REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 12 OF 2020

HUSSEIN SAID ABDI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment by Hon. J. O. Alambo Principal Magistrate

in Kehancha Resident Magistrate's Court Criminal Case No. 183 of 2018

delivered on 13/8/2020).

JUDGMENT

Hussein Said Abdi, the appellant herein, was convicted for the offence of trafficking in Narcotics contrary to Section 4 of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 (the Act), by Resident Magistrate Kehancha on 13/8/2020.

The particulars of the charge are that on 18th February 2019, at Kwa Makera Village, Mabera Division, Kuria West, Migori County, trafficked in narcotics by transporting cannabis sativa (bhang) to wit 10Kgs with a street value of Kshs. 100,000/= using motor cycle registration number KME Q834 X Honda in contravention of the Act.

On 19/8/2020, he was sentenced to serve ten (10) years imprisonment and in addition, to pay a fine of Kshs. 100,000/= in default one year in prison.

The appellant is dissatisfied with the whole judgment and filed this appeal through the firm of Abisai Advocate. On 28/8/2020, the appellant cited fourteen (14) grounds of Appeal which can be summarized into the following broad grounds:

1) that the court erred in allowing the production of the Government analysist report by a witness (PW3) who was not the author without an explanation;

2)that the court failed to ascertain whether and how the exhibits were weighed and how the 10Kgs was arrived at;

3)that the court erred by not considering that the informer was a crucial witness and should have been called as a witness;

4) that the court failed to consider the appellant's defence;

5) that the court erred in relying on unreliable and discredited evidence;

6) that the sentence is excessive;

The appellant therefore prays that the conviction be quashed and sentence set aside.

The court directed that the appeal be determined by way of written submission. **Ms. Okota,** the appellant's counsel filed her submissions on 17/6/2021 while Mr. **Kimanthi, Senior Assistant Director, DPP** filed his submissions on 23/6/2021.

In her submissions, Ms. Okota basically faulted the court's decision for allowing the production of the Government Chemist Report by PW3,

the investigating officer. Counsel relied on Article 159 (2) of the Constitution that the production of the report by a person other than the maker of the report prejudiced the right of the appellant in that he was not accorded sufficient time to prepare for his case; that since the appellant was acting in person, the court should not have allowed the prosecution to proceed with an illegality of producing the report through the investigating officer. Counsel relied on several authorities where the courts have rejected the production of medical evidence by other witnesses other than the maker of the reports. In **Sibo Makovo =vs= R (1997) eKLR** the court observed that the court record had not shown that the contents of the P3 form were explained to the accused nor was it shown that the maker was unavailable to produce the P3 form and that no foundation had been laid for production of the P3 form by another person other than the maker.

In Julus Karisa Charo =vs= Republic (2005) eKLR, the court observed that ordinarily, expert evidence should not be produced by police officers because the accused person and his counsel may need to cross examine the person called to produce the document.

In **James Bari Munyoris =vs= Republic (2017) eKLR,** the court said that the prosecution must demonstrate that it took due diligence to secure the attendance of the maker of the document but failed.

Ms. Okota urged that the investigating officer was not competent to produce the expert report as he was not versed in the area to be able to table the evidence before the court.

Mr. Kimanthi opposed the appeal and argued that the prosecutor explained to the court why he wanted the investigation officer to produce the expert report and when asked if he had any objection, the appellant said he had no objection and that the appellant has not demonstrated what prejudice he has suffered by the investigation officer producing the report; that the appellant only challenges the process of producing the report but not the contents of the report; that though counsel relied on Article 159 of the Constitution that justice be done to all irrespective of status, yet the same Article provides that justice must be administered without undue regard to procedural technicalities; that Article 50 also promotes the expeditious disposal of matters and that is what the prosecutor alluded to when applying to have the report produced by a person other than the maker .

Counsel also submitted that under Section 77 of the Evidence Act, reports of the Government analysist, and Geologist 'may' be produced by the maker meaning that it can be produced by other persons; that the evidence of PW1 and PW2 who arrested the appellant with a substance that turned out to be cannabis sativa has not be challenged. As regards the sentence, counsel urged this court to correct the error made by the trial court in not sentencing the appellant to Kshs. 1 Million fine in addition to the Prison sentence in accordance with Section 4(a) of the Act.

I have duly considered the grounds of appeal, the rival arguments and the decisions relied upon.

Ms. Okota seemed to have abandoned the other grounds of appeal. The main contention by the appellant is the production of the expert evidence by the investigating officer instead of the maker. Section 77 of the evidence Act gives the court the discretion to admit into evidence reports of expert witnesses. Section 77 of the Evidence Act provides as follows:

> **"In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.**
>
> **The court may presume that the signature to any such documents 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.**
>
> **When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be and examine him as to the subject matter thereof."**

Ordinarily, the prosecution must call the maker of the expert report. However, in instances where the prosecution intends to call another person other than the maker, like for example in this case, the investigation officer, the prosecution has to lay a basis and has to demonstrate that it has done due diligence to secure the attendance of the maker of the report to no avail and that the delay in wailing for the expert will cause unnecessary delay. See **James Bari Munyori's** case (supra). In this case, the prosecutor addressed the court indicating that the Government Chemist was a difficult witness to get, being the only one in the area and that he covers a large area. However, the prosecutor did not demonstrate that he had done any due diligence. For example, the court was not told when is the earliest date that the witness would be available. The court does appreciate that the appellant was not represented then but when asked whether he objected to the investigating officer producing the report, he did not object. The appellant went ahead to cross examine PW3 on what he did, i.e. weighing of the substance he was arrested with. In his submissions, the appellant has only challenged the process of admitting the expert report in evidence. There is no evidence that any prejudice has been occasioned to the appellant. He has not pointed to the prejudice that he has suffered from the contents or findings of the expert in the report. Even if due process was not exactly followed, the appellant did not suffer any prejudice as the contents of the report remain unchallenged. The evidence of PW1 and PW2, the arresting officers, was never challenged by the defence counsel. The appellant has only challenged the process but not the substance. I am guided by Article 159, that the court should not dwell on formal technicalities like this one. I find no reason to interfere with the trial court's finding there being no prejudice occasioned to the appellant.

As regards whether the sentence is excessive, Section 4 (a) of the Act provides for prison sentence of not less than ten (10) years together with fine of Kshs. One Million shillings. Mr. Kimanthi urged this court to increase the fine to One Million shillings. However, in Criminal Appeal No. 62 of 2015, **Moses Banda Daniel =vs= Republic,** the Court of Appeal when considering Section 4(a) of the said Act said that they have held that the said Section is discretionary. In that case, the Court of Appeal reduced the mandatory sentence imposed by the trial court. This court would not have reason to interfere with the trial court's discretion to fine the appellant Kshs. 100,000/=. In any event, the Prosecutor never notified the appellant that he would be applying for enhancement of the sentence to increase the fine. I find no plausible reason to interfere with the sentence.

In the end, I find that the appeal lacks merit and it is hereby dismissed in its entirety.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 4TH DAY OF NOVEMBER, 2021

R. WENDOH

JUDGE

Judgment delivered in open court and in the presence of: -

Mr. Kimanthi. State Counsel

Ms. Okota for Appellant

Ms. Nyauke Court Assistant