



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 7 OF 2019

RONALD NYAGA KIURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant herein was charged with three counts as follows;

COUNT I: Trafficking in Narcotic Drugs contrary to Section 4 (A) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.

COUNT II: Selling Alcoholic Drinks without a license contrary to Section 7(1) as read with Section 62 of the Alcoholic Drinks Control Act No. 4 of 2010.

COUNT III: Selling Alcoholic Drinks in sachets contrary to Section 31 (1) as read with Section 31 (3) of the Alcoholic Drinks Control Act No. 4 of 2010.

He pleaded not guilty to all the three counts and in its judgment delivered on the 1st March, 2019 he was convicted and sentenced to 14 years imprisonment 3 months imprisonment and 3 years imprisonment in the three counts respectively. The court ordered that the sentences should run concurrently.

This being the first appeal, the court should re-evaluate the evidence adduced before the trial court and make its own independent conclusion but it should remind itself that it did not have the benefit of seeing or hearing the witnesses testify.

The prosecution called six (6) witnesses in total. The appellant testified on oath and called two witnesses in support of his defence.

PW1, Sgt. Josphat Sakwe testified that, on the 18th day of July 2015 at 1520 hours, he was at Ena market in the company of APC Shihanji, PC Langat, APC Asuke and 2 drivers on two motor vehicles and they were on patrol. He spotted the appellant on motor cycle KAL 597U Yamaha white and there was a blue crate on the motor cycle. He approached him with his colleagues on the two motor vehicles from different directions.

It was his further evidence that the appellant tried to accelerate the motor cycle but it could not start and they arrested him. He conducted search on the crate which had two paper bags (yellow in colour and he recovered 8 stones of substance implicated to be cannabis (bhang) and 20 sachets of “machore” a local brew. That Stg. Shihanji conducted a body search and he recovered Kshs. 3,000/= in cash which they suspected to be the proceeds of sale of the business. They escorted the appellant to Runyenjes Police Station.

APC Boniface Asuke gave evidence as PW2. His evidence was similar to that of PW1. He stated that they had gone on patrol within Ena market and he was in the company of Jessel Mbatia (driver), PC Langat, PC Shihanji and PC Thurania (driver) when they saw the appellant selling “machore” to a crowd of people and he was on a motor cycle with a blue crate and a yellow paper bag. They surrounded him, conducted a search during which they recovered bhang, sachets and some Kshs. 3,000/=. He stated that he knew the appellant previously and he had been arrested and charged for selling illicit brew called “machore”. He further stated that he was aware that the appellant sells the brew and that police in Embu had raided his premises and found brews but he had escaped.

Steve Matinde, gave evidence as PW3. He is a Government Analyst. He stated that he examined some plant materials in 8 bundles weighing 950 grammes wrapped in a khaki envelope which had been submitted to him by Philip Mbithi No. 83510 for analysis. He examined and found it to be cannabis under first schedule of narcotic drugs and psychotropic substances 4/94 and he prepared a report on the 6th August, 2015.

PW4, Maryann Chege who is also a Government Analyst stated that She analyzed an exhibit memo of 18th July, 2015 which was taken to her, on the 31st July, 2015 from Runyenjes Police Station for her to determine if it was traditional liquor. She analyzed and made a report dated the 8th November, 2015. The result of the analysis was that it had alcohol and from the smell, it was traditional liquor.

PW5 PC. Joel Langat gave evidence similar to that of PW1 and PW2 on how they went on patrol within Ena Market and found people gathered near a building and someone was on a motor cycle and the people were consuming drinks and sachets. On seeing them, the people ran into maize plantation but the owner of the motor cycle who is the appellant could not run because it refused to start. They arrested him and escorted him to Runyenjes police station. He escorted the samples to the government chemist and for analysis and he received the report dated 8th November, 2015. He stated that the appellant had been selling “machore” and he employs people or he sells it himself in sachets. That on previous occasions, he would escape using his motor cycle to evade arrest.

PW6, Adan Hussein, stated that he was at the report office on the 18th July, 2015 at between 3.20 - 4pm when two prisoners were taken to the station by PC Shihachi and PC Langat. They were the appellant herein and Patrick Mutingi. He conducted a search and placed the appellant in the cells and the appellant voluntarily surrendered Kshs. 19,550/= in form of coins amounting to Kshs. 3,000/= and notes for Kshs. 16,550/= which he later returned to the appellant and he signed for it.

Jackson Shihachi who was the Investigating Officer testified as PW7. He reiterated the evidence given by PW1, PW2 and PW3 and produced motor cycle registration number KAL 597U Yamaha white in colour, a blue crate and two yellow paper bags. It was his evidence that upon carrying out a quick search, they recovered 51 sachets of “machore” and 8 stones of bhang. The accused was also holding cash in coins for which was in a transparent polythene bag. They arrested the accused and escorted him to Runyenjes police station where they booked him in the occurrence book and he was handed to the report office with the money which was in the form of coins and notes but PW7, later took the coins as he believed it was the sale proceeds. He prepared the exhibit memo form and forwarded the 8 stones of bhang to the government chemist for analysis.

The appellant on being put on his defence gave a sworn statement and called two witnesses. He stated that on the 18th July, 2015, at 3.30pm he was at home sleeping since he was unwell when his wife told him there were some police officers outside who were calling him. They told him that they had been ordered by the County Commissioner to arrest him, which they did and took him to Runyenjes police station. They took his motor cycle which was in the store and Kshs. 90,000/= which was in his trouser. At the OB he gave out Kshs. 19,500/= which he had, plus some coins but which money was later given back to him. He was charged in court on the 20th July, 2015.

He denied having alcohol or bhang in his possession at the material time of his arrest.

DW2 Patrick Mutugi Njagi stated that he was arrested on the 18th day of July, 2015 at his home near Ena bridge after which the appellant was also arrested on the same day at this home also. It was his evidence that he was not drunk when he was arrested and that the accused was not selling alcohol and he had no bhang or liquor in sachets. That the motor cycle was recovered from the accused’s home and ferried to AP police post.

The wife to the accused testified as DW3 and stated that the accused was arrested at home on the 18th day of July 2015 and that the police officers who arrested him said that the County Commissioner had ordered his arrest. She stated that he did not have bhang and he was not selling “machore” and that the motor cycle was taken from the house.

Upon hearing the case, the learned Magistrate convicted the appellant in all the three counts and sentenced him to 14 years, 3 months and 3 years imprisonment respectively, which sentences he ordered were to run concurrently.

The appellant being dissatisfied with both the conviction and sentence appealed to this court and has listed several grounds of appeal in his petition of appeal dated 5th day of March, 2019 and in the supplementary petition of appeal dated the 19th June, 2019.

Parties filed written submissions to the appeal which this court has duly considered together with the authorities cited. The court has also re-evaluated the evidence adduced before the trial court.

Looking at the grounds of appeal, it is clear that the appeal is both on both conviction and the sentence. In his submissions, the appellant has identified the errors that he belief, the learned Magistrate made in arriving at his finding. First, he submitted that the charge sheet did not disclose how the appellant trafficked the purported narcotic drugs. He contended that, the charge sheet lacked specificity in view of the definition of the term under section 2(1) of the Narcotic Drugs and Psychotropic Substances Control Act 1994.

It was further submitted that according to Section 2(1) supra, prosecution needed to proof;

- a) *The nature of trafficking.*
- b) *The conduct of the appellant was the purpose of the trafficking.*
- c) *The substance was a narcotic drug or psychotropic substance.*

The appellant relied on the case of Gabriel Ojiambo Nambesi vs. Republic (2007) eKLR wherein the court held that;

“In our view, for the charge sheet to disclose the offence of trafficking, the particulars of the charge must specify clearly the conduct of an accused person which constitutes trafficking. In addition, and more importantly, the prosecution should at the

trial prove by evidence the conduct of an accused person which constitutes trafficking. in this case, neither the charge sheet nor the evidence disclosed the dealing with the bhang which constituted trafficking. The learned trial Magistrate did not even deal with that aspect of the case.”

And the case of David Andoh vs. Republic (2009) eKLR in which Ojwang J. (as he then was) stated;

“Even though in the instant case, the appellant was caught as he entered Jomo Kenyatta International Airport with his offending cargo from abroad, and so, quite obviously, he could only have trafficked the narcotic drug by conveying it in the aircraft across international boundaries, still it remains true that this detail was not laid out in the charge sheet; and so the principles so well set out in the judgment of Mr. Justice Onyancha in Wanjiku vs. Republic (2002) 1 KLR 825 were not complied with. Those principles are an important element in the trial rights of the accused; section 77(2) of the Constitution which guarantees them in the following terms;

Every person who is charged with a criminal offence; -

a) Shall be presumed to be innocent until he is proved or had pleaded guilty.

b) Shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged.

On this issue, the court has perused Section 2 (1) referred to herein above and the definition given therein of the word trafficking and has noted the broad nature of the definition of the said word under the section. In count 1, the appellant was charged with the offence of trafficking narcotic drugs. Under the particulars of the charge, it was alleged that he trafficked 8 (eight) stones of cannabis sativa (Bhangi) in contravention of the Act.

The charge sheet does not specify the nature of the trafficking that the appellant is said to have involved himself in. In the evidence adduced before the trial court, it was alleged that he was selling narcotic drugs but there was no sufficient evidence that was brought before the court as proof of that allegation. The police officers just suspected that he was selling the same because of the money that they recovered from him which was Kshs. 3,000/= in the form of coins.

The appellant also submitted that there was no certificate of the market value of the cannabis sativa as required by the law. Section 86 (1) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994, provides for valuation of goods for penalty as follows: -

1) Where in any prosecution under this Act any fine is to be determined by the market value of any narcotic drug, Psychotropic substance or prohibited plant, a certificate under the hand of the proper officer of the market value of such narcotic or psychotropic substance shall be accepted by the court as prima facie evidence of the value thereof.

My understanding of Section 86(1) is that where the court convicts an accused person under Section 4(a), he is liable to a fine as prescribed therein and in addition, to imprisonment for life and in order to determine the amount of fine payable, then the provisions of Section 86 comes to play.

In respect to the life sentence, the court is alive to the supreme court decision in the Muruatetu case which means that the term of imprisonment does not have to be for life. In short, under count 1 it was necessary for the prosecution to produce a certificate of market value as required under Section 86(1) of the Act.

The other issue raised by the appellant is that there is no drug called cannabis sativa or bhang or cannabis sp. Section 2 of the Act refers to “cannabis”, “cannabis oil” “cannabis plant” and “cannabis resin” which are all defined under that section. The first schedule to the Act lists cannabis (Indian Hemp) and cannabis resin (resin of Indian Hemp). The third schedule lists cannabis as among the prohibited plants. In this regard, my considered view is that under the 3rd schedule, the word is given a broad meaning which in my view covers all types of cannabis.

The third issue raised by the appellant is that there was no evidence to prove that the eight stones before the trial court were either cannabis sativa “bhang” or cannabis or narcotic drugs. He submitted that the investigation process fell short of the procedure prescribed under section 74A of the Act. The said section sets out the procedure upon seizure of narcotic drugs as follows;

1) where any narcotic drug or psychotropic substance has been seized and is to be used in evidence, the commissioner of police and the Director of Medical services or a police or a medical officer respectively authorized in writing by either of them for the purposes of this Act (herein referred to as “the authorized officers” shall, in the presence of where applicable.

a) The accused person

b) A designated analyst.

c) The advocate

d) The analyst, if any appointed by the accused person (in this section referred to as “the other analyst” weigh the whole amount seized, and thereafter the designated analyst shall take and weigh one or more samples for such narcotic drug or psychotropic substance and take away sample or samples for the purpose of analyzing and identifying them.

In cross-examination the investigating officer admitted that the procedure under Section 74A was not followed. Also looking at the evidence of PW3 and PW4, it is clear that the correct procedure under Section 74A was not adhered to.

My conclusion herein is supported by the decision of the court in the case of ***Paul Matolo Olare vs. Republic (2015) eKLR*** where it was held:

“33. the analysis and evaluation of the evidence by the prosecution shows non-compliance with Section 74(A) and section 86 of the Act. The application of the procedures set out are mandatory and failure to comply is fatal to the prosecution’s case.”

On the 2nd and 3rd counts, it was submitted that the learned magistrate convicted the appellant in all the counts without cogent evidence. He contended that the prosecution produced empty clear polythene papers which meant that there was no evidence that the appellant was in possession of the purported alcoholic drink called “machore”. It was also submitted that the prosecution failed to prove that he was selling the said “machore” as there was no cogent evidence that the kshs. 3,000/= in coins were proceeds of sale. The appellant further submitted that one Patrick Mutugi Njue who was arrested and charged for being drunk and disorderly after he had bought the drink from the appellant was acquitted on appeal for the said offence in ***Patrick Mutungi Njue vs. Republic (2018) eKLR***. He asserted that the finding by the court contradicted the trial court’s finding that the appellant was arrested at Ena market while selling traditional liquor as alleged.

Lastly, the appellant submitted that the learned Magistrate convicted the appellant for being in possession of an alcoholic drink called “machore” that is unknown in law as the same is not listed under Section 2 of the Alcoholic Drinks Control Act, 2010.

The said Section defines alcoholic drink as follows;

“Includes alcohol spirit, wine, beer, traditional alcoholic drink, and any one or more of such varieties containing one half of one per cent or more of alcohol by volume including mixed alcoholic drinks, and every liquid or solid, patented or not, containing alcohol, spirits, wine or beer and capable of being consumed by a human being.”

In her evidence PW4 stated that she examined exhibit memo of 18th July, 2018 in a plastic bottle containing a brown liquid to determine whether it was a traditional liquor. She carried out the analysis and made a report dated 8th November, 2015. She concluded that the same was a traditional liquor. It was 6% alcohol by volume.

In my considered view and going by the evidence of PW4, the prosecution was able to prove that the appellant was in possession of a traditional alcoholic drink. The evidence available to the court is that “machore” is a traditional alcoholic drink and it does not have to be listed specifically as “machore” under Section 2 of the Act.

With regard to the submission that Patrick Mutungi Njue was charged with being drunk and disorderly and was acquitted on appeal, the court has taken the trouble to peruse through the charge sheet in Criminal Case No. 409/2015 and the proceedings in Criminal Appeal Case No. 43/2017. The Judge who heard the Appeal agreed with the trial magistrate that the alibi defence was raised a bit late in the day; that, the issue of being arrested at his farm watering miraa was introduced during the unsworn evidence and the location or particulars of his farm were not given. The court further noted that it was not possible for the prosecution to verify the truth of such an ambiguous alibi. This, in my view, brought to rest the issue of the alibi and confirmed that the said appellant Patrick Mutungi Njue was arrested at Ena market and not at his home.

In the end I find that the learned magistrate erred in convicting the appellant on count 1 but the conviction on counts II and III was proper. I therefore set aside the conviction and sentence in count 1 but do uphold the convictions and sentence in counts II and III. Both to run concurrently.

It is so ordered.

DELIVERED, DATED and SIGNED at EMBU this 11th day of November 2020.

L. NJUGUNA

JUDGE

In the presence of: -

.....for the Appellant

.....for the Respondent