



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**CRIMINAL APPEAL NO. 16 OF 2017**

**MARTIN NDEGWA MBUBA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the original conviction and sentence in the Principal Magistrate Court at Lamu criminal case 118 of 2014, Hon. Njeri Thuku (PM) dated 28<sup>th</sup> March 2017)**

**JUDGMENT**

1. The Appellant and another were charged with trafficking in narcotic drugs contrary to Section 4(a) of the **Narcotic and Psychotropic Substance Control Act No. 4 of 1994**.
2. The particulars of the offence were that on the 23 March 2016 at Kiunga Shopping Centre in Lamu East District within Lamu County jointly trafficked by way of storing a narcotic drug namely cannabis to wit 5 stones with an estimated market value of Ksh. 25,000/- in contravention to the provisions of the said Act.
3. The accused persons pleaded not guilty and the matter went to full trial where the prosecution called four witnesses while the defence had two. After full hearing, the trial Magistrate acquitted both the accused persons of the offence of trafficking as it had not been proved. However she found the Appellant guilty of possession of narcotic drugs contrary to section 3(1) as read with section 3(2) of the Narcotic Drugs and Psychotropic Substance Control Act and sentenced him to imprisonment for ten years.
4. The Appellant being aggrieved by the conviction and sentence lodged his appeal on the following grounds reproduced verbatim below:-
  - (i) That the evidence of PW2, PW3 and PW4 was so contradictory and conflicting that it ought to have raised a reasonable doubt in the mind of the learned Principal Magistrate who, in the circumstances ought to have given the Appellant the benefit of that doubt and accordingly acquitted him.
  - (ii) That no certificate of valuation was produced and exhibited in court to prove the value of the narcotic drugs.
  - (iii) That the sentence was manifestly harsh and excessive.
5. The Appellant relied on his written submissions dated the 4<sup>th</sup> July, 2017 in support of his appeal.
6. The Appellant submitted that the three police officers gave conflicting evidence in court, which raised reasonable doubt as to whether the Appellant was indeed in possession of the drugs as found by the learned magistrate and therefore he should have been given the benefit of the doubt due to the contradictions.
7. The Appellant also submitted that the prosecution had failed to produce as evidence a certificate showing the market value of the narcotic drugs as provided by **Section 86 of Act No. 4 of 1994** and therefore the conviction ought to be quashed.
8. The Respondent opposed the appeal and filed its submissions dated 16<sup>th</sup> October, 2018. It was the Respondent's submission that the contradictions did not prejudice the Appellant nor vitiate the trial process and that the elements of the offence had been proved and therefore the conviction was safe.
9. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come to

its own conclusions while taking into account that the trial court had the advantage of seeing the witnesses as was laid out in the case of **Okeno v R (1972) EA 32; Eric Onyango Odeng' v R [2014] eKLR.**

10. The first issue in this appeal is whether the contradictions in the prosecution's case were of such nature as to render the conviction of the Appellant unsafe. Evidence riddled with material contradictions fails to meet the threshold of beyond reasonable doubt required in criminal cases. The Court of Appeal in the case of **Philip Nzaka Watu v Republic Criminal Appeal No. 29 OF 2015 [2016] eKLR** held that:-

***“It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.”***

11. It is trite that not all evidence that is inconsistent shall be rejected as human recollection differs from one witness to another. The court has a mandate to determine whether the contradictions are minor or they affect the main constituent of the prosecution's case. In **Philip Nzaka Watu v Republic (supra)** the Court of Appeal adopted the finding of the Tanzanian Court of Appeal in **Dickson Elia Nsamba Shapwata & another V. The Republic, CR. APP. NO. 92 OF 2007** where it held that:-

***“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.***

***The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”***

12. The main contradiction in the prosecution's case is whether the bag containing the drugs belonged to the Appellant. PW 2, Cpl. Japheth Nyamongo, testified that when he, PW3 and PW4 went to the co-accused's shop and found the drugs, the Appellant was not there. That PW3 arrested the Appellant later after he had investigated the case further. During cross-examination, he testified that he heard the Appellant had claimed the bag.

13. PW3, Cpl. Ezekiel Ngode, gave his evidence that after a tip from an informer, they went to the shop and only found the co-accused. That while in the process of searching the bag which contained the drugs, the Appellant forcibly entered the shop. PW3 stated that he knew the Appellant as a GSU officer and that they identified themselves by producing their Force cards. The Appellant then stated that the bag was his and whatever was in the bag was for his own consumption. It was Cpl. Ngode's testimony that when they found the drugs he instructed PW3 to prepare a search certificate (Exhibit. 5) and inventory (Exhibit. 6) which were signed by PW2, PW3, PW4, the co-accused and the Appellant. That they took the co-accused and the Appellant to the station where they were booked.

14. PW4, PC Felician Maru, gave his testimony that after a tip from an informer, they went to the shop where they found the co-accused. They inspected the contents of the bag and started interrogating the co-accused when the three men stormed the shop and said that they were GSU officers and that the bag was theirs. PC Maru claimed that he knew the men physically. That one of the three men claimed the things were his and that he had brought them from his rural home. PC Maru prepared the search certificate and inventory, which was signed by the police officers, the co-accused and the Appellant and they went with the Appellants to the station. PC Maru further testified that he went on a different assignment to KRA and when he returned to the station he found the co-accused and the Appellant in the cells but the GSU officer who insisted that the bag was his was not in the cells.

15. I have reconsidered the evidence as summarised above. I observe that the evidence of PW4, PC Maru, raises many unanswered questions. If the Appellant did not claim the bag, why did PC Maru make him sign the search certificate and inventory which was prepared at the scene of the arrest yet the person who claimed the bag was at the scene? Why would the Appellant, who was a GSU officer at the time, sign the said documents if he was not the owner? Why didn't PW4, in his capacity as the investigating officer, inform the OCPD that the Appellant was not the owner of the bag? It is my observation that PW4, blatantly lied to the trial court when he gave his evidence.

16. Similarly PW2, Cpl. Nyamongo, lied to the court when giving his testimony. It is clear that the Appellant was present at the shop at the time the drugs were found as both PW2 and the Appellant signed the search certificate and inventory.

17. However, despite the glaring contradictions and apparent craft in PW4's evidence, the prosecution did not wish to have him declared a hostile witness and to clear the contradicting evidence through cross-examination but chose to rely on it to prove its case. I find that the contradictions go to the root of the matter. It is as probable as it is not that the bag belonged to the Appellant. The prosecution failed to prove beyond reasonable doubt that the Appellant was the owner of the drugs and the benefit of such doubt ought to have gone to the Appellant.

18. In the upshot, I find that the conviction was unsafe and the appeal is merited. The conviction against the Appellant is quashed and the sentence set aside. The Appellant is set at liberty forthwith unless otherwise lawfully held.

19. Orders accordingly.

**Judgment delivered dated and Signed at Garsen on 13<sup>th</sup> day of March, 2019.**

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**R.LAGAT KORIR**

**JUDGE**

**In the presence of**

S. Pacho Court Assistant`

The Appellant

Mr. Kasyoka For the Respondent