



REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL NO 214 OF 2001

FAHIM SALIM SWALEH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Judgment of L M Achode – P M in Mombasa Chief Magistrate’s
Court Criminal Case No 2735 of 2001)

JUDGMENT

The appellant was jointly charged with others not party to this appeal, with 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 convicted and sentenced to imprisonment of 10 years or a fine of Kshs 1,000,000/-. He appeals against conviction only. The appellant was represented by Mr Mburu who argued the grounds of appeal in the amended petition of appeal.

The facts of the case are that on the 11th day of August 2000 at about 10.45 pm at Mariakani Weigh Bridge along Mombasa Nairobi road, jointly with other four persons trafficked in 1854kgms of *cannabis sativa* by conveying the same in motor vehicle registration number KAL 213Y in contravention of the Act above mentioned. Several officers from Anti- Narcotic Unit were at the mentioned road at the Mariakani Weigh Bridge when they stopped the appellant who was accompanied by other persons in the said motor vehicle. Upon inspecting the motor vehicle, the officers found three occupants amidst what appeared to be packages which later were to be alleged to be *cannabis sativa*. The packages according to the evidence, were filling the back seat, the floor beneath the glove compartment and the boot.

The occupants of the said motor vehicle KAL 213Y were arrested and taken to the Provincial Criminal Investigations Office together with the motor vehicle and the packages aforementioned. On investigation, it turned out that the motor vehicle had been hired from accused number 4 in the lower court and that the vehicle belonged to accused number 5 in the lower court. The latter two were also arrested and in all, five people, inclusive of the appellant were charged with the above offence.

The main evidence came from the Anti-Narcotic Police Officers, who had made the arrest; that is to say PW1, PW2 and PW3 and PW 4 who dealt with the samples sent to the Government Chemist. The evidence of the above witnesses was that they found the appellant and two others in the motor vehicle KAL 213Y at the material time carrying the many packages of the stuff that finally was suspected to be *cannabis sativa*.

They stated that the packages were so many and thrown all over the floor of the motor vehicle that those in the motor vehicle could not miss seeing and knowing what was being carried. The 4th accused was

employed as the operator of the KAL 213Y as a taxi operator. There was evidence on the record that he had let the motor vehicle out to the appellant on a selfdrive basis to pick passengers from Mombasa Airport and deliver them at Malindi. He was supposed to sign a written hire contract but he did not do so as he said he was in a hurry and that he would do so when he returned. This was never to happen since the next time he saw the appellant was when three days later, the appellant was under arrest at the Police Station and the taxi was in the police custody.

In the motor vehicle when the police officers stopped it, were appellant, accused three in the lower court – one Joseph Ouma Obonyo, and accused two in the lower court – one Nassir Khamis Timoni. Appellant's defence was that he was only a passenger in the vehicle at the material time, having taken the lift at Nairobi near Coast Bus Station where he found the 2nd accused in the lower court – Nassir Khamis Timoni calling for any possible passengers who wished to travel to Mombasa. He claimed to have responded to the call and paid for the lift. That is where he met 3rd accused in the lower court, Joseph Ouma Obonyo who also paid for the lift and they travelled to Mombasa. Nassir Khamis Timoni who was eventually charged jointly with others in this case absconded and was not tried with others. The 5th accused in the lower court Mahamud Abdala Mohamed was acquitted early in the trial as not being connected with the events forming the case and not being party to what happened after he had let accused 4 Ali Omar Zaburi, have control of the motor vehicle and operate the same as a taxi.

The trial magistrate, after considering the evidence before her, concluded that the appellant who had hired the motor vehicle and accused 3 who claimed he was only a passenger in the vehicle from Nairobi were the real culprits in the case, in the absence of accused 2 who was driving the motor vehicle at the material time. She convicted them upon evidence from PW1, PW2, PW3 and PW4 who were the arresting officers and upon the evidence of the Government Analysis report which confirmed that the stuff which was found inside and in the boot of the motor vehicle was *cannabis sativa*, a narcotic drug and psychotropic substance that offends the provision of s 4 (a) of the relevant Act.

The appellant through his counsel Mr Mburu attacked the conviction on mainly three main grounds:-

- (1) That the evidence contained in the Government Analyst report was wrongly admitted in evidence and that in convicting the appellant on reliance on the report the trial magistrate erred.
- (2) That the trial magistrate erred in fact and law in believing the prosecution witnesses whose evidence contradicted against each others' in material particulars.
- (3) That the conviction was against the weight of evidence and that the evidence on record failed to prove the case beyond a reasonable doubt.

It is trite law that this Court being a first appellate court can be a judge of fact and law but that the Court will only interfere with the trial court findings and conclusions in matters of fact if such findings or conclusions are clearly against the weight of evidence or are against reason or ordinary logic.

There is agreement in this case that the appellant and two others, who were jointly charged with him were found in the vehicle KAL 213Y and that the motor vehicle was carrying the stuff later identified as *cannabis sativa*. The 1st issue then is as to whether the appellant from all facts and circumstances of the case knew or can be taken to have known that the packages carried in the vehicle were *cannabis sativa*.

The trial magistrate concluded that the appellant was sitting in the vehicle and that there were packages of the relevant material all over on the floor below the gloves compartments and on the seats at the back of the vehicle and in the boot. Clearly therefore, the appellant whether he sat at the front seat or at the back seat, must have noticed the packages whose presence in the vehicle has really not been denied by him. There is no evidence that the appellant was blind at the time but even if he were, the smell of *cannabis sativa* as is commonly known, could not have missed disturbing any normal person sitting in the said vehicle.

This Court has no difficulty in accepting the trial magistrate's finding on this point to the effect that the

appellant knew of the presence of what like *cannabis sativa*. The next issue is whether the trial magistrate erred in admitting the Government Analyst's report. The appellant's counsel strongly submitted that the trial magistrate should not have admitted the report in view of the fact that the maker was not called to produce it in evidence. Before considering the issue, I note that the appellant was represented by counsel Mr Magolo. The report was produced into evidence by PW4 54996 Cpl Juliana Muthini. She apparently had received the packages of the material being carried in the motor vehicle registration number KAL 213Y, from one Corporal Mwasi on 15.8.2000 while she was on duty.

On receiving the packages PW4 appears to have prepared a memo form. She stuffed the materials in seven gunny bags after taking a sample from each. She then sent the samples to the Government Chemist after labeling the same. Later the analyst report was ready and she took it. There are important questions, which remain unanswered in PW 4's evidence in the circumstances where Corp Mwasi was never called to give evidence. We understand from the evidence on record that Corp Mwasi was in charge of the exhibits store. He should have been called to confirm that he received the packages in question from PW1, PW2 and PW3. He should also have confirmed or otherwise stated whether he saw PW4 take samples of the stuff, label them and forward them to the Government Chemist and also confirm whether he later received the Government Analyst's report or kept it. He would probably be the right person to produce it after giving evidence establishing the chain of events of receiving the exhibits, sending same to the Government Chemist through some officer, receiving the same back and from whom keeping it in the exhibit store under his control until he produces the same. The result of the failure to call him was that the chain of events in the procedure of obtaining and sending the samples and receiving the report back and producing same, was not maintained. The importance of the failure to maintain the sequence will become apparent in a little while in this judgment.

It is also not clear from PW4's evidence whether she is the person who personally delivered the exhibit samples to the Government Chemist and whether she personally collected it or whether she sent the same through another officer and also received or took possession of the report herself or through another officer. Nor did she establish whom she handed the sample exhibits to at the Government Chemist and from whom the report was received when it was ready.

A careful perusal of the trial magistrate's judgment confirms that the honorable magistrate no doubt relied on the Government Analyst's findings that the stuff which was recovered from the motor vehicle KAL 213Y was *cannabis sativa*.

PW 4 was not the maker of the report, and yet the Court allowed her to produce the report in evidence. It is surprising that Mr Magolo who represented appellant and his colleagues in the lower court, did not raise any objection or even contention to the report's production. The result was that the Government Analyst report sailed into evidence uncontested.

Indeed it is not even clear in these proceedings as to under which provisions of the law it was so produced as neither the prosecution, nor the accused nor even the magistrate appeared to worry about its production. This Court has now the task of assuming that the report may have been produced in evidence under s 77 of the Evidence Act, which states thus:-

“(1) In criminal proceedings any document purporting to be a report under the hand of a government analyst upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The Court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the Court may, if it thinks fit, summon the analyst and examine him as to the subject matter thereof.”

The view of this Court is that under this section the Court could admit the report of the Government Analyst as it did. The section presupposed that the maker of the report cannot be called to prove that he

made the report and that the signature on it is his. To surmount the problem of such proof of authentication of the signature on the report, the provision gives authority to Court to presume that the signature on the report is the genuine signature of the maker. It will be noted, however, that the section preserves the overriding prerogative of the relevant Court to admit or not to admit a report by the use of the word 'may' instead of the imperative word, 'shall' in the last line of subsection (1) of the section. It widens the Court's discretion by specifically providing in sub-section (3) that the Court may before, during or after the Court admits the report nevertheless summon the maker to examine him as to the contents of the report and in my view, to help it decide on admissibility or weight of the report.

It is my further view that the fact that the trial court has discretion to admit the report implies that there are other circumstances under which the Court may refuse to use the report in evidence. Refusing to use the report in evidence would indeed include excluding the report or refusing to admit the same for reasons to be stated which would include the totality of the circumstances surrounding the making of the report, and other legal provisions relating to the production of documents made by person who cannot testify owing to various reasons. These would include the fact that the persons' attendance cannot be procured, or procured without an amount of delay or prohibitive or unreasonable expense. The provisions of s 77 must therefore be read together with the provisions of section 33 and other relevant sections of the Evidence Act where such may apply.

Under section 33, statements written or oral, of admissible facts made by persons whose attendance *inter alia*, cannot be procured or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to be unreasonable, are themselves admissible when such a statement among other conditions, was made in the discharge of a professional duty such as was the case herein. It is however now an established practise and law that before the Court admits such a statement (which in this case, is the Government Analyst report) it has to be satisfied that the necessary conditions for such admission have been proved on the Court record. The person producing the report who in this case was PW4 had to record reasons why the maker of the report, (here the Government Analyst), was not present to produce the report. Was the Analyst dead or completely unavailable? Was his attendance unprocurable completely or unprocurable due to prohibitive or unreasonable expense? And if the maker was completely unavailable to produce the report, would PW4 identify the Analyst's signature? Clearly no such foundation was in this case laid on the record before the report was introduced into evidence. It was imperative that such a foundation should be laid especially in this case where as I have earlier indicated the procedure of securing exhibit samples and sending them to, and receiving the analyst's report or certificate back from the Government Chemist was not reliable. As I have said before in this judgment the trial magistrate could not obviously convict the appellant if the Analyst's report did not prove that the stuff recovered from the motor vehicle KAL 213Y in which appellant was found at the material time, was *cannabis sativa*.

Wrong admission of the report clearly therefore prejudiced the appellant who as a result was convicted when he could not have been so convicted in the absence of the said report. It is my ruling therefore that the trial magistrate erred in law in admitting the Government Analyst's report in the circumstances and manner he did. I accordingly hold that I would allow this appeal on this ground alone.

Incase, I am not upheld in my above finding, I find it necessary to consider other grounds of appeal herein. The appellant's 2nd main ground was that the prosecution witnesses contradicted one another in material particulars. It was argued that the witnesses were not clear as to who among the occupants of the motor vehicle registration number KAL 213Y, was driving the vehicle when the police stopped and arrested them. The trial magistrate found that it did not really matter. There is evidence on record which suggests that the appellant drove half way from Nairobi when the 2nd accused who later absconded, drove to Mombasa and was the person driving when the police stopped the vehicle. I support the trial magistrate view that the contradiction was unimportant where all the occupants were finally charged specifically of the fact that they all were in the motor vehicle with knowledge that it was transporting the prohibited drug. Nor was it really important whether the police check which led to the discovery of the drugs in the said motor vehicle was a random one or whether they had prior information that the particular motor vehicle or other vehicles generally, were transporting drugs to Mombasa. What was important was the fact that the vehicle in which they were traveling was carrying the alleged drugs and that it was with their

full knowledge thereof.

There is adequate evidence on the lower court record that appellant hired the taxi from PW4 who confirmed that the only reason why the appellant did not sign a hire agreement was because the appellant postponed the signing until he would return from the airport. The trial magistrate's conclusions in respect thereof are correct. The final ground of appeal is that the trial magistrate convicted the appellant against the weight of evidence or that the prosecution failed to discharge its burden of proof. I have made a finding that the trial magistrate should not under the circumstances of this case have admitted the Government Analysts report. Without the said report in evidence, the remaining evidence on record would only prove possession of the 1236 packets of a stuff that looked like the offending drug plant. There would be no evidence that the packages contained *cannabis sativa*. The charge would thus fail. The effect of my finding that the admission of the report was wrong, has the effect of taking away the offending evidence as against the appellant and the other accused in the lower court.

The upshot of all that has been canvassed above is that this appeal succeeds. The appellant's conviction is quashed and the sentence of the fine of kshs 1,000,000/- or 10 years imprisonment is hereby set aside.

The appellant is also hereby set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 18th day of December, 2001

D.A. ONYANCHA

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JUDGE