his conviction and sentence.

In his petition of appeal, the appellant has raised several grounds. He was aggrieved that he had been convicted on trumped up charges. He was aggrieved that the trial magistrate had not put into consideration his evidence that he had been hijacked and forced to drive the said motor vehicle at the behest of his abductors. He faulted the trial magistrate for not considering the evidence adduced by his co-accused in the lower court that the said co-accused was the owner of the narcotic drugs. The appellant was aggrieved that the trial magistrate had considered extraneous matters including being put under outside pressures to arrive at the decision finding the appellant guilty. The appellant faulted the trial magistrate for sentencing him to a harsh custodial sentence without putting into consideration the mitigation of the appellant which included his assertion that he was a diabetic.

At the hearing of the appeal, the appellant with the leave of the court presented written submissions

in support of his appeal. Mr Gumo, the Assistant Deputy Public Prosecutor supported the conviction and the sentence imposed upon the appellant. He submitted that there was sufficient evidence which was corroborated which established the guilt of the appellant. He urged the court not to disturb the findings of the trial magistrate and the sentence imposed, which in his view, was neither harsh nor excessive. I will consider the submission made by the appellant and the State after briefly setting out the facts of this case.

On the 3rd of October 1999 PW5 Inspector Paul Gitau, a police officer then attached to Nakuru 99 station received information to the effect that a Government motor vehicle ferrying bhang would be driven along Eldoret-Nakuru road. It was about 2.00 pm. PW4 went to Soilo area along the Nakuru-Eldoret road in a bid to try and intercept the said motor vehicle. Presently, PW4 saw the motor vehicle. It was an Isuzu Trooper registration number GK Z244. He tried to stop the motor vehicle but it sped past him. PW4 followed the motor vehicle in his patrol car. He also informed the police officers who were manning a road block at Soilo road block to put spikes on the road to prevent the motor vehicle which he was pursuing from getting away.

PW1 Police Constable David Warutumo and PW2 Inspector Mary Gakuo were among the police officers manning the road block. They testified that they saw motor vehicle registration number GK Z244 being driven towards the road block followed by the police 99 motor vehicle PW 1 testified that the driver of the motor vehicle attempted to evade the road block by trying to drive the motor vehicle towards the left side of the road which did not have spikes. PW1 managed to throw the spikes on the said left side of the road. Meanwhile PW2 stepped into the middle of the road and pointed her gun at the occupants of the said motor vehicle. The driver of the motor vehicle was forced to stop. PW2 ordered him and the two passengers who were sitting on the front seat of the motor vehicle to come out with the hands held up in the air. The three occupants of the motor vehicle complied with the order of PW2.

When PW1, PW2 and PW5, who had by then arrived at the scene, searched the motor vehicle, they discovered that it contained thirteen bags with 3,027 stones of cannabis sativa (bhang). The three occupants of the motor vehicle including the driver (the appellant in this case) were arrested. The appellant was later charged with the two offences. PW3 Simon Nduvi Atebe, a Government Chemist testified that he had received a sample of the drugs found in possession of the appellant. He analysed it and established that it was cannabis sativa – a narcotic drug as defined by the Narcotic **Drugs and Psychotropic Substances (Control) Act, 1994**. He produced his findings as an exhibit in the case. PW4 Patrick Njoroge Gitonga, an assistant Transport Officer employed by the Ministry of Health and based at its headquarters at Afya House, testified that on the 1st of October 1999 he had authorised the appellant to transport some members of staff to their homes at various estates within Nairobi. The appellant was driving motor vehicle registration number GK Z244 belonging to the Ministry. He testified that he did not authorise the appellant to drive the said motor vehicle outside Nairobi, least of all to Nakuru. PW6 Inspector Michael Nderitu investigated the case and produced the motor vehicle and the cannabis sativa in evidence. He also charged the appellant with the two offences. PW7 Police Constable Livingstone Lihanda, a police officer attached to the scenes of crime section as the Rift Valley Provincial C.I.D. officer, took the photographs of the motor vehicle registration number GK Z244 with the *cannabis sativa* (bhang) packed inside. He produced the photographs that he had taken in evidence.

When the appellant was put on his defence, he testified that he was carjacked on the 1st of October 1999 by three people who looked like police officers in Nairobi. He was then ordered to drive the said motor vehicle to Nakuru where he was detained in a store and locked inside. On the 3rd of October 1999 he was ordered to drive the motor vehicle back to Nairobi. At the road block at Soilo, the motor vehicle was stopped and he was arrested. He testified that his explanation to the police that he had been carjacked and kidnapped was not considered by the police. The appellant testified that he was innocent and was not involved in the trafficking of cannabis sativa (bhang).

This is a first appeal. The duty of the first appellate court in criminal cases was restated in the case of **Charles Mwita –versus- Republic C.A. Criminal Appeal No. 248 of 2003 (Eldoret)** (unreported) where the Court of Appeal held that: (at page 5)

“In *Okeno v R* [1972]E.A. 32 at page 36 the predecessor of this Court stated:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –v- R [1957]EA. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions, (Shantilal M. Ruwala –v- R [1957]EA 570) it is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusion; it must make its own findings and draw its own conclusions Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424.”

The above sets out the duty of the first appellate court. We are of the view that it is upon the first appellate court to carry out that duty by actually re-evaluating the evidence. It is not enough for the first appellate court to merely state that it has re-evaluated the evidence. Indeed, in Gabriel Njoroge v. Republic [1988-85]1 KAR 1134, at page 1136 this Court said:-

“As this Court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on the question of law to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect (see Pandya v. R. [1957] E.A 336, Ruwala v. R [1957] E.A. 570). If the High Court has not carried out its task it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Certainly misdirections and non-directions on material points are matters of law.”

In the instant appeal the issue for determination by this court is whether the prosecution proved its case against the appellant beyond any reasonable doubt. According to the evidence adduced by the prosecution witnesses, information was received by PW5 that a Government motor vehicle would pass along the Eldoret- Nakuru road ferrying *cannabis sativa (bhang)*. PW5 acted on the information and went to the Eldoret-Nakuru road near Soilo and waited to confirm if the information he had received had any basis. PW5 did not wait in vain. He saw the motor vehicle in question. It was an Isuzu Trooper registration No. GK Z244 driven by the appellant. Its windows appeared to have been tinted. PW5 tried to stop the motor vehicle in vain. He radio PW1 and PW2 who were manning the road block at Soilo to erect a barricade and stop the motor vehicle. At the same time PW5 followed the motor vehicle in a police patrol car.

PW1 testified that when the motor vehicle reached the road block, the driver attempted to evade the spikes which had been placed on the road. The attempted evasion was however thwarted by PW1 who put spikes on both sides of the road. PW2 ordered the appellant and his two accomplices to come out of the motor vehicle. When the motor vehicle was searched, thirteen bags containing 3027 stones of *cannabis sativa (bhang)* was found inside the motor vehicle. The appellant was apprehended. He could not explain how he came to be driving the said motor vehicle in Nakuru. PW1 and PW2 testified that the appellant told them nothing when he was arrested. When he was put on his defence, the appellant testified that he had been carjacked and held hostage against his will. At the time the motor vehicle was stopped by the police he was driving under duress. He denied that he was involved in the ferrying of the *cannabis sativa (bhang)*.

I have re-evaluated the evidence adduced by both the prosecution and the appellant in his defence. I have also carefully considered the submissions made before me by the appellant (in his written submission) and the State, in the oral submission made by Mr Gumo. The appellant does not deny that he was found in possession of thirteen bags containing 3,027 stones of *cannabis sativa (bhang)* in the motor vehicle registration number GK Z244 Isuzu Trooper which was in his possession by virtue of his employment. The appellant however explains his possession of the 3,027 stones of *cannabis sativa* and the motor vehicle. He testifies that he was hijacked, (presumably by his accomplices) from Nairobi and ordered to

drive the said motor vehicle from Nairobi to Nakuru. He was detained and after two days ordered to drive the same motor vehicle to Nairobi. He testified that at the time of his arrest, he was driving the said motor vehicle under duress.

Does the story of the appellant contain any element of the truth? I do not think. Having evaluated the evidence on record, I do hold that it was improbable that the appellant could have been driving under duress and at the behest of his alleged kidnappers from Nairobi to Nakuru without the appellant calling attention to his plight in the several roadblocks manned by the police along the said road. Further the appellant was intercepted driving the said motor vehicle into Nakuru town from Eldoret direction. He had not yet reached Nakuru town. His story is therefore improbable if not outrightly unbelievable. In my view, the appellant created the story during his defence to exonerate himself from the overwhelming evidence adduced against him by the prosecution. At page 3 of her judgment the trial magistrate, stated, as regard the defence offered by the appellant:

“When stopped at the road block, the accused didn’t mention to any of the officers that he had been kidnapped and forced to drive the motor vehicle. Even at the police station, the accused didn’t mention to anybody about that kidnapping. Even when plea was being taken, the accused (appellant) didn’t state that anybody forced him to drive the motor vehicle. That issue only came up in the defence.”

Having re-evaluated the evidence on record, I agree entirely with the finding of the trial magistrate as regard the evidence of the appellant. The true position as regard the circumstances under which the appellant was arrested is that, he drove the motor vehicle in question from Nairobi to Western Kenya without the authority of his employer. The appellants mission was to use the said motor vehicle to ferry *cannabis sativa* (*bhang*) to Nairobi for profit. The appellant willingly and consciously made the decision to ferry the said cannabis sativa (*bhang*). He was thus a drug trafficker. The prosecution proved its case beyond any reasonable doubt. I find no merit whatsoever in the appeal filed by the appellant against his conviction by the lower court. His appeal against both counts which he was convicted is therefore dismissed.

On sentence, **Section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act** provides that where an accused person is convicted of trafficking drugs he shall be fined Kenya Shillings One Million or three times the market value of the narcotic drug or psychotropic substance, whichever is greater and in addition to imprisonment for life. In the instant case the appellant was ordered to pay Kenya Shillings One Million (Kshs 1,000,000/=) or serve ten years imprisonment on the first count. The appellant complains that the said sentence meted on him was harsh and excessive. Mr Gumo for the State submitted that the said sentence meted out was appropriate.

I have considered the said submissions made. In so far as the appellant was fined One Million Kenya Shillings, the sentence was illegal. The appellant ought to have been fined three times the value of the narcotic drugs according to Section 4(a) of the said Act. In this case the appellant was found trafficking narcotic drugs with a street value of Kshs 3,027,000/=. The appellant ought to have been fined three times the value of the said narcotic drugs. I therefore exercise my powers as provided by **Section 354(3)(II) of the Criminal Procedure Code** and set aside the sentence imposed by the trial magistrate and impose an appropriate legal sentence. The appellant is therefore ordered to pay a fine Kshs 9,081,000/= and in addition to serve ten (10) years imprisonment.

The sentence imposed in respect of the second count shall remain as ordered by the trial magistrate.

It is so ordered.

DATED at NAKURU this 17th day of June 2005.

L. KIMARU

JUDGE

