



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL APPEAL NO. 210 OF 2004**

**(From original conviction and sentence of the Senior
Resident Magistrate's Court at Molo in Criminal Case
No. 857 of 2004 –R. K. KIRUI)**

JOHN MWANGI GATITU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, John Mwangi Gatitu, was charged with another with the offence of trafficking 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 offence were that on the 7th of March 2004 at Salгаа Trading Centre along Eldoret-Nakuru road, the Appellant jointly with others not before Court was found conveying 1382 stones of *cannabis sativa (bhang)* which was not in the form of a medical preparation. The Appellant pleaded not guilty to the charge. After a full trial, the Appellant was convicted as charged. The Appellant was fined Kshs 500,000/= or in default he was to serve ten (10) years imprisonment. His motor vehicle and mobile phone were ordered forfeited to the State. The Appellant was aggrieved by the conviction and sentence. He has appealed to this Court against the said conviction and sentence.

The Appellant, in his Petition of Appeal has raised several grounds faulting the decision of the trial magistrate in convicting and sentencing him. The said grounds of Appeal may be summarised as hereunder; that the trial magistrate erred in convicting him on insufficient evidence; that no evidence was adduced to connect the Appellant with the person who was found with the bhang; that the prosecution did not prove its case against the Appellant beyond reasonable doubt; and finally that the trial magistrate did not consider the evidence adduced by the Appellant in his defence before arriving at the said decision convicting him.

At the hearing of this Appeal, Mr Waiganjo Learned Counsel for the Appellant urged this Court to allow the Appeal as the Prosecution had not established its case against the Appellant as required by the law. Mr Koech, learned State Counsel conceded to the Appeal. Mr Koech submitted that there was no sufficient evidence which connected the Appellant to the offence. On the issue of forfeiture, Mr Koech submitted that he would leave the decision to the Court.

The facts of this case are straightforward. On the 7th of March 2004 PW 1 Corporal Evans Getembe and PW 2 Constable Peter Kivuva were manning a road block at Salгаа Trading Centre. The road block had been mounted on the Eldoret-Nakuru Highway. At about 12.00 noon, PW 1 saw a motor vehicle registration number KAN 492A Toyota Corolla approach the road block and then divert into Salгаа Trading Centre. PW 1's suspicion was aroused. He used a circuitous route and approached the motor

vehicle from a direction where he was not be seen by the occupants of the motor vehicle. He managed to arrest the driver of the motor vehicle who was the Appellants co-accused in the magistrate's Court. PW 1 inspected the motor vehicle and found that it was carrying cannabis sativa (bhang). To be precise, it was carrying 1382 stones of bhang. PW 5 Constable Feisal Haji Lumumba testified that he took a sample of the bhang which was recovered to the Government Chemist, Nairobi who confirmed that the stones recovered were indeed cannabis sativa (bhang).

Of particular significance to the Appellant is the evidence of PW 6 Inspector Richard Mogire and PW 7 Chief Inspector Nyale Muga. PW 6 testified that he was the officer in charge of Kayole Police post. He received a call from the Molo CID with a request that he looks for the owner of motor vehicle registration number KAN 492A. He testified that he was able to find the Appellant, arrested him and transferred him to the CID based at Molo. PW 6 testified that when he arrested the Appellant, he did not interrogate him but acted on the basis that he was the owner of the motor vehicle in question and further on the basis that he was assisting the CID Molo to arrest the owner of the said motor vehicle.

PW 7 testified that after the driver of motor vehicle registration number KAN 492A had been arrested, he took over the investigation of the case. He impounded the mobile phone which the driver of the said motor vehicle was using. PW 7 posed as the driver and took calls from a person who identified himself as Njoro or Njoroge. He noted the mobile phone number of Njoroge. PW 7 later rang his police colleague based at Kayole Police post and requested him to arrest the owner of motor vehicle registration number KAN 492A. According to PW 7, the Appellant was arrested and subsequently charged because he was the Njoro or Njoroge whom he had communicated with through the mobile phone. It was PW 7's evidence that the Appellant used the name Njoro or Njoroge to conceal his true identity. It was further his evidence that the person known as Njoro or Njoroge was non-existent. PW 7 upon arresting the Appellant, interrogated him and established that he was the owner of motor vehicle registration number KAN 492A. It is on the said basis that the Appellant was charged with the offence which he was subsequently convicted.

When the Appellant was put on his defence he testified that he was the owner of motor vehicle registration number KAN 492A. He further testified that the said motor vehicle operated as taxi at Eastleigh area in Nairobi. It was his testimony that he had employed a driver called Njoroge Wangohi. On the 5th of March 2004 he was informed by Njoroge that his motor vehicle had been hired out to someone who had travelled to Busia. The motor vehicle had not been returned by the 7th of March 2004. The Appellant became concerned. He inquired of the whereabouts of the motor vehicle from Njoroge.

He was informed that the driver of motor vehicle registration number KAJ 001W had left the vehicle with Njoroge and had taken the Appellant's motor vehicle for the journey to Busia. Njoroge then paid the Appellant Kshs 5000/= being the deposit for the hire of the said motor vehicle. Njoroge informed the Appellant that the motor vehicle was going to be returned by 5.00 p.m. the same day. It was not returned. On the following day, the 8th of March 2004 he went and reported the disappearance of the motor vehicle to the Police at Kayole. He was arrested and brought to Molo CID office. The Appellant denied any knowledge that his motor vehicle was involved in the transportation of the bhang. He further denied that he talked on the mobile phone with PW 7. He further testified that he took the police to the home of Njoroge at Soweto but the police could not trace him. It was his evidence that he never permitted his motor vehicle to be used to transport narcotic drugs

This is a first Appeal. It is the duty of the first Appellate Court to weigh the conflicting evidence and draw its own inference and conclusions both on questions of law and of fact, bearing in mind always that it neither saw nor heard the witnesses and accordingly made due allowance for this. The Appellate Court is further mandated to consider the grounds of appeal put forward by the Appellant before reaching its decision (*See Lukas Okinyi Soki –versus- Republic C.A. Cr. App No. 26 of 2004 (unreported) (Kisumu)*).

In the instant case two pieces of evidence was adduced to support the prosecution of the Appellant. The first was the evidence related to the ownership of motor vehicle registration number KAN 492A. PW 6 Inspector Richard Mogire and PW 7 Chief Inspector Nyale Munga testified that the Appellant told them

that he was the owner of the said motor vehicle. The Appellant admitted in his defence that he owned the said motor vehicle. PW 6 testified that he arrested the Appellant because he got information from the CID Molo that the owner of the motor vehicle should be arrested and taken to Molo, the said motor vehicle having been detained after it was found to be transporting bhang. PW 7 testified that after the Appellant was arrested, he interrogated him and established that he was the owner of the said motor vehicle.

PW 7 further testified that prior to arresting the Appellant, he had impounded the mobile phone which was in possession of the Appellant's co-accused in the lower court and had spoken to someone who claimed that he was called Njoro or Njoroge. PW 7 testified that he established that Njoro or Njoroge knew of the bhang that was being transported by the said motor vehicle. It was further his evidence that after the Appellant was arrested he established that the Appellant, Njoro or Njoroge were one and the same person. It was his evidence that the Appellant has used the name Njoro or Njoroge in the telephone conversation to conceal his true identity. PW 7 further testified that he investigated the matter and found that a person called Njoro or Njoroge did not exist or was non-existent.

On the other hand the Appellant testified that he was the owner of the said motor vehicle which was operated as a taxi in the Eastleigh area of Nairobi. He testified that he had employed someone called Njoroge Wangohi as a driver of the said taxi. At the material time the said motor vehicle was in possession of his driver, the said Njoroge Wangohi. He testified that he was informed by his said driver that his motor vehicle had been hired out to someone who had travelled to Busia. The Appellant was became concerned when the said motor vehicle was not returned on the day that the said driver had indicated that it would be returned. He reported the matter to Kayole Police post but was arrested when he was at the Police post. The Appellant denied that he was aware that his motor vehicle has been used to transport bhang.

On re-evaluation of the evidence adduced by the Prosecution and that which was advanced by the Appellant in his defence, it is the finding of this Court that the prosecution did not establish beyond any reasonable doubt that the Appellant was aware that his said motor vehicle was used to transport and therefore traffic the bhang. It appears that the only reason why the Appellant was charged is because he is the owner of motor vehicle registration number KAN 492A. The Appellant did not deny that he was the owner of the said motor vehicle. It was incumbent upon the prosecution to establish that the said motor vehicle was within the sole control of the Appellant when it was found to be transporting bhang. The explanation given by the Appellant that the said motor vehicle was normally hired out as a taxi is a reasonable explanation in the circumstances of this case of how the said motor vehicle came to be transporting the said bhang. Someone could have hired the said motor vehicle and used the same to transport bhang. The Appellants evidence that the said motor vehicle was under the custody of his driver known as Njoroge where it was hired out was not displaced by the evidence of the Prosecution. The evidence by PW 7 Chief Inspector Nyale Muga that he spoke to someone who identified himself as Njoro or Njoroge by mobile phone confirms the evidence of the Appellant to the extent that there actually existed a person known by the name Njoroge. PW 7 stated that the person known as Njoro or Njoroge was non-existent. In actual fact he did not conduct any investigations to establish whether or not the person known as Njoroge existed.

In the circumstances of this case, it is the finding of this Court that the Prosecution did not establish its case beyond any reasonable doubt. The theory advanced by the Prosecution that it was the Appellant who hired out his motor vehicle for the purposes of transporting bhang did not stand the scrutiny of the evidence adduced in Court. The evidence adduced by the Appellant raises reasonable doubt that he knowingly allowed his motor vehicle to be used to transport bhang. This doubt has to by necessity, be resolved in favour of the Appellant. This appeal must succeed. The Appeal is therefore allowed, the conviction quashed and the sentence imposed set aside. The Appellant is set at liberty unless otherwise lawfully held. The motor vehicle registration number KAN 492A which was ordered forfeited to the state by the trial magistrate is ordered released to the Appellant.

It is so ordered.

DATED at NAKURU this 23rd day of November 2004.

L. KIMARU

AG. JUDGE