REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL 46 OF 2016

(From original conviction and sentence Criminal Case. 428 of 2015 of the Chief Magistrate's Court at Kerugoya – Andayi W. F. CM)

SIMON WARUI NDAMBERI .....1ST APPELLANT

DAVID KAIRU GITARI.....2ND APPELLANT

V E R S U S

REPUBLIC.....PROSECUTOR

JUDGMENT

1. The appellants Simon Warui Ndambiri and Davd Kairu Gitari were charged with the offence of Trafficking in Narcotic Drugs contrary to **Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act**before the Chief Magistrate's Court at Kerugoya Criminal Cases No. 428/2015 and 625/2015 which were consolidated. After a full trial they were convicted and sentenced to life imprisonment.

2. The appellants were dissatisfied with both the conviction and the sentence and have filed these appeals, **No. 47/2016 David Kairu Gitau – v- R and Np. 46/2016 Simon Warui Ndamberi –v- R** which have been consolidated and proceeding in File No. 46/2016.

3. The 1st appellant has raised the following grounds in his amended Petition of Appeal dated 22/5/2019.

1. That the learned trial Magistrate erred in law and in fact by failing to appreciate that the evidence adduced did not support the charge.

2. That the learned trial Magistrate erred in law and in fact in failing to appreciate that the conviction was against the weight of evidence adduced.

3. That the learned trial Magistrate erred in law and in fact in there were gaps and discrepancies regarding the identification of the appellant.

4. That the learned trial Magistrate erred in law and in fact in replying on the statements by P.C Obonyo who was deceased.

5. That the learned trial Magistrate erred in law and in fact by misinterpreting Sections 33, 62 and 63 of the Evidence Act (Cap) Laws of Kenya.

6. That the learned trial Magistrate erred in law and in fact by disregarding the defence as tendered by the appellant.

7. That the learned trial Magistrate erred in law and in fact by failing to consider the defence or give reasons for his judgment.

8. That the learned trial Magistrate erred in law and in fact by shifting the burden of proof to the appellant.

9. That the sentence was manifestly harsh and excessive regard being made to all circumstance of the case.

10. That the learned trial Magistrate erred in law and in fact in failing to find that the particulars of the charge were not proved beyond reasonable doubts.

11. That the learned trial Magistrate erred in law and in fact in failing to find that cannabis sativa was not narcotic drug

under the 2nd schedule of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 and therefore the charge before court did not disclose any offence.

4. He prays that the appeal be allowed, conviction be quashed and the sentence be set aside.

5. The 2nd appellant David Kairu Gitari raised Ten grounds of Appeal in his petition of appeal. Having considered his grounds, they are word for word the same with those filed by the 1st appellant. The only additional ground No. 8 where he has stated that –

"That the learned magistrate did not think wise to call the owner of the car to testify."

6. In the circumstances, I will not reproduce the grounds filed by the 2nd appellant as those of the 1st appellant will suffice.

7. The court gave directions that the appeal be disposed off by way of written submissions. For the 1st appellant, submissions were filed by Joshua Magee Wa Magee Maina. He submits on ground 10 & 11 that the charge before the sub-ordinate court did not disclose an offence known in law and could therefore not sustain a conviction. This is based on the fact that the particulars of the charge stated that the applicant trafficked by conveying on 383 (Three Hundred and Eighty Three) stones of cannabis sativa. The bone of contention is that cannabis sativa is not a Narcotic Drug as defined under **Section 2 of the Narcotic Drugs and Psychotropic Substances Control Act No. 4/1994**which is defined to mean any substance specified in the first schedule or anything that contains any substance specified in that schedule.

8. Mr. Mage has submitted that under Schedule -1- there is no drug known as Cannabis Sativa. The only Narcotic Drugs listed in the 1st schedule are:-

a) Cannabis (Indian Hemp)

b) Cannabis Resin (resin of Indian Hemp).

9. The expert report states that what was taken to the Government Chemist was plant material identified as cannabis.

10. He further submits that cannabis is listed in the 3rd schedule of the Narcotic Drugs and Psychotropic Substances (Control) Act as a prohibited plant not as a Narcotic Drug. It is not subject to **Section 4(a) of the Act** under which the appellant was charged.

11. With regard to grounds 1, 2, 3, 4, & 5 Mr. Magee submits that the witnesses PW 1 & 2 did not implicate the 1st appellant. That the only evidence which implicated him was that of P.C Obonyo who was not called as a witness as he was deceased by then and only his statement was produced. He submits that the evidence was hearsay and therefore the trial Magistrate erred by relying on the statement to convict. The statement was produced under **Section 33(6) of the Evidence Act** on an application made by the State. He submits that the trial Magistrate erred by allowing the statement to be produced as the section covers entries or memoranda in the cause of business but does not include witness statements.

12. It is further submitted that the appellant who was unrepresented was prejudiced as he did not understand the contents of the statement. He further impugns the statement as the said P. C Obonyo had not indicated that he had recognized the suspect who ran away at the time the offence was committed but later said he know the 1st appellant very well. It is further submitted that **Section 74 A(6) of the Narcotic Drugs and Psychotropic Substances Control Act** was not complied with.

13. It is further submitted that the defence of the appellant was not considered and the trial magistrate erred by shifting the burden of proof to the appellant.

14. He further submits that the sentence was excessive since it was the maximum sentence.

15. The 2nd appellant has copy pasted the submissions by Mr. Magee only adding that the owner of the vehicle exhibit -7- was not called. I will therefore consider the submissions which I have listed above.

16. For the state it was submitted that the charge was proved beyond any reasonable doubts. Mr. G. Obiri Assistant Deputy Public Prosecution's counsel submits that the charges by the prosecution met the criteria set under **Section 137 of the Criminal Procedure Code** as it has set out the charge and such particulars necessary to make the accused to understand the charge. That there was sufficient evidence to sustain the offence of trafficking in narcotics. The burden was not shifted as alleged. He prays that the appeal be dismissed. I have considered the appeal. The law is trite following the various authorities by the Court of Appeal that a 1st appellate court has a duty to re-evaluate and re-consider the evidence which was adduced before the trial court and come to its own independent finding but bearing in mind that it did not have the advantage of seeing or hearing the witnesses testify and leave room for that. This was the holding in **Okeno –v- R (1972) E. A 32.**

17. I will proceed to re-evaluate the evidence. I will start with the evidence against the 1st appellant who was the 2nd accused in the lower court. The evidence which was before the learned trial Magistrate against the 2nd appellant was insufficient. PW1 & 2 were clear that they never saw him at the scene where they arrested the vehicle and recovered Narcotic Drugs. It was their evidence that 2nd appellant was identified by P.C Obonyo, now deceased who they said knew the 1st appellant before. There was no evidence that the appellant was identified at the scene. This is because when the statement of P.C Obonyo was produced and read in court, had no such evidence that he had identified the appellant at the scene. It is only when he arrested the 1st appellant much later and recorded a further statement after arresting

the 1st appellant within the Law courts that he stated that the 2nd appellant had escaped from the scene. I find that nothing much can be said about the evidence. It was insufficient and the trial Magistrate erred by relying on the evidence to convict. I agree with counsel for the appellants Mr. Magee that the trial Magistrate erred by relying on the uncorroborated evidence in P.C Obonyo's statement to convict. None of the witnesses PW-1- & PW-2- had identified the 2nd appellant at the scene. They were the only eye witnesses called. PW-1- stated that when cross-examined by 1st appellant –

> ***"I cant say I saw you that date. You were arrested later in court"–*** Page 13 line 6.

> ***"I did not see you because I was concentrating in driving the motor vehicle----"***Page 13 line 17.

As for PW-2- he stated that –

> ***"I did not arrest you. You were arrested by a difference officer. I cant tell if you had differences with the Officer."***Page 18 line 16.

18. This offence was committed in broad light. The fact that PW1 & PW2 did not identify the 1st appellant at the scene, and the statement of P.C Obonyo did not mention that he had recognized him but he escaped raised serious doubts on the involvement of the 1st appellant in the crime. **Article 50(2)(a) of the Constitution** provides that a person has a right to be presumed innocent until proved guilty. It is a right to fair trial. In criminal matters, the burden is on the prosecution to prove the case beyond any reasonable doubts. In this case there were doubts which ought to have gone to the benefit of the 1stappellant.

19. I have considered the statement of P.C Obonyo which was produced following an order by the trial Magistrate under **Section 33 of the Evidence Act** as there is no prejudice to the 1stappellant. I must however state that the trial Magistrate erred by allowing the production of the statement under the Section 33 Evidence Act. The section has very elaborate situations under which a statement made by a person who is dead can be produced in evidence. It has not made provision for the production of the witness statement of a deceased witness in a criminal trial. The production of the statement is prejudicial as the accused would not have an opportunity to test it in cross-examination. My view is that the statement could not be produced under **Section 33 of the Evidence Act.**

20. The conviction of the 1st appellant was based on hearsay. The conviction of 1st appellant was against the weight of the Evidence. I need not consider the other grounds. The 1stappellant was entitled to an acquittal.

21. As against the 2nd appellant, there was overwhelming evidence adduced against him to prove that he was involved in the commission of this offence. I will therefore consider ground 10 of his appeal where he states that the trial Magistrate erred in failing to find that cannabis sativa was not a narcotic drug as defined under **Section 2 of the Narcotic Drugs Psychotropic Substances Control Act No. 4 of 1994(to be referred to as the Act).** The appellant was charged with trafficking in Narcotic Drugs Contrary to **Section 49(a) of the Act** defines **"Narcotic Drug"** as follows:-

> ***"means any substance specified in the 1st schedule or anything that contains any substance specified in that schedule."***

22. For the prosecution to discharge the burden of proof that the appellant was trafficking in Narcotic drugs, they must prove that the substance trafficked is specified in the 1st schedule. By charging the appellants with trafficking in Narcotic drugs, it must be assumed that the drug is one which is to be found in the 1st schedule as a narcotic drug. A perusal of the 1st schedule of the Act the only drug referred to as cannabis is cannabis (Indian Hemp) and cannabis resin (Resin of Indian Hemp). **Section 2 of the Act** defines ***"Cannabis" as – "means the flowering or fruit tops of the cannabis plant (excluding the seeds and the leaves when not accompanied by tops) from which the resin has not been extracted by whatever name they maybe designated."***

On the other hand cannabis plant is defined under **Section 2 of the Act**as –

> ***"means any plant of the genus cannabis by whatever name called and includes any part of that plant."***

23. Now cannabis sativa is a plant in the cannabis genus. It is one of the many species of cannabis and is therefore a narcotic drug. Cannabis is from the plant cannabis sativa also known as marijuana. It fits in the definition of cannabis quoted above as a genus of cannabis and is therefore a narcotic drug. I am therefore not persuaded by the decision of Khamoni –J In **Cr. Appeal No. 149/02 H.C Nyeri** as the Act has given various definitions cannabis to include any genus by whatever name called and includes any part of that plant. In **Samuel Mutuku –v- R (2016) eKLR Justice P. Nyamwea** stated:-

> ***"Section 2 of the Act defines a 'Narcotic drug' as any substance specified in the first schedule or anything that contains any substance specified in that schedule and*** *'Psychotropic substance'* ***as any substance specified in the second schedule or anything that contains any substance specified in that schedule. I have perused schedule -1- of the said and cannabis (Indian Hemp) and cannabis resin (Resin of Indian Hemp) are among the narcotic drugs listed therein. Section -2- of the Act in addition defines cannabis as, means the flowering or fruiting tops of the cannabis plant excluding the seeds and leaves when not accompanied by tops) from which the resin has not been extracted by whatever name they may be designated, and*** *'cannabis plant'* ***as any plant of the*** *'genus cannabis by whatever name called and includes any part of that plant 'cannabis sativa'* ***is a plant in the cannabis genus and is therefore a narcotic drug and is mainly used torefer to cannabis hemp ----- cannabis sativa is clearly a narcotic drug".***

24. Cannabis Sativa is a Narcotic Drug. The prosecution produced an expert report **Exhibit -4-** at Page 42 of the record. The report says

that the exhibit received was Three hundred and Eighty Three (383) of plant material. The report states –

> ***"The plant material was examined and found to be cannabis which falls under the first schedule of the Narcotic Drugs and Psychotropic Substances (control) Act 1994."***

25. The prosecution therefore discharged the burden to prove that the exhibit was cannabis. This is included in the 1st schedule of the Narcotic Drugs and Psychotropic Substances Control Act. The appellant never raised the issue before the trial court. **Section 382 of the Criminal Procedure Code** provides:-

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

26. Though the prosecution proved that the plant material was cannabis, the appellant had an opportunity to raise the issue but did not.

27. I will now consider other grounds in the petition by 2nd appellant. The appellant submits that the evidence did not support the charge. He submits that P.C Joseph Obonyo was not called to testify. I have dealt with the issue of the evidence of the late P.C Obonyo above. However the prosecution gave sufficient evidence to prove that the 2nd appellant was involved. Evidence of PW-1- & -2- is consisted and proves that the 2nd appellant was one of the occupants of the motor vehicle which was loaded with the drugs and took off on seeing the police vehicle. PW-2- P.C Morris Kimotho testified he received a call from an informer that a motor vehicle was distributing bhang. He proceeded to the scene and on a feeder toad he saw motor vehicle KAR 121 S Toyota Saloon Green in colour coming from the opposite direction. It had four occupants. The driver of the vehicle jumped our leaving the vehicle in motion and took off. The vehicle hit the police vehicle on the bumber. The other three occupants also took off. He managed to arrest David Kairu Gitari the appellant. He opened the motor vehicle boot and in the presence of the 2nd appellant and saw assorted stones of bhang. There were a White sack in the back seat of the car which contained assorted stones of bhang. At the police station they were counted and in total there were 383 stones of cannabis. PW-2- prepared an exhibit memo form and forwarded the samples of exhibit to Government Chemist. A report from the Government Analyst **Exhibit 4** confirmed that the exhibit was cannabis. This testimony of PW-2 was corroborated in all material particulars by the testimony of PW-1-.

28. The 2nd appellant in his defence testified that he was at the scene pushing the motor vehicle which had stuck in the mud. He stated that he was carrying a panga and sack as he went to cut grass. The trial Magistrate stated.

Page 33 Line 13 stated:-

> ***"The 1st accused person insists that he had a panga and a sack for gathering grass when he was arrested. However, he never put that issue to any of the prosecution witnesses. Moreover there is no indication from his testimony as to where this items went upon his arrest. In that regard I find that this was only a story he made up as a way of his defence".***

29. In the end the trial magistrate found that the charge was proved beyond any reasonable doubts. I find that the decision by the trial Magistrate was proper as it was based on cogent evidence tendered before him by the prosecution. The trial Magistrate considered the defence of the 2nd appellant and came to the inevitable conclusion, that a guilt of the 2nd appellant.

30. The second appellant has submitted that **Section 74 A of the Act** was not complied with.

31. The Court of Appeal in the Case of **Moses Banda Daniel –v- republic Cr. Appeal 6/2015 – (2015) eKLR.**

Observed that –

> ***"The section uses terms where practicable, if any, and stated that the use of the words like where practicable and if any – convey the reading that the procedure is not mandatory but directory and the use of the word shall must be so interpreted. A procedure provision would be regarded as not mandatory if no prejudice is likely to be caused to other party or there is substantial compliance with the procedure"***

In Joshua Atila & Another –v- republic (2016) eKLR C.A. The Court of Appeal stated:-

> The objective of Section 74A was meant to deal with instances where the exhibits seized disappeared or were tampered with before conclusion of trial. ***"However in the instant case, the offence related to trafficking in 2200 stones of cannabis sativa. This was confined by the Government analyst through the exhibits produced before court. The 2200 stones were availed as exhibit and the applicant raised no complaint as to tampering. There was no prejudice occasioned to the second appellant in the circumstances."***

32. The amount of the drug and its value was indicated on the charge sheet. The evidence on how the drug was recovered was given by PW1 & 2. The report of the Government Analyst confirmed that the plant material was cannabis. PW-2- testified that the stones were

counted at the police station in the presence of 2nd appellant. A Memo Form was prepared and exhibits forwarded to the Government Chemist for analysis. The appellant was not prejudiced.

33. The appellant had not raised the issue of the motor vehicle in his grounds of appeal. In his submissions he states the owner of the motor vehicle was not called. PW-2- testified that the vehicle had fake number plates as the chassis and registration number were for KAR 390 X Toyota Corolla. There was no prejudice occasioned to the 2nd appellant by failure to call the owner of KAR 121 S. It is the number plates with registration of his motor vehicle which were used, not his motor vehicle.

34. Finally the 2nd appellant submits that the sentence was harsh. The appellant was charged under **Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act** which provides:-

> ***"Any person who trafficks in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence and liable—***
>
> ***(a) in respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and, in addition, to imprisonment for life; or"***

The prosecution proved that the 2nd appellant was trafficking in narcotic drugs by conveying. I have considered the case of **Mohamed Famau Bakari –v- R (2016) eKLR.**

It was stated:-

> ***"This court, in addition but more recent decisions of Carolyne Anna Majabu –v- R Cr. Appeal No. 65/2014, Kabibi Kalume Katsui –v- R Msa Cr. App No. 90 of 2014 and Anthony Mbuthi Kasyula –v- R Cr. Appeal No. 134/2012 has reiterated that the word liable is Section 4(a) of the Act merely provides for a likely maximum sentence and allows a measure of discretion to the court in imposing a sentence with a maximum limit being indicated."***

35. The court further stated that depending on the quality and value of the drugs the past relevant record of the accused, the court retains its discretion to impose as it did ------ the maximum sentence.

36. The 2nd appellant was charged with trafficking in 383 stones of cannabis sativa by conveying, with a street value of Kshs 191,500/-.

37. The 2nd appellant was a 1st offender. The sentence passed was the maximum provided under the section. The sentence of life imprisonment against the 2nd appellant who was a 1st offender was manifestly harsh. I will therefore interfere with the sentence.

In Conclusion.

The charge against the 1st appellant Simon Warui Ndamberi was not proved beyond any reasonable doubts. I therefore allow his appeal, set aside the sentence and set him at liberty in this matter unless otherwise lawfully held.

38. As against the 2nd appellant David Kairu Gitari, the appeal against conviction is without merits and is dismissed. The appeal on the sentence is allowed and the sentence is set aside. It is substituted with a sentence of Twelve years in addition to a fine of Kshs 500,000/- in default imprisonment for One Year.

The sentence to run from the date he was remanded in custody that is 20-7-2015.

Dated at Kerugoya this 13thday of February 2020.

L. W. GITARI

JUDGE